Legislative Assembly of Manitoba

HEARING OF THE STANDING COMMITTEE

ON

STATUTORY REGULATIONS AND ORDERS

Chairman

Mr. D. James Walding
Constituency of St. Vital

THURSDAY June 16, 1977 **10:40 a.m.**

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TIME: 10:40 a.m.

CHAIRMAN: Mr. D. James Walding

MR. CHAIRMAN: Order please. We have a quorum gentlemen, the Committee will come to order. Mr. Silver advises me that we now have a further amendment which will probably take care of the concerns raised last night.

Just as a matter of procedure we currently have an amendment before us to Section 20. Perhaps by leaVe of the Committee that can be withdrawn and we can go back to 19 to deal with this matter. Is that agreed? (Agreed)

Mr. Silver has suggested a further 19(3) be moved. Would you read that please and a member will move it? Mr. Silver.

MR. SILVER: This would appear as Subsection 19(3). The heading: Effect of Notice. 19(3) The giving of an accounting by a spouse pursuant to a notice given under clause 1(e), shall not of itself be deemed to be an acknowledgment by the spouse receiving the notice of the truth of the allegations as to dissipation contained in the notice.

MR. SHERMAN: Would you give us that again, Mr. Chairman, please?

MR. CHAIRMAN: Would you read that again, Mr. Silver, please, slowly so that the members can write it down?

MR. SILVER: The heading again is: Effect of Notice. 19(3) The giving of an accounting by a spouse pursuant to a notice received under clause 1(e), shall not of itself be deemed to be an acknowledgment by the spouse that the allegations as to dissipation contained in the notice are true.

There is a slight change from the first version that I read, but I think this is better. Would you like it read again?

MR. GRAHAM: Of the acknowledgment by the spouse as to, was it?

MR. SILVER: By the spouse that the allegations as to dissipation contained in the notice are true.

MR. CHAIRMAN: The amendment moved by Mr. Jenkins.

MR. JENKINS: I so move that amendment, Mr. Chairman.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: I know that there is an amendment to 20 that will be forthcoming, which I assume ties in with this particular one although it has implications for the total for 19 and 17. But I want to understand from Mr. Silver that having accepted that as the intent, which I think is expressed there, "upon request," which will be the amendment that will be posed in 20, if an accounting has been given after a notice has been served alleging dissipation and accounting given, but no admission really by that of a dissipation, and the 50 percent is not given and therefore the spouse applies to the court, the court will not award under 20 automatically, but will insist at that point that the original claim of dissipation must be proved.

MR. SILVER: I can't hear what he is saying.

MR. CHAIRMAN: Mr. Cherniack, can you answer that?

MR. CHERNIACK: Well, Mr. Spivak is asking Mr. Silver for a legal opinion. I don't want to give it.

MR. SPIVAK: ... . is that what he, obviously the court may make a judgment differently then.

MR. CHERNIACK: Mr. Silver did not hear you, Mr. Spivak.

MR. SPIVAK: I see. I'm sorry, then I will repeat it again. . If a notice of dissipation has been served on the husband, who in fact provides an accounting, and that is now not necessarily an acknowledgment of dissipation, under 20, where the wife would have under (a), (b), (c), (d) of 19, upon request, which will be the change that is going to be forthcoming, the right to her half. If the accounting is given under 19(e) and the husband refuses to provide the half and she makes an application to the court, must she still prove dissipation before the court will award that or will she have an automatic right, having requested it, under 20. That is all I am asking at this point. The court may interpret it differently, but is it his belief that at this point the legislation that has been proposed would simply indicate that she would have to still prove her dissipation before she would have title vested in her by the court?

MR. SILVER: I would say that the new subsection 3 ensures that if the defendant spouse raises, in a court action that follows, raises the issue of dissipation that the plaintiff spouse will not be able to say, "You have accepted the notice without objection. You have given an accounting, etc., without any objection, and you are therefore estopped from raising the issue." She will not be able to say that, so that if the defendant spouse raises the issue I think that the court will have to consider it, and unless there is some other evidence in existence which the court considers as something that settles the issue, I think the court will have to receive evidence on the issue of dissipation. So that the wife or the husband, who has served the notice, as plaintiff, will have the overall onus of satisfying the court that there has been dissipation. If the other spouse raises it.

MR. SPIVAK: That is acceptable in that sense.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: I was just going to say, Mr. Chairman, would the problem raised by Mr. Spivak not be taken care of 19(1)(e) and 19(2)? 19(1)(e) says "where the other spouse is dissipating commerical assets," that implies that the other spouse is dissipating and then there is an onus of proof of dissipation. So it seems to me that the problem would be taken care of by 19(1)(e) and 19(2).

MR. SILVER: Well, that is what I said, but Mr. Spivak doesn't agree.

MR. SPIVAK: I accepted that, but my concern was that I want to be sure that that was your position with respect to it and recognizing the courts may find differently, but that is another issue.

MR. CHAIRMAN: 19(3)—pass; 19 as further amended—pass; Section 20 — Mr. Cherniack will again move the same motion. That is No. 10 on page 11 and 12.

MR. CHERNIACK: Do you want it repeated? It is all ready on the record.

MR. CHAIRMAN: Do we waive the reading? (Agreed) Mr. Jenkins has a further sub-amendment.

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

THAT the new subsection 21 be further amended in the fifth line thereof after the words "other upon" add the words "upon request".

MR.CHAIRMAN: "Upon request". Sub-amendment—pass; Clause 20, sub (1) —pass.

MR. CHERNIACK: As amended.

MR. CHAIRMAN: As amended.

MR. CHERNIACK: That means "serving" and "upon request".

MR. CHAIRMAN: With the typographical change in the first line to change the word "service" to the word "serving". A grammatical change.

20 sub (2)—pass; 20 as amended—pass. Mr. Jenkins.

MR. JENKINS: Mr. Chairman, I move THAT section 21 of Bill 61 be struck out and the following section be substituted therefor:

Termination and valuation dates.

21(1) Subject to subsection (2), in any accounting had pursuant to a notice served under section 17, the closing date for the inclusion of assets in the accounting, and the valuation date for the assets so included, shall be, except as the spouses may in writing under Part II otherwise agree,

(a) where the event or circumstance authorizing the notice is as described in clause 19(a), (b), (c) or (d), the date when the spouses last cohabited; and

(b) where the event or circumstance authorizing the notice is as described under clause 19(e), the date of service of the notice.

