IAFL – AIJUDEFA

Latin American Family Law Webinar

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Panel 3: Property distribution of assets in different countries after divorce/ Distribución de bienes a propósito del divorcio

Supporting Documents

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Thank you very much, Madam Chair.

The first thing I must say is that once I reviewed the impressive resumes of the colleagues with whom I have the pleasure of sharing this webinar, I found a small omission in the information of Daniela Horvitz our moderator. For several months, she has held the position of President of the International Association of Family Law Lawyers or AIJUDEFA, as abbreviated in Spanish.

Thanks to her and her tireless work to bring together lawyers from different jurisdictions who are truly integrated and interested in international family law, I owe her the invitation to this webinar, which I must confess has me terrified, seeing the level of the speakers with whom I share this experience and having met a number of participants who accompany us in this new adventure.

A few months ago, Daniela called me out-of-the-blue to ask me to participate in a seminar in which some lawyers would discuss the distribution of a couple's assets during a divorce. In my opinion and arrogance as a lawyer with some years of experience under my belt, I considered that this was a minor topic in which I would discuss with some colleagues from a couple of jurisdictions, some cases.

To my surprise, the esteemed colleagues from other jurisdictions belong to the International Academy of Family Law and the International Association of Family Lawyers to which I have the great privilege of belonging.

So seeing the specialty, professionalism and credentials of the participants left me and keeps me in a state of total terror. Therefore, I ask you to do your best to endure for a few minutes. I intend to share with you the theoretical and practical status of the distribution of personal and family assets faced daily by those who file for divorce in Mexico.

I consider it important that before explaining the form of distribution of assets in divorce cases, you have at least a small snapshot of the rules governing marriage, cohabitation and common-law unions in Mexico.

As you all know, the Mexican Republic, that is, Mexico, is made up of 32 states, each one of them having the power to legislate the laws that correspond to the civil status of persons. For this reason and recognizing that the most current and avant-garde legislation is found in Mexico City and that the others are constantly adjusting to it, I will refer mainly to the laws in force and effect in Mexico City.

Since the Family Law provisions of 1917, Mexican law provides that marriage must be entered into under one of the two recognized property regimes, either as a marital partnership and separation of property.

For this purpose, in theory, it is necessary to grant or constitute marital contracts, which are the covenants in which the spouses establish the agreement regarding their assets during their marriage and their management, which corresponds to both spouses.

Such marriage contracts must be signed or submitted before the marriage and may be amended before a judge specialized in family law or before a notary public, in a public deed.

At this point, we face the first problem. The persons who enter into the marriage under the regime of marital property, conjugal partnership or partnership in goods, celebrate by exception, a prenuptial agreement that constitutes the bases or conforms a matrimonial covenant. All those who have entered into a marriage under the separation property regime do not have a matrimonial agreement or covenant. In this case, under the law, it is assumed that each spouse owns their own property.

Marriage contracts are totally free and autonomous, so that any arrangement or condition regarding the assets of the spouses may be agreed upon, without restriction, and in the case of marriages entered into under the marital property regime, the assets will belong equally to both spouses.

Thus, when entering into a marriage under the marital property regime, it is clear what each spouse is entitled to, but with respect to those married under the separation of property regime, property provisions were exceptionally overcome by various amendments to the Civil Code of Mexico City. First, it recognized the right of the spouse who did not own property with respect to the other, in cases of divorce of persons who married under the separation of property regime.

In terms of divorce by persons married under the regime of marital partnership, the law expressly excludes assets acquired prior to the marriage or by donation, inheritance or by fortune as well as assets acquired with the own resources of the sale of those assets prior to the marriage, the objects of personal use and the instruments of the profession or business of the spouse for a specific profession, such as tools used by a carpenter, blacksmith, dentist or lawyer.

In terms of the separation of property regime, Mexican law recognizes the free and absolute ownership of the property that each spouse acquires during the marriage, without any limitation or restriction whatsoever.

The division of the two types of property regimes is so clear that the Civil Code of Mexico City recognizes that the owner can make use of the property without any limitation, as well as the proceeds, revenue and benefits from each of them, without the intervention of the spouse.

The only limitation to the free exercise of the right of ownership and possession of such assets is provided by Article 212 of the Civil Code for Mexico City, which establishes that the assets must be used primarily to pay alimony to the spouse and children. In event of default, a family law judge may intervene to sell, mortgage or place a lien on such assets in order to cover alimony payment.

As I stated at the beginning of this presentation, we have reached the moment of transitioning from legal provisions into terror.

What actually happens during a divorce and distribution of assets?

Pursuant to Article 267, section 6 of the Civil Code of Mexico City, when facing a divorce under the separation of property regime, the spouse who has devoted himself/herself mainly to the household duties and childrearing during the marriage, has the right to request from the other spouse, a compensation that can range from zero to 50% of the value of the property acquired during the marriage.

That is to say, the property covenant entered into by the spouses upon marriage under the separation of property regime ceases to be valid and becomes a matter of judicial examination pursuant to the evidence and facts that are submitted either to the benefit or detriment of one of the spouses.

The Mexican federal courts have analyzed from different perspectives the nature of the compensation that can be requested by one of the spouses during the divorce. The Mexican Supreme Court of Justice ruled that the reason for alimony is duty, welfare and compensation resulting from economic imbalance existing at the time of the dissolution of the marriage. The compensatory objective implies

compensating the economic loss and opportunity suffered by the spouse who assumed the domestic and family burdens without receiving remuneration in return. Said loss entails two aspects: 1. The economic loss resulting from a spouse not having been able, during the marriage, to dedicate to a remunerated activity, or not having been able to develop oneself in the traditional labor market with the same time, intensity and diligence as the other spouse; and, 2. The damages derived from the opportunity cost, which translate into the obstacle to education or professional or technical training; decrease or obstacle to join the labor market and the consequential loss of social security rights, among others. In other words, the aim is to compensate the losses suffered, insofar as the performance of these activities, sustained over time, generate the weakening of the links of this person with the labor market (lost employment options, few hours of paid work, work exclusively in the informal sector of the economy, lower wages, etc.) and of academic-labor preparation.

Therefore, the facts that the family judge must examine to determine the amount and type of alimony are: 1. cost of opportunity and economic losses; 2. accumulation of assets and the economic and property rights resulting from the cost of opportunity and economic losses; and 3. the duration of the obligation must be proportional to repair the cost of opportunity and economic losses.

In order to arrive at this valuation, the judge must assess the cost of opportunity and economic losses, and to do so, it is essential to determine the time and degree of diligence that the creditor spouse employed in these activities.

Thus, the judge must analyze: first, the duration of the family relationship in which the creditor spouse assumed most of the household chores and/or the childrearing; and second, take into consideration what part of the disadvantaged spouse's available time was used for the performance of household chores; and; third, the dedication to the home and to the care of the children or dependents can translate into many activities, which are not mutually exclusive and that must be valued individually.

It should be noted that the assets subject to compensation are only those generated during the marriage, excluding previous assets or those that were obtained with other assets or prior resources. Assets received by the debtor spouse either by donation, inheritance or gift should not be taken into consideration.

In order to determine the possible economic loss suffered by the spouse who, in benefit of the marriage, assumed certain domestic and family burdens without receiving financial remuneration in return, the Mexican Supreme Court of Justice has established that the judge must take into consideration

that the dedication to the home and to the care of dependents can be understood as multitasking, and that they must be valuated individually. For example, these duties include: (a) material execution of household chores, which may consist of activities such as sweeping, ironing, preparing food, cleaning and tidying up the house in light of the needs of the family and the household; (b) material execution of tasks outside the home, but related to the organization of the house and the obtaining of goods and services for the family, which may consist of appointments with public offices, banks or companies supplying services, as well as purchases of furniture, household goods and health and clothing products for the family; c) performing functions of direction and management of the household economy, which includes giving orders to domestic employees regarding daily work and supervising them, as well as making arrangements for certain repairs, maintenance and conditioning of the home; and d) care, upbringing and education of children, as well as care of relatives living in the marital home, which includes material and moral support of minors and, on occasion, of the elderly, which involves their care, feeding and physical accompaniment in their daily activities. In other words, the support of domestic employees in the marital home does not exclude by itself the applicability of the compensatory

mechanism provided for in the law but will be adjusted only to the amount to be set.