Assets in existence.

21(2) Subject to section 23, the assets to be included in an accounting under this Division shall be those assets that are in existence as at the applicable closing date.

And I so move, Mr. Chairman.

MR. CHERNIACK: Mr. Chairman, could you hold that for a moment?

MR. CHAIRMAN: Order please. The Chair has just been advised that the amendment just read is not the latest one, that there have been changes to it.

MR. JENKINS: Well, then, Mr. Chairman, with the agreement of the committee, can I withdraw the motion that I moved?

MR. CHAIRMAN: Agreed the motion be withdrawn. Mr. Jenkins.

MR. JENKINS: Mr. Chairman, I move that Section 21 of Bill 61 be struck out and the following section be substituted therefor:

Termination and valuation dates.

21(1) Subject to subsection (2), in any accounting had pursuant to a notice served under section 17, the closing date for the inclusion of assets in the accounting, and the valuation date for the assets so included, shall be, except as the spouses may in writing under Part II otherwise agree,

Then I would suggest to honourable members they stroke out in Sub-clause (a) the first two lines thereof and it would read then:

(a) the date when the spouses last cohabited; strike out the word "and" and substitute therefore the word "or" and

(b) or where the event or circumstance authorizing the notice is described as in clause 19(e) and then insert the following: "and the spouses continue to cohabitate after service of the notice, the date of the service of the notice." And 21(2) Assets . . .

MR. CHERNIACK: Is that the word, cohabitate or is it cohabit?

MR. JENKINS: Cohabit. Pardon me. Not cohabititate, cohabit. Do members have that or do you want me to read it again?

Assets in existence.

21(2) Subject to section 23, the assets to be included in an accounting under this Division shall be those assets that are in existence as at the applicable closing date.

And I so move, Mr. Chairman.

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: Here I would like to find out what the intention of the government is with respect to

assets and valuations. When we talk in terms of valuation date, are we applying the income tax term with respect to valuation or are we talking . . . what terminology are we applying? If there is depreciated property involved in, let's take one example an apartment block that has depreciated. Are we talking about asset value at its depreciated value or at its market value — valuation date market value.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, it would be just straight value.

MR. SPIVAK: Well, what value, market value or book value?

MR. PAWLEY: Market value . . .

MR. CHERNIACK: What does value mean?

MR. SPIVAK: Well, because a business may have . . .

MR. CHERNIACK: A phoney value; it could have a phoney value and a real value.

MR. SPIVAK: No, Mr. Chairman, I think, let's start to be a little bit realistic. There are many businesses that value . . . There may very well be shares of the company that are in fact going to have to be transferred, or an equivalent amount will have to be transferred. Those shares may have a value which was based on the book value of the assets, the economic value, or the real values. Now, I mean, what are we talking about? Those are three separate values and they can vary.

MR. PAWLEY: As I say, Mr. Chairman, we are referring to actual market value. I don't know what other way we could fairly deal with it but that the value be on the basis of the market.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, we are talking about an accounting and a distribution of assets, or division of assets between two parties entitled to equal ownership. Now, it seems to me that it would be — I want to be mild about it — odd to expect that the book value, which can be far removed from an actual value, would be used in that kind of an accounting. And for Mr. Spivak to suggest even the possibility that one would bring in value which would be acceptable in an income tax term as being depreciated and really unrealistic, is as unrealistic as almost anything that could be suggested. Surely the court will determine what is the value and I don't think that there is a problem involved unless Mr. Spivak wants to make it a problem. There is no suggestion of The Income Tax Act, nor is there any suggestion of an artificially-depreciated value at all. When you come to shares, I know, and I thought Mr. Spivak would know, that when it comes to buying a share, to value it, one takes into account what is the value to the owner of the share which has certain revenues coming from it, which has a potential tax liability which would be taken into account, I believe, in an evaluation and to encumber this word with anything at all, would, I think, put on it a connotation which is different than it ought to be. .

Value, I think, is known and if necessary, we have a dictionary here which we can read if Mr. Spivak needs it. But if he is suggesting that it ought to be the depreciated or the book value, then I wish he would say that that's what he thinks it ought to be and if it shouldn't be that, then what does he say should be improved on that?

MR. SPIVAK: Mr. Chairman, I do not intend to be intimidated by the words or the actions of Mr. Cherniack. I want to make that very clear. And I am not going to allow him to try and, you know, essentially "snow" the Committee as to what really will happen.

If in fact there are shares of a company and there are 500 shares and that is the only commercial asset that a husband has, it's very clear, without getting involved in the value, if he transfers 250 of those shares and that's all that there is involved in the commercial assets, that he has given up half. If, on the other hand' there is an equivalent amount of money that has to be paid over, and then those shares have to be valued . . .

MR. CHERNIACK: That's right.

MR. SPIVAK: . . . and they are valued either on the basis of economic value, on the basis of a valuation which will take into consideration the appreciated value of the book value assets. Now I mean there are ways and methods with respect to deal with this and they vary, and the methods that are applied in business transactions are not identical. So the problem we have here and the problem that comes right from the very beginning, to try and give some certainty to the legislation, is to find out exactly what we are talking about rather than to have, or force the situation where there'll be a substantial case law involved before decisions are made and then future amendments will be forthcoming.

I want to understand from the government what they are talking about in terms of value and how they expect someone dealing with this situation, or a court to apply the situation with respect to what they're dealing with.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Well, Mr. Chairman, I'm afraid I don't grasp Mr. Spivak's point. The question is market . . . I see no other basis by which this can be fairly done, than if the value prescribed is market value. Anything less than that I think would see many unfair situations occurring. If we take for instance the depreciation of farm machinery as per The Income Tax Act. The value on the return after

depreciation often reflects wildly in a very wide divergence from the actual market value of that farm machinery, because the depreciation is speeded up over a short period of time and doesn't reflect what that machinery can bring on the market.

The same thing insofar as the shares are concerned. It seems to me that the court — and I don't know in what way, we don't reflect this here — the court would have to determine the true and correct market value of any asset in the accounting and would have to provide a determination of that. I don't know in what way Mr. Spivak proposes that we pin this down in such a way that we would reflect anything but market value.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, I'm glad that Mr. Spivak cannot be intimidated by anyone on this Committee. On the other hand I don't think that we in the Committee should continue listening to double-talk from him as to what can be done, when I think the simplest way is to let a court decide what is the value and to give the court any other direction, I think, will be to confuse the issue and to limit the court's discretion.