The Mexican Supreme Court of Justice has also defined that the judge must take into consideration the portion of the available time of the petitioning spouse is used for the performance of the household chores as a parameter to measure the dedication to the home. This, in order to distinguish the following cases: a) full and exclusive dedication to housework on the part of one of the spouses; b) the majority dedication to housework of one of the spouses combined with a secondary activity outside the home; c) the minority dedication to housework of one of the spouses combined with a main activity, but a majority and more relevant than the contribution of the other spouse; and d) both spouses share the housework and contribute to the performance of the household chores.

Thus, the specificities, duration and degree of dedication to household work are elements to be considered by the judge when potential compensation, without the mere condition that the applicant is employed in the conventional market or that he/she receives the support of domestic employees excluding, by itself, the applicability of the compensatory mechanism, but only graduating the amount to be set when applicable.

The rules that I have explained above for the distribution of assets do not apply to couples who lived together in common-law relationships, but in both cases, it is possible for the partner who does not have sufficient income or assets to support him or herself to request alimony.

I hope that the information shared is sufficient to provide an idea of how to distribute a couple's assets when facing divorce.

Thank you.

AFL/AIJUDEFA - LATIN AMERICAN FAMILY LAW CONFERENCE

Property distribution of assets after divorce - BRAZIL

Marriage is an act by which "full communion of life is established, based on the equality of rights and duties of the spouses", considered by many to be the most solemn legal act foreseen in the Brazilian legal system.

It is the civil celebration of the love and feeling of two people. As in the *de facto* or common-law marriage, marriage is the symbolism of the union between individuals who decide to share the onuses and bonuses of common life.

However, before the formalization of love, the Brazilian legal system opens space for the aspect of negotiation - the combination of *affectio maritalis* and *affectio societatis* – allowing different property regimes that can govern the matrimonial union.

As a general rule, marriage and informal common-law marriage will be governed by the regime of **Restricted or Partial Ownership of Property**. However, the Brazilian Civil Code still provides for the existence of other property regimes that can be established by the couple in a Prenuptial Agreement, in the case of marriage, or in the deed of the formal *de facto* marriage: **Joint Ownership of Property or Universal Community of Property, Final Participation in Acquisitions or Community of Acquests** and, finally, **Separate Ownership of Property**, the latter divided in Legal Separation and Conventional Separation.

1.1. Partial Ownership of Property

It is the patrimonial regime established by law if there is no different intention expressed in a prenuptial agreement or even if the adopted regulation is null or void.

Since the Divorce Law of 1977, we have had this change in our matrimonial legal system. Before that law, the legal property regime in Brazil was that of the Universal Community of Property, when all the patrimony was shared equally between the spouses, regardless of its origin.

According to the rules of the Partial Ownership of Property, the assets acquired before the celebration of the marriage will not be considered joint property, establishing thus the separation of past assets and the community of future assets.

Individual assets are classified as incommunicable or communicable. It is possible to affirm that the former are those that constitute the private patrimony of one of the spouses while the latter constitute the social or common assets.

It is important to bear in mind that incommunicable assets are not only those acquired before the celebration of the marriage, but also all assets acquired free of charge, by donation or inheritance, and those that may have been subrogated in their place; obligations prior to marriage, goods for personal use, books and professional instruments; income from personal work of each spouse; retirement pension and similar income, as stated on articles 1659 y 1661, from the Brazilian Civil Code

Finally, according to article 1664 of the Civil Code, "the assets of the social patrimony will respond for the obligations contracted by the husband or the wife to provide for family charges, administrative expenses or that come from legal imposition".

1.2. Universal Community of Property

Contrary to the Restricted or Partial Community, in the Universal Community of Property regime there is full communication of the assets, regardless of whether they are present or future, with communication even of debts and obligations.

However, by express legal provision, some assets and debts are also excluded from the community, in accordance with article 1668 of the civil codex, such as donated or inherited property with an incommunicability clause and those subrogated in their place, debts prior to the marriage, except those that come from the expense of its preparation, or that have common benefit and also prenuptial donations made by one spouse to the other with an incommunicability clause.

1.3. Final Participation in Acquisitions or Community of Acquests

Article 1672 of the Civil Code addresses this property regime, which is perhaps the most complex of Brazilian Law, establishing that "*in the final participation in acquisitions regime, each spouse has his or her own patrimony, and at the time of dissolution of the conjugal partnership, is entitled to half of the assets acquired by the couple, onerously, during the marriage* ".

In the words of Carlos Roberto Gonçalves[1], the regime is defined as "*mixed: during the marriage all the rules of total separation apply and, after its dissolution, those of the restricted or partial community are valid. Born from a Convention, it depends, therefore, on a Prenuptial agreement. "*

Therefore, it is possible to affirm that the assets that each spouse had when he / she married will be included in their own and individual assets, as well as those acquired by them during the marriage. Thus, each spouse is responsible for the management of his assets and can dispose of them freely.

At the time of the assessment of the assets that will integrate the final participation in acquisitions, all the spouse's own assets will be added up, excluding, however, the assets he /she had prior to the marriage and those that were subrogated in their place, those received by each spouse by succession or liberality and the debts related to this property.

At the time of the dissolution of the marriage by divorce, the amount of the joint acquests must be verified on the date the coexistence ceased.

If the distribution of the assets is not possible, its total or partial value must be calculated so that the non-owning spouse compensates it in cash. The exception to this provision is in the sole paragraph of article 1685 of the Civil Code, which establishes that "if it is not possible to compensate it in cash, as many assets as necessary will be evaluated and, with judicial authorization, alienated."

Incidentally, we must also highlight the determination contained in article 1686, which establishes that *"the debts of one of the spouses when greater than his patrimony, do not bind the other, or his/her heirs."*

[1] GONÇALVES, Carlos Roberto. Direito de Família - Sinopses Jurídicas. Volume 2. São Paulo: Editora Saraiva, 2007.

This property regime is very rare. Its implementation is very difficult and even more so, in case of divorce of the parties, its practical applicability.

1.4. Separate Ownership of Property

The legal or mandatory separation of property does not depend on a prenuptial agreement, since it is established by law. According to article 1641 of the Civil Code, this regime will be mandatory in the marriages of people who contract it with the non-observance of the suspensive causes of the celebration of the wedding; of a person over 70 (seventy) years of age and of all those who depend, to marry, on a judicial supply.

In this regime, each spouse retains exclusive ownership of his/her property, as well as remains in the integral administration of the same, and can freely dispose of it, regarding either real estate property or chattel, according to article 1.687 of the Civil Code.

It must also be said that both spouses are obliged to contribute towards the expenses of the couple in proportion to the income from their work and their patrimony, unless otherwise provided in the prenuptial agreement (article 1688).

It is important to note, however, that, despite the norm contained in the Civil Code, Jurisprudence 377 of the Supreme Federal Court establishes that “in the legal separation of assets, assets acquired during marriage are communicable,” that is, the assets that were acquired during the marriage and / or the common-law marriage will be considered common to the couple.

Finally, in the conventional separation of property, each spouse will also continue to be the exclusive owner of his/her assets and will maintain the integral administration of them.

In this sense, because they do not differ greatly, we can say that the great "gap" between the two regimes - if we can say so - is the fact that the legal separation is derived from a legal requirement while the conventional one results from mere liberality of the spouses.

Paulo Lins e Silva

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DIVISIÓN DE BIENES DESPUES DEL DIVORCIO - BRASIL

El matrimonio es un acto por el cual “se establece la plena comunión de vida, basada en la igualdad de derechos y deberes de los cónyuges” (artículo 1511 del Código Civil brasileño), considerado por muchos como el acto jurídico más solemne previsto en el sistema jurídico de Brasil.

Es la celebración civil del amor y del sentimiento de dos personas. Al igual que en la Unión Convivencial, el matrimonio es el simbolismo de la unión entre individuos que deciden compartir las cargas y los bonos de la vida común.

Sin embargo, antes de la formalización del amor, el sistema jurídico brasileño abre espacio para el aspecto de la negociación - la combinación del *affectio maritalis* e del *affectio societatis* - al prever diferentes regímenes de bienes que pueden regir la unión marital.