Now I am prepared to leave it to a court to decide what is the value under the circumstances. And if he's afraid of the common law then he should find out that most of our law is based on what develops through the common law and through the jurisprudence. I should think that that would be the healthiest way to do it unless, of course, he has some concrete suggestion to make as to how it is. He asked what the government would do. I can only tell him, as a member of the Committee, I would say it's up to the court to determine what is the value and then under the other section which arranges for payment in kind or in cash and to defer payment and make such terms as possiblethat's Section 35, I am prepared to rely on the court to use its discretion on how to determine value. . .

MR. CHAIRMAN: Mr. Spivak.

MR. SPIVAK: I really wonder whether we have enough appraisers in Manitoba to be able to take care of the situation you're talking about.

A MEMBER: No.

MR. SPIVAK: You may think that's a facetious question. —(Interjection)— Well, because what we are now talking about is in the thousands of married situations that are going to arise, the necessity of appraisal, the re-appraisal, the necessity of any court action of probably a number of people examining situations to be able to establish — will become a very important part of this process. I mean that really will be the effect.

MR. CHERNIACK: So what's the suggestion?

MR. SPIVAK: Well, you know, I'm not sure. I'm simply saying that I want to deal with the practise of this in relation to it. Let's assume we go back to the farm machinery example that Mr. Pawley suggested — a tractor. And again let's assume that that is one of the assets. In effect the husband says, "All right, I have a John Deere tractor and it's worth $40,000 today but I will give you half title to that. I will give you half of that title." You know, and the other person says, "I want the equivalent in money." Now we go into the question of its market value and we go into the assessment of it. It will have a depreciated value. It will have a market value that will have to be appraised by an appraiser on both sides and the court will have to make the judgment. This is what we're talking about, in terms of this total process that we have before us; there is constant reference on every item that will be involved in the commercial assets in terms of the accounting that has to take place.

MR. CHERNIACK: That's what happens in any partnership of this nature.

MR. SPIVAK: Well I know that we're now talking . . . Can I ask something, Mr. Chairman? How many partnerships do we have in Manitoba right now and how many partnerships are we adding? Are we multiplying it by five or tenfold, or maybe twentyfold, or fortyfold?

That's all I'm saying to you, in relation. We're saying that it will be market value and it will be determined by an appraisal, and that will be determined by the court, then I think we have to recognize the implications of what that is going to mean in the day-to-day handling of the number of transactions that are going to take place.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, my only question on this was that I wanted to ask Mr. Cherniack, or the Attorney-General, how do you value or evaluate a business on one given day? And I'm asking for information. Acknowledging the fact that certain things can change in market value almost daily, how do you evaluate a business on one given day? Would it be helpful if there was some reference in the clause to businesses or specific commercial assets of that kind and a pinning down of a date, such as the end of the last fiscal year or something? I'm only asking for information because it seems to me that looking at any business, whether a one-man business or a large operation, it could be unfair to either party, and in many cases it may well be the wife who is suffering the unfairness. If you attempt to pick one specific day, which happens to be the day that they last cohabited and say that's the date on which you are going to evaluate that business, it might be worth thousands more, or thousands less, one week before or one week after that.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I suppose that can take place, so I think that some date has to be imposed for the direction of the court. Because if we permit a wandering about insofar as the date, then we could be creating an unfair situation if, for instance, a week before the end of the cohabitation the business was at a widely divergent value than that at the date of the ending of the cohabitation or the service of the notice. Then we relate it to that date and it seems to me that the other party suffers. So, whatever way one turns here, there is widely divergent dates, somebody is going to receive more or be reduced in value. I don't know any other date that would more fairly reflect the criteria by which we should establish this. But those dates that are set out in (a) and (b) . . . Mr. Sherman referred to the date in which the fiscal year ended. Well, that might be an unfair day, too, in the arrangement of things.

MR. SHERMAN: I recognize what the Attorney-General is saying, but is it not possible that either spouse could manipulate their termination of cohabitation. Perhaps manipulate is too strong a word — but could arrange to walk out the door on a day when they knew that the business was going to be worth less, or more, because of information available to them — when they knew that the business was going to be worth less or more than it was going to be worth a month from now. Would it not be possible, under those circumstances, for people contemplating dissolution of their marriage to simply arrange to walk out the door and end cohabitation earlier or later than would otherwise be the case? That's the only reason why I suggest a date like the end of the company's last fiscal year. I'm not saying that's the solution but I am posing this other possibility to the Attorney-General.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, legislators cannot look ahead; people cannot look ahead. Mr. Sherman suggests the possibility that someone knowing ahead of time that the value may be more or less a month later would then decide, in advance, to cease cohabitation in order to take advantage of that increase or decrease. —(Interjection)— Yes, he may. But firstly, if he is that omniscient, he should be in the stock market making a lot of money because he knows in advance. Or if it is something that becomes apparent later that he knew would happen, then surely the value of the business is worth less or more than it is on that particular day if you take stock, because on that date, knowing that it was trending downwards or upwards would be taken into account.

I have to say that I cannot think of any more sensible approach than to leave it to the discretion of the court, which will be impartial and which will not have the bias that we might be concerned about in other respects, and will make a finding.

Now I want to remind honourable members of a couple of things. Firstly, the court does have to have a guideline. The court has to be able to say, "Well, as of what date do we do an evaluation? Do we go back ten years? Do we go ahead to the date when it could be manipulated after notice is given?" So that then, indeed, it could be distorted. Or the court could say, "Well, now, let's start from a certain date and with the knowledge — since that date is behind us — of what has happened, we can estimate what the value truly was."

Therefore we have to give a date, and the section we are now debating is only to determine what is the date used as a guideline for the court. The logical date, I think, is the date of ceasing of cohabitation or, if cohabitation has not ceased, then on the date of the notice. That makes sense; that makes absolute sense.

Now we get to the question of value, which is not really the question before us now, but Mr. Chairman has allowed a great deal of latitude. May I remind honourable members that just two minutes before we started discussing this, we passed a subsection which deals with payment of half and then it says, "In lieu of a payment, or part of a payment, a spouse may, with the consent of the other or in the absence of that consent, upon the order of a judge transfer, convey or deliver to the other spouse an asset in a form other than that of money value." And if I were faced with the kind of problem that gentlemen have already posed, then I might be inclined as a judge to use Solomon's famous verdict which is not disastrous and say, "All right then, you will each have an equal share in that tractor." What does that mean? It means that one can apply for partition; one can put the tractor up for sale; both parties can bid for it and the price can then be established as to the value to both parties and to the public, and then it can be split. It won't happen, Mr. Chairman, because it is not logical that it should happen. But if it happens there is a way out and the courts provide for it. There are ways now to partition and distribute assets jointly held. There will be more.