Por regla general, el matrimonio y la unión convivencial informal se regirán por el régimen de comunidad restringida o parcial de bienes. No obstante, el Código Civil brasileño aún prevé la existencia de otros regímenes de propiedad que pueden ser establecidos por la pareja en un Pacto Antenupcial, en el caso de Matrimonio, y en la propia escritura de la Unión Convivencial formal: Comunidad Universal, Participación Final en los Gananciales y Separación de Bienes, esta última dividida en separación legal y separación convencional.

1.1. Comunidad Restringida o Parcial

Es el régimen patrimonial establecido por la ley si no hay una intención diferente manifestada en acuerdo prenupcial o incluso si el reglamento adoptado es nulo o sin efecto.

Desde la Ley de Divorcio en 1977, hemos tenido este cambio en nuestro sistema jurídico matrimonial. Antes de esa ley, el régimen de propiedad legal en Brasil era el de la Comunión Universal de Bienes, cuando todo el patrimonio se compartía por igual entre los cónyuges, independientemente de su origen.

Según las reglas de la **Comunidad Restringida**, los bienes adquiridos antes de la celebración del matrimonio no serán considerados propiedad común, estableciendo la separación de los bienes pasados y la comunidad de los bienes futuros.

Es posible encontrar en la mejor doctrina una subdivisión con respecto a las "masas de bienes" derivadas de este régimen, de la siguiente manera:

- Los bienes comunes (pertenecientes a la pareja) y, por así decirlo, dos veces los individuales (una vez que la pareja es formada por 2 personas).

Los bienes individuales se clasifican como incomunicables o comunicables, siendo posible afirmar que los primeros son aquellos que constituyen el patrimonio particular de uno de los cónyuges (artículos 1659 y 1661 del Código Civil), mientras que los segundos ingresan al haber social o común.

Es importante tener en cuenta que los bienes incomunicables no son sólo los adquiridos antes de la celebración del matrimonio, sino también todos los bienes adquiridos a título gratuito, por donación o herencia, y aquellos que puedan haber sido subrogados en su lugar.

En este sentido son los artículos 1659 y 1661, ambos del Código Civil:

> Art. 1.659. Quedan excluidos del haber social:
> I - los bienes que cada cónyuge posee al casarse, y los introducidos durante el matrimonio por donación o herencia, y los subrogados en su lugar;
> II - los bienes adquiridos con valores que pertenezcan exclusivamente a uno de los cónyuges en subrogación de bienes privados;
> III - las obligaciones anteriores al matrimonio;
> IV -las obligaciones derivadas de actos ilícitos, a no ser en caso de reversión a favor de la pareja;
> V - los bienes de uso personal, libros e instrumentos profesionales;
> VI - los rendimientos del trabajo personal de cada cónyuge;
> VII - las pensiones, medios salarios, montepíos y otros ingresos similares.
>
> Art. 1.661. Son incomunicables los bienes cuya adquisición tiene por título una causa anterior al matrimonio.

Por último, conforme al artículo 1664 del Código Civil, "*los bienes del haber social responderán por las obligaciones contraídas por el marido o la mujer*

para proveer a los cargos familiares, gastos de administración o que provengan de imposición legal"

1.2. Comunidad Universal

A diferencia de la Comunidad Restringida o parcial, en el **Régimen de Comunidad Universal de Bienes** hay plena comunicación de los bienes, independientemente de si son presentes o futuros, con comunicación, incluso, de deudas y obligaciones.

Sin embargo, por expresa disposición legal, algunos activos y deudas están también excluidos de la comunidad, de acuerdo con el artículo 1668 del códex civil:

> Art. 1.668. Quedan excluidos del haber social:
> I - los bienes donados o heredados con cláusula de incomunicabilidad y los subrogados en su lugar;
> II - los activos con fideicomiso y el derecho del heredero fiduciario antes de realizada la condición suspensiva;
> III - las deudas anteriores al matrimonio, salvo las que procedan de gasto de sus preparativos, o que tengan por objeto beneficio común;
> IV - las donaciones prenupciales realizadas por un cónyuge al otro con cláusula de incomunicabilidad;
> V – Los activos contemplados en las secciones V a VII del artículo 1659.