If we want to deal with this logically, we should leave it to the discretion of the court. If we want to be illogical, we then start bringing in what I consider red herrings and start talking about artificial values, which I believe book value is. Book value is a value determined for income tax purposes, and that only, I believe. Therefore, I consider it artificial. But if the court on review decides that book value is the value then the court would say so. For us to predict ahead of time and look for every opportunity, I believe is destructive of the effort to create workable legislation.

MR. CHAIRMAN: Mr. Brown.

MR. BROWN: On the same topic, we have been talking about tractors, and things that could happen on the farm, but no doubt there would be quite a bit of grain in the granaries. Now, some of

your grains fluctuate in price very much. It would be very difficult, on any given date, to determine, for instance, what a bin of rape would be worth because at the time when your quota would open and you could sell it, it could be worth half the value that it would be on evaluation date. So this is just another area in which it would be very difficult to have just the date when they cease to cohabit as the evaluation date.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Well, Mr. Chairman, I only had one question. It was dealing with clause (b) where you have decided that the date shall be the date of the serving of the notice, and I would wonder why you chose that rather than the date that the onus of proof has been established.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: May I suggest, Mr. Chairman, that after notice is served then it is clear that the parties have differing interests and, as I think Mr. Sherman said, there is the possibility that they could affect the value by actions they take knowing that they are heading into this. So it seems to me that the logical thing is that the giving of notice is the date from which the evaluation would be made. It seems to me that it is better than a date in the future. But there has to be an arbitrary decision and it seems to me this is the best one.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Well, Mr. Chairman, in an attempt to answer Mr. Brown, I think that insofar as the question of the grain in storage, I suppose there could be situations where it would be difficult to establish the evaluation but I don't see any other measure, Mr. Brown, that we can better assist the court than what we have done here. We have established a guideline and the court will have, within its powers, all the facilities available to it to attempt to determine what a fair value would be as of that given date. It might not be an easy task, certainly, but the court has to have some date. I don't know of a better date than that. The court will place some fair market value on that grain, despite what might be some difficulty in establishing it. I think that any given date the court can establish the value on grain.

MR. CHAIRMAN: 21(1)(a)—pass; 21(1)(b)—pass; 21(1)—pass; 21(2)—pass; Section 21 as amended. Mr. Graham.

MR. GRAHAM: Mr. Chairman, perhaps I could get an explanation on 21(2) "those assets that are in existence as at the applicable closing date." Is that the date of the serving of the notice, or the date that the whole thing is finalized.

MR. PAWLEY: The applicable closing date would be the date — I am asking Mr. Silver to correct me if I am wrong — would be the date of the service of the notice or the . . .

MR. GRAHAM: That they last cohabited.

MR. PAWLEY: . . . date the parties last cohabited.

MR. SILVER: Yes, either (a) or (b), whichever applies.

MR. CHAIRMAN: 21(2)—pass; Section 21—pass; Section 22(1)—pass; 22(2)—pass; Section 22—pass. Would the committee agree to go back to 22(1), I have just been advised that there is another amendment to that? Go back to . . .

MR. PAWLEY: I am just wondering, while that's being distributed . . . Oh, Mr. Lamont has to be here for the . . . All right. I didn't want to detain him if it wasn't necessary.

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: Mr. Chairman, I move:

THAT subsection 22(1) of Bill 61 be amended by adding thereto immediately after the word "spouse" in the second line thereof, the words "whether pre-existing or arising by virtue of the accounting and consequent equalization."

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, honourable members will recall that we were concerned to make absolutely sure that if the result of equalization produces an income tax liability, which has not yet been waived by the Federal Government, that that should be taken into account so that the asset would be netted out and that this amendment is to make sure that that potential liability, which may not be known yet, is taken into account so that neither of the two parties is adversely affected by a subsequent tax imposition.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, through this whole section, starting from 19 down, we have listed various means where the termination can occur if they are satisfied with the accounting. It can stop there. It can stop with a transfer of assets in lieu of cash. That can solve the problem. We have given several ways that it can be stopped but if the other spouse persists in carrying it through right to the final termination, why would we not then include a negative value? They have had several opportunities previously to cease and desist, but if they insist on carrying it right through to the termination, why would we not include a negative value if one so existed?

MR. CHERNIACK: Well, that could work the other way. I believe it could work so that the spouse forcing the separation might be in a negative position and that way be able to force on the receiving

spouse a liability which that spouse doesn't have. I think that's quite conceivable. That would make it adverse to the interests of the party receiving the notice to be forced to accept the liability because there is a negative value. On the other hand, it is just not conceivable that a person who can see that there is a negative value coming, would proceed to deal with it.

MR. GRAHAM: Mr. Chairman, this is exactly my point. I think the receiving spouse is the one that is bringing the action in all cases here. Now, there's the onus of proof of dissipation. Fine, if that has been proven, that person can still persist in carrying on and they have had the accounting and they still want to share in the assets. I fail to see, where we have given them numerous occasions to cease and desist in their . . . But if they continue to persist in carrying it through to the ultimate end, I think that if there is such a thing as a negative value, I think it should be included in the . . .

MR. CHERNIACK: Mr. Chairman, may I ask Mr. Graham whether it isn't what I suggest is possible, the other way around, that a person who is bankrupt and wants to have his liability shared would be able to force a separation and a negative value onto the party who is receiving the notice. It's a both-way equalization and it might be an awfully cute and possible situation where you could force a liability onto your spouse.

MR. GRAHAM: Mr. Chairman, may I suggest that in this section we are dealing, subject to subsection 17, which again is subject to Section 19, and in Section 19, we are dealing . . . We've handled (a), (b), (c), and (d) but we are dealing with section (e) where the dissipation of assets and they are continuing to cohabit in this particular case. If I read it correctly 'this is served under Section 17 which is conditional upon 19.

MR. CHERNIACK: Any of 19, (a), (b), (c), (d) or (e).

MR. GRAHAM: Yes. So, in that case, I would think that the spouse, if they thought there was a negative value, has ample opportunity to desist.

MR. CHERNIACK: Just one more thing, Mr. Chairman. Mr. Graham does not accept my point so I won't stress it. I'll say one other thing. In the family assets we brought in a negative value; in commercial assets, I don't think it is right and the Law Reform Commission didn't think it was right and I just feel that that's . . .

MR. GRAHAM: Well, the only reason I raised it is because we have made considerable changes from what the original position was and I just wondered if with all those additional changes, if we still wanted to include the no negative value.

MR. CHAIAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I would like to make two points in this discussion. First, the parties certainly have the right to proceed through all the remedies provided for them in the legislation and I am sure that if the continued pursuit of remedy by the party at any stage to the next stage is frivolous and unnecessary in the circumstances, that in some way I am sure that the court will deal with the movement from the one stage to the next. So I have to assume that the party in refusing the remedy that is available at one stage, and proceeding to the next, is moving ahead with some reasonable basis to attempt to obtain further and different remedy. Otherwise, the court would consider it to be frivolous.

The second thing which concerns me, Mr. Chairman, insofar as negative value, we have commercial assets, and I am just wondering what we are going to do here. The one spouse, because we decided to defer the sharing of commercial assets, has had the sole management and control of those commercial assets and they are in a bankrupt situation, heavily in debt, it certainly has something to do or reflects the sole management of those assets. Then we are going to say that we are going to burden the spouse who had no involvement in the management of those assets with half of the negative debt. The concern that I have here is that we are really helping nobody except a creditor, that when that creditor was dealing with these commercial assets, entering into trade relations, lending money, he was dealing with the one spouse, not with the other spouse. So we are going to accommodate the creditor who didn't depend upon both spouses by bringing into the arrangement a negative value so that the creditor, though he wasn't — he or it — wasn't depending upon the other spouse at all in advancing the loan or the credit, now has the availability to go after a spouse who the creditor hadn't even foreseen would be responsible for the debt.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: I'll pass on these . . .

MR. CHAIRMAN: The amendment to Section 22(1). Mr. Spivak.

MR. SPIVAK: I just want to ask a question here and it really is not related to 22(1) but because of its application, and I don't think it has been asked, and it goes back really to the whole process of 17, 19, 20 and the procedures. It does not follow automatically that if one spouse serves the other with a notice, that the accounting we were talking about is an accounting of both as opposed to one of the spouses, in terms of commercial assets, or is it automatic that we are talking about an accounting in which both spouses, serviced by one spouse on the other, automatically follows that in terms of the accounting, in terms of the commercial assets, both spouses must . . .

MR. CHERNIACK: Why don't you read 17?

MR. SPIVAK: Ah, you're saying that to join in the accounting means that they have to provide an accouting for the commercial assets.

MR. CHERNIACK: I think when it says "total combined monetary value of the accummulated commercial assets of both spouses", it can't mean anything but that. I'm sorry for my interjection.

MR. SPIVAK: Well, but then it has to do with the whole question of the liability because in effect we have one spouse who may have control of the commercial assets in which there is a liability, a bankruptcy, and the other spouse in which there is not. But there may still be control of commercial assets of the couples and that brings into play a little different situation depending on how couples were structured at the time of this Act.

MR. CHERNIACK: Two arms; two legs.

MR. SPIVAK: Well, the reality is that for tax purposes, for estate purposes, there are various structures that have been created among couples right at the present time in terms of control of commercial assets and their management. The reality is that in terms of the obligations, going back to that, in the case of . . . It is not just where one spouse has control and the other does not.

MR. CHAIRMAN: The amendment to 22(1). Mr. Spivak.

MR. SPIVAK: Well, then you're saying, by your silence, that that is not going to . . . the other spouse in control of the other commercial assets will not have that liability.

MR. CHERNIACK: Mr. Chairman, I for one have never accepted Mr. Spivak's interpretation of what I said. I said we wouldn't agree to accept his interpretation of what I didn't say. I, for one.

MR. SPIVAK: Well, the problem at this point and the whole object of this thing is to first of all provide, I guess, equity and to provide stability and to provide certainty to the degree that we can, recognizing that there always will be court interpretations that will come to play. Now, the Attorney-General basically presented the principle from which he sees is the basic principle to operate. I'm accepting that but I think that it does not take into consideration the examples that I have talked about where, in fact, there are commercial assets that are in the control of the other spouse and in which case the feature he is talking about may very well be something that shouldn't in fact be assumed by the other spouse who has control of part of the commercial assets in terms of the liability.

MR. CHAIRMAN: The amendment to 22(1)—pass; 22(1) as amended—pass; Section 22—pass.

The Chair is informed that Mr. Lamont has some suggested changes to forms. Mr. Lamont.

MR. LAMONT: I present this with some hesitation because it was prepared rather hurriedly and I have already seen something that I've added in in ink since it was typed. Mr. Silver should have another copy because I gave him one without a little slight change there. —(Interjection)— That's all I have, I'm sorry. The committee was smaller last night.

I want to make one observation on the second paragraph "that no part of the land referred in the instrument above (or within) written (or hereto annexed) is a family asset within the meaning of The Marital Property Act." That was intended to not be in the alternative. Now the others are in the alternative. However, the difficulty is that it too can be in the alternative with reference to the fact whether someone has or does not have a spouse, so it's a tricky question of draftsmanship. Perhaps Mr. Silver can resolve that for me. It's how we show that that is not in the alternative with reference to the other provisions because it is necessary we have a . . . that if the parties are married, then we do need that statement as well as the other statement with reference to the marital home. So the way I have put it in position there where it's not exactly accurate but perhaps under the wide discretion given to the District Registrar under this Section, we will have to juggle it with The Dower Act in any event.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Do I understand correctly, Mr. Lamont, that either 2 or 3 must be in then the others — or let me put 2, it differently, if you have then that wipes out the rest doesn't it.

MR. LAMONT: No, because if you have 2 in then it could also be the marital home, so 4 or 5 could apply as well.

MR. CHERNIACK: Could you indicate to us which ones, what are the alternatives as to which ones would be required and would they not be footnoted to say— (Interjection)— That's clear but it makes it appear that 2 must be left in.

MR. LAMONT: The only time 2 is not required is when 3 is left in.