1.3. Régimen de Participación Final en los Gananciales

El artículo 1672 del Código Civil aborda el régimen de bienes que es quizás el más complejo del Derecho Brasileño, estableciendo que "*en el régimen de participación final en los gananciales, cada cónyuge tiene su propio patrimonio, y en el momento de la disolución de la sociedad conyugal, tiene derecho a la mitad de los bienes adquiridos por la pareja, a título oneroso, durante el matrimonio"*

En las palabras de Carlos Roberto Gonçalves[1], el régimen se define como "*mixto: durante el matrimonio se aplican todas las reglas de la separación total y, después de su disolución, las de comunidad restringida. Nacido de Convención, depende, por consiguiente, de acuerdo prenupcial*. "

Por lo tanto, es posible afirmar que los bienes que cada cónyuge tenía al casarse serán incluidos en el patrimonio propio e individual, así como los

[1] GONÇALVES, Carlos Roberto. Direito de Família - Sinopses Jurídicas. Volume 2. São Paulo: Editora Saraiva, 2007.

adquiridos por él, a cualquier título, desde que durante el matrimonio Así, cada cónyuge queda responsable por la gestión de sus activos y puede disponer de ellos libremente, cuando muebles.

En el momento de la averiguación de los bienes para llevar a cabo la comunidad final de los gananciales será sumado todo el patrimonio propio del cónyuge, excluyendo se, sin embargo, los bienes anteriores al matrimonio y los que en su lugar se sub-rogaron, los recibidos por cada cónyuge por sucesión o liberalidad y las deudas relativas a los bienes.

Cuando de la disolución del régimen patrimonial por divorcio, el importe de los gananciales debe ser verificado en la fecha en que cesó la convivencia.

Si no es posible la división de los activos, se deberá calcular el valor de parte o la totalidad para que el cónyuge no propietario reemplace en efectivo. La salvedad de esta disposición está en el párrafo único del artículo 1685 del Código Civil, que establece que "*si no es posible remplazar en efectivo serán evaluados y, con autorización judicial, alienados tantos bienes cuántos sean suficientes*."

A propósito, hay que destacar también la determinación contenida en el artículo 1686, que establece que "*las deudas de uno de los cónyuges cuando mayores que su aparcería, no obligan al otro, o sus herederos"*

Este régimen de bienes es muy raro entre los novios. Su implementación es muy difícil y más aún, en caso de divorcio de las partes, su aplicabilidad práctica.

1.4. Separación de Bienes también denominada Separación Total de Bienes

La separación **legal u obligatoria** no depende de acuerdo prenupcial, una vez que es establecida por la ley. A tenor del artículo 1641 del Código Civil, este régimen será obligatorio en los matrimonios:

> I - de las personas que lo contrajeren con la no observancia de las causas suspensivas de la celebración de la boda;
> II – de persona mayor de 70 (setenta) años;
> III - de todos los que dependieren, para casar, de suministro judicial.

En este régimen cada cónyuge conserva la propiedad exclusiva de sus bienes, así como se mantiene en la integral administración de los mismos, y

puede enajenarlos y grabarlos de carga real libremente, sea para bienes muebles o inmuebles, según *caput* del artículo 1.687 del Código civil.

Hay que decir también que ambos cónyuges están obligados a contribuir para los gastos de la pareja en proporción a los ingresos de su trabajo y de sus bienes, salvo que se disponga lo contrario en el acuerdo prenupcial (artículo 1688).

Es importante señalar, no obstante, que, a pesar de la norma estampada en el Código Civil, el Precedente Legal 377 del Supremo Tribunal Federal establece que “en el régimen de separación legal de bienes se comunican los adquiridos durante el matrimonio”, es decir, los bienes que fueron adquiridos durante el matrimonio y / o la Unión Convivencial serán considerados comunes a la pareja.

Finalmente, al igual que en el sistema de separación legal u obligatorio, en la separación de bienes **convencional** cada cónyuge también seguirá siendo el propietario exclusivo de sus bienes y mantendrá la administración integral de los mismos.