MR. CHERNIACK: So I was right

MR. LAMONT: Yes, when 3 is there then you don't need either 2 or as a matter of fact none of the others apply if you have 3. But if you don't have 3— if 3 is struck out — then you need 2 or one of the others. You need 2 and one of the others.

MR. CHERNIACK: But if 3 applies then you don't need any more than one. 1 and 3. Would that not be a direction as a note . . .

MR. LAMONT: It could be put as a note or a footnote.

MR. CHERNIACK: . . . either at the top or at the bottom. Couldn't that be Mr. Silver? I mean this is really an instruction as to how to complete a form and it seems to me that it's in order to indicate on

the form what is required.

MR. LAMONT: We do need the same evidence under The Dower Act with reference to the spouse and it still applies.

MR. CHERNIACK: But that doesn't have to be part of the form does it, the explanatory note. It doesn't have to be in the Act.

MR. LAMONT: No, it doesn't have to.

MR. CHERNIACK: So then wouldn't that not be a matter for the District Registrar to establish the nature of the footnote. It doesn't have to be part of the Act though does it?

MR. LAMONT: I just want to explain that it was a difficult thing to put in this right into the section.

MR. CHAIRMAN: Any further questions on Form A? If not, is Form A accepted? Is Form A acceptable to the Commitee as redrafted? Mr. Sherman.

MR. SHERMAN: I have no questions, Mr. Chairman, I just wanted another 30 seconds on it that was all.

Q **MR. CHAIRMAN**: Mr. Cherniack.

MR. CHERNIACK: Just a question of procedure, what do we intend to do? Are we going to do all the forms now when Mr. Lamont is present?

MR. CHAIRMAN: At the will of the Committee.

MR. CHERNIACK: We haven't yet passed Part III although we've discussed it in his presence.

MR. PAWLEY: I think that only Form A is one that required any changes, Mr. Lamont. Is that correct?

MR. LAMONT: Yes, as far as the forms were concerned. I had wanted to introduce something to the Committee and I hesitated to do it knowing how pressed you are for time and how much debate you have. But a point has come up and with your permission I would raise it. That is in connection with a situation where perhaps a father and son are registered owner as joint tenants for example of a perhaps a duplex or something. They may have made that arrangement perhaps and may not have liked their son-in-law or their daughter-in-law or something. Now what is the situation? Normally if one of those parties died, the other would take full ownership by survivorship, but if under this whim or decision joint tenancy of each joint tenant has a dower interest in the moiety of the other person, in the interest of the other person. Now if we apply the Marital Property Act to that situation, in effect you would have to create a severance of the joint tenancy in order to give a half interest to one of the joint tenants so that the spouses could become joint owners of that interest which would defeat the original joint tenancy. It's an awkward conundrum and I don't pretend to know the answer. There are a number of these situations.

MR. CHERNIACK: Can you have a joint tenancy of three people?

MR. LAMONT: Yes, you can have a joint tenancy of any number of people.

MR. CHERNIACK: Wouldn't this add them on as a joint tenant?

MR. LAMONT: Well, in that case you would be adding a new feature in that you would be dependent then on the survivorship of one of the spouses which probably was not the intent of the original arrangement.

MR. CHERNIACK:: They could also partition it, couldn't they?

MR. LAMONT: Yes.

MR. CHERNIACK: I'm not going to worry about it.

MR. LAMONT: You're not. Well, I thought I would raise it in case the Committee wanted to consider it.

MR. CHAIRMAN: On the matter of procedure that was raised the Committee did complete Part III last night. We asked Mr. Lamont to come back this morning and advise us on the form.

MR. CHERNIACK: You're right, I see that I did pick it up as being done.

MR. CHAIRMAN: If there are no questions on this or other forms. . . Mr. Sherman.

MR. SHERMAN: Just one question on A, Mr. Chairman. When we were looking at last night, Mr. Silver originally suggested a paragraph 5 that would pick up at the end of paragraph 4 as a new sentence and paragraph and say: "No person is entitled to an interest in the land referred to above under the Marital Property Act . "As I put the positions represented in the new form in front of us together, run them through my mind, my only question is, is that condition that Mr. Silver suggested last night contained within these new proposals?

MR. LAMONT: Well, the difficulty I had with that "catch-all" phrase was that it could be used in lieu of any of the others so that you might as well eliminate all of the others . So if we're going to be specific we should be specific and try to cover everything in the specific ones. Now, if it is possible and I'm not quite sure that it is, for someone to have an interest in a commercial asset, it wouldn't be a registrable interest as I read the Act. So to have them swear that they don't have any interest under the Marital Property Act, might not be necessary . What we're really concerned with is these two interests, the one in the marital home and the one in the family asset where they're entitled to become a registered owner. Otherwise they can have some sort of interest under the Act which is not necessarily registrable, as I understand it, and wouldn't prevent them conveying the property. I don't

know whether Mr. Silver agrees on that. I haven't had time to discuss it with him.

MR. PAWLEY: Mr. Silver agrees.

MR. SHERMAN: These do the job that Mr. Silver and the Committee were trying to get at in the proposal of last night.

MR. LAMONT: Well, that was my intent. As I say I can't categorically say that they do.

MR. CHERNIACK: But you think they do.

MR. LAMONT: I think they do, yes.

MR. SHERMAN: Well, I have to take Mr. Lamont's word for it, Mr. Chairman. I'll go with him and we'll see how it works out.

MR. CHERNIACK: Well, then Mr. Chairman, I do have in my own mind the knowledge that in the Act, Mr. Lamont and his district registrars have the right to enlarge on the needs, so that's why I'm not too worried about the form.

MR. CHAIRMAN: Form A as amended—pass. Are there any questions of Mr. Lamont on forms B, C and D?

MR. GRAHAM: Pass, pass, pass.

MR. CHAIRMAN: Passed three times.

MR. CHERNIACK: Form B. Form C. Form D. That is three times.

MR. CHAIRMAN: If the Committee then does not require Mr. Lamont to suffer the Committee any further perhaps we could excuse him.

MR. CHERNIACK: I'm just wondering if the amendments of Mr. Silver reserved for today, last night for today, do they involve Mr. Lamont at all?

MR. SILVER: I don't think so, but it might be useful if Mr. Lamont heard the amendments and had some comments.

MR. CHERNIACK: Well, maybe then, Mr. Chairman, we could deal with them now then so that . . .

MR. SILVER: Because they do deal with real property interests.

MR. CHAIRMAN: Would you advise the Chair which parts they refer to. Okay then, perhaps we can go to the definition section. Mr. Jenkins.

MR. JENKINS: Mr. Chairman, I move that clause I 1 A (a 1(a) of Bill 61 be further amended by adding thereto sections . . .

MR. CHAIRMAN: One be renumbered.

MR. JENKINS: Clause 1 be renumbered.

MR. CHAIRMAN: And those clauses added. . .

MR. SILVER: No, just a moment please. We are inserting in section 1, we are inserting after clause (b) as amended, we are inserting two new clauses, (c), and (d) and as a consequence we are renumbering all the remaining clauses, that is clauses (e) (f) (g) (h) (i) (j).

MR. CHAIRMAN: Okay, move and read the new clauses, Mr. Jenkins.

MR. JENKINS: I would move, Mr. Chairman, that Clause (1) of Bill 61 be further amended by inserting after Clause (b) as amended the following Clause: (c) Disposition includes every grant, transfer, sale, agreement of sale, grant of an of option to purchase, mortgage, encumbrance, charge, pledge, hypothecation, lien, lease and every other disposition by Act *inter vivos* and every device or other disposition made by will.

And the following Clause:

(d) Dissipating assets means jeopardizing the financial securities of a household by grossly and irresponsibly squandering assets.

Further that clauses (c) to (h) be renumbered to read (e) (f) (g) (h) (i) and (j).

MR. CHAIRMAN: The amendment as moved. Any comment on those Mr. Lamont?

MR. LAMONT: No.

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

MR. GRAHAM: Before you move it, will your read it to us again, so we can write it in.

MR. SILVER: I have copies of these for everyone.

MR. SHERMAN: The only point I would make, Mr. Chairman, is that dissipating assets now means grossly and irresponsibly squandering assets of any kind. That is the wording that we have in front of us and I'm only raising that for clarification. The amendment we originally considered referred to commercial assets.

MR. SILVER: Well, it is true that the way this is worded and I deliberately took out the word commercial because it is used in the Act only in connection with commercial assets and so that wherever we want to use this definition in connection with commercial assets, we say so in the Act. And if at any future date we want to put in an amendment, an additional section dealing with other kinds of assets, we will be able to do so without having to change this.

MR. SHERMAN: Okay, that's agreed.

MR. CHAIRMAN: The amendment as moved. (Agreed). Section 1 as amended—pass.

If the Committee then does not wish Mr. Lamont to remain. . . Thank you, Mr. Lamont.

Mr. Silver advises. me that he has refined the wording in Division 3, Section 13 and 14 in

accordance with the changes agreed to by the Committee to Section 13(1) and 14(1). Does the Committee wish them read out? It's really wording changes where we added the words, "is deemed to be" and that wording carries on through each of the sections in accordance with that. (Agreed)

Perhaps we can then go on to — we completed Section 22 — Section 23. Mr. Jenkins.

MR. JENKINS: Mr. Chairman, I move that Section 23 of Bill 61 be amended

(a) by striking out the figure "6" in the 2nd line thereof and substituting therefor the figure "2"; and

(b) by adding thereto, immediately after the word "writing" in the 3rd line thereof, the words "under Part II".

MR. CHAIRMAN: Any discussion on the amendment as read?

MR. SHERMAN: No, that's good, Mr. Chairman.

MR. CHAIRMAN: The amendment as read—pass; 23 as amended—pass.

Section 24. Mr. Jenkins.

MR. JENKINS: Mr. Chairman, I move that section 24 of the bill be amended

(a) by striking out the "6" in the 2nd line thereof and substituting therefor the figure "2"; and

(b) by adding thereto, immediately after the word "receipt" in the 7th line thereof, the words "or so much of that value as may be excessive,".

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

MR. SHERMAN: That was on the amendments, Mr. Chairman, but not on the clause.

MR. CHAIRMAN: The amendment as read—pass. Section 24 as amended? Mr. Sherman.

MR. SHERMAN: Section 24, I raise the question, Mr. Chairman, as to whether this could not result in unfair suffering on the part of a child, for example, as a result of an action taken by a spouse in a second marriage. I think realistically one has to recognize that there can be and often is considerable envy on the part of a spouse who is a second wife or a second husband towards children of the first marriage. The clause appears to me to open up a possibility where a child who had been a recipient of an excessive gift from his or her natural father or mother, would be responsible to the stepfather or stepmother on a breakdown of that marriage, to recompense that person for the gift that their natural parent bestowed on them. That's one possibility I would like to put to the Attorney-General and Mr. Cherniack.

The other one is, Sir, I don't understand why the wording is as follows, and I'm picking up from the fourth line of the clause, in the middle of the fourth line: "The other spouse may by application to a judge under section 33 recover from the recipient of the gift, an amount equivalent to the value of the gift as at the time of its receipt."

Why should that not be an amount equivalent to half the value of the gift because if the gift had never been made and the money had gone into the accounting and equalization, presumably it would have been split on a 50-50 basis, so why should the recipient be responsible for providing an amount equivalent to the total value?

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: I think on the latter point that we'll have to ask Mr. Silver to reflect upon that because that might be a very good point.

On the first point, I suppose a situation such as that mentioned by Mr. Sherman can occur but I don't think we can lose sight of the general reason for this clause because to delete it would be, I fear, to create situations by which much more serious problems could occur, just as with dissipation, as with excessive gifts. There could be such a pattern of conduct in gifting as to threaten the security of the household, jeopardizing the security. I would think it would be only on that type of basis that a court would find that there was a gift of an excessive nature.

On the second point, though, at the moment I can't see how Mr. Sherman might not be correct. Why would it have to be . . .

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: I think perhaps what was really intended by this section was that, particularly since it appears to be tied to a condition expressed in the third line saying, "where it appears that the remaining assets of the spouse are insufficient or unavailable for the making of any equalizing payment required under the accounting half pursuant to the notice," so that the ability to recover hinges on that condition.

So I think what was intended was that this, whatever is recovered under this section, should be put into the pot, so to speak, for purposes of the equalization. —(Interjection)— Yes, so that it's not relevant to consider whether it should be divided in half or not. It's simply to come back into the commercial assets of the spouse who made the gift and to be included in the accounting.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Well, Mr. Chairman, would legal counsel agree that that could be worded in a way that would make that more clear? What he is saying is that there should be a recovery of the value of the gift to go into the equalization fund, but not that the other spouse may simply recover the value from the recipient.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, the way I read this, this only comes into play if the value of the gift is taken into account and there is a shortage for making the equalizing payment. It seems to me that if the excessive gift is chargeable back to the giver of the gift, then the gift doesn't have to be returned unless there is a shortfall in the equalization and if that's the case, then I assume that's why Mr. Silver said, the amount equivalent to the value or so much of that value as may be excessive.

Is that designed, then, to provide enough money to take care of the equalizing payment? You know, I'm not sure; I'm just groping for an understanding.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Well, I would have to think about that for a few seconds, Mr. Chairman, and I'll do that. But in the meantime, could I put the other question back in front of the Committee, the situation that I have referred to. It seems to me that the section could be written in such a way that the other spouse should have recourse to recover this value that we are talking about from the donor of the gift rather than the recipient of the gift. Now, I know what the objection is going to be, that we have already determined that the remaining assets are insufficient or unavailable, but presumably that person is going to have to maintain himself or herself for the rest of his natural life and there is going to be income; there is going to be some source of revenue or income. Could the value not be recovered through the attachment process where that income is concerned, so that it would be the donor who took the action in the first place and diverted the asset from the marital account in the first place, who would be responsible, rather than the innocent recipient?

Earlier in the legislation we amended a section which seemed to operate unfairly against innocent third parties in transactions. It seems to me, to be consistent, we should be looking at the same principle here. The recipient is totally innocent.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: No, I'm just thinking the way Mr. Sherman is. I think the only need for the recovery is to make sure that there is enough available for the equalizing payment to be made. I suppose it doesn't matter as long as the value is taken into account in the equalizing. If the value is taken into account, is assumed to be part of the total assets of the spouse who has to make the contribution and if there is then a shortfall, then that gift would be available to be recovered. I don't think we are in disagreement about what the intent is and I think it is up to Mr. Silver to tell us what is the best way.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Upon looking at this again and also at the preceding section 23, 23 is the section that provides for including in an accounting assets that have disappeared by virtue of dissipation, as a result of dissipation. But this is a different thing.

As recommended by the Law Reform Commission, it was simply a straight case of recovery by one spouse of a gift, or the value of a gift, of an excessive gift made by the other spouse. We attached the condition that this is effective only when there are insufficient assets to complete the equalization.

MR. SHERMAN: I understand that, Mr. Chairman, but I'm not sure that it reads that way and I . . .

MR. CHERNIACK: Mr. Chairman, I wonder if I may ask Mr. Silver whether really what we want is for that gift to be returned to the donor to make it available for distribution?

MR. SILVER: No, this is drafted to convey the idea that where the spouse who made the gift does not have sufficient assets to make any required equalization payment that he has to the other spouse, and that there is this kind of a gift, then the other spouse, the spouse who has to receive the equalization payment, can by action recover the value of that gift from the third person. Even if it is more than what she has to get under the equalization, she gets the whole thing.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Even if it is more than the . . . I don't know if that is the intent. The Law Reform Commission, if I can just read one sentence, says that recipients should have to restore the value to the spouses' combined shareable estates and I think that's the intent.

MR. SILVER: Are you reading about the excessive gift or about a dissipated asset?

MR. CHERNIACK: No, excessive gift. "Where transfer for an inadequate consideration or an excessive gift is made, the squandering spouse's," — well there they consider that squandering — "the squandering spouse's shareable estate should include the value."

Then, they say that it's only right that a person who accepts such a gift and didn't pay for it should be expected to return it and restore the value to the spouses' combined shareable estates.

It seems to me that that is fair because then it is back in there and available for distribution and then once the equalization has been met, then the donor can still give back the half to the recipient of the gift. I'm just wondering whether we wouldn't answer the purpose if we say in the third last line, under section 33, "recover for both spouses" — "recover from the recipient of the gift the amount" . . .

MR. SILVER: Recover for inclusion . . .

MR. CHEIACK: Fine.

MR. SILVER: . . . for inclusion in the assets of of the spouse who made the gift.

MR. CHERNIACK: Yes, isn't that right Bud?

MR. SHERMAN: That's getting at it; that certainly is taking care of part of it. I can see other problems, though. What if the excessive gift was $10,000 and what if that child, 21 years old, used the $10,000 to put herself through medical college or take a trip to Europe, or buy a business, or do anything? In the first place, they accepted the gift in all innocence; in the second place they are not in a position to pay back that $10,000 without going out and borrowing it and they might not be able to borrow it.

Going back to 13(2), we at one point considered, in terms of disposition of an asset, dispositions of personalty made by the other spouse in favour of a third person without the consent of the spouse, we were looking at the concept of making that third person responsible. But we passed an amendment in the last couple of days which recognized, in my view, a much more humane principle, that that innocent third person should not be responsible. We passed an amendment which now says that that arrangement is valid and effective but the spouse making the disposition is liable therefore to the other spouse. This seems to me to be inconsistent with that principle.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, the word "excessive" is judgmental and I guess I mean it literally; a judge would have to say, "That's excessive." A gift to a child, I believe, is in order but can be excessive in the light of what is known about the circumstances of the family. So I go back to the Law Reform Commission and it reads, "We think," — they say the net, that is the net — to bring assets back in for consideration "the net, we think, should cover any person who accepts the gift or transferred property and who knows, or should be taken to know, that the donor or transferer is a married person subject to a subsisting standard marital regime or who did not trouble to enquire astutely, that recipient should have to restore the value to the spouses' combined shareable estates unless they were conveyed with a clear assent of both spouses."

Now, I would say that in a person of fairly affluent circumstances, a $10,000 gift or a trip anywhere may not be excessive, whereas it would be in other circumstances, and the recipient is expected to be aware of the responsibilities of the donor. So it would not be excessive if the recipient couldn't be expected to be aware of it and spent it and it would be judgmental. You know, I would think that the court could determine a substantial gift to a child is not excessive whereas a substantial gift to a stranger, in the same amount, would obviously be excessive. So I think that it's adequate to know that it is a judgmental decision as to what is excessive, or so much of the value which may be excessive which is the addition just put in by Mr. Silver. I really can't be too worried about that. I do think the earlier one — which I think we ought to deal with by the way — to put it back into the assets — but then if it is not available, how could it be put in? But then you don't want that gift to disappear because it's passed. Oh, I'm sorry.

MR. CHAIRMAN: Order please. Perhaps that's something members could think about over the lunch hour. Committee rise and report. Committee rise.