En este sentido, por no guardaren grandes diferencias, podemos decir que el gran "abismo" entre los dos regímenes - si es que así podemos decir - es el hecho de que la separación legal se deriva de requisito legal y la convencional de mera liberalidad de los cónyuges.

Paulo Lins e Silva

"Property Distribution of Assets in Barbados after Divorce"

1. The Barbados Family Law Act of 1981

1.1 The Barbados Family Law Act of 1981 was a significant departure from previous provisions. It was based on the Australian Family Law as opposed to English. It has been described as "*the most ambitious and comprehensive single statue Family Law reform initiative in the Commonwealth Caribbean*" . Fundamental changes include

- No fault divorce. A person did not have to prove adultery, cruelty, etc., sole ground was irretrievable breakdown evidenced by 1 year separation.
- Recognition of unions other than marriage, (cohabitation for a five year period) and the property rights of persons within those unions.
- Recognition of the direct and indirect financial contributions establishing property interests.
- Recognition of the contribution of a homemaker and parent supporting an interest in property.

1.2 There was considerable initial concern about the apparent ease with which a divorce could be obtained and bringing about the necessity for property division in circumstances where one party was not at fault ,the cause of the breakdown of the marriage/union and or not wanting the divorce/seperation. However as jurisprudence has developed courts have generally operated on finding a resolution that is "*just and equitable to the parties*".

2. Family Law Act 1981-29

A Property application must be related to current, pending or completed proceedings and a divorce application can not be finalized if there is an outstanding property application .

Section 2. – Definitions

"property", "in relation to the parties to a marriage or union other than a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled in possession or reversion;"

Section 53. (2) - Matters to be taken into consideration in proceedings include

(a) ***"the age and state of health*** *of each of the parties;*

(b) ***the income, property and financial resources*** *of each of the parties and the* ***physical and mental capacity of each of them for appropriate gainful employment;***

(c) ***whether*** *either party has the* ***care or control of a child*** *of the marriage or union other than a marriage, who has not attained the age of 18 years;*

(d) ***the financial needs and obligations*** *of each of the parties;*

(e) ***the responsibilities*** *of either party to* ***support any other person****;*

(f) ***the eligibility*** *of either party* ***for a pension, allowance, or benefit*** *under any Act or rule, or under any superannuation fund or scheme, or the rate of any such pension, allowance, or benefit being paid to either party;*

(g) where the *parties have separated or the marriage has been dissolved,* ***a standard of living that in all the circumstances is reasonable;***

(i) the extent to which the party has contributed to the income, earning capacity, property and financial resources of the other party;

(j) ***the duration of the marriage or union*** *other than a marriage, and the* ***extent to which it has affected the earning capacity of the party*** ;

(k) the need to protect the position of a woman who wishes only to continue her role as a wife and mother;

(n) any fact or circumstance that, in the opinion of the court, the justice of the case requires to be taken into account."

Section 57. (1) - Alteration of property interest

(1) "In proceedings in respect of the property of the parties to a marriage or union, or of either of them, the court may make such order as it thinks fit ***altering the interests of the parties in the property,*** *including*

(a) an order for a settlement of property in substitution for any interest in the property; and

(b) an order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage or union, such settlement or transfer of property as the court determines.

(2) *The court* ***shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.***

(3) In considering what order should be made under this section, the court shall take into account the following:

(a) the financial contribution made directly or indirectly by or on behalf of a party or a child to the ***acquisition, conservation or improvement*** *of the property, or otherwise in relation to the property;*

(b) the contribution made directly or indirectly by a party to the marriage or the union, including any contribution made in the capacity of homemaker or parent, to the welfare of the family which constitutes

(i) the parties to the marriage or the union; and

(ii) where applicable, any child of that marriage or union;

(c) the effect of any proposed order upon the earning capacity of either party;

(d) the matters referred to in section 53(2) in so far as they are relevant; and

(e) any other order that has been made under this Act in respect of a party".

<u>Section 58.</u> - Power to set aside orders altering property interest

(1) "Where the court is satisfied on an application by a person affected by an order made under section 57 that the order was obtained by fraud, duress, the giving of false evidence or by the suppression of evidence, the court may, in its discretion, set aside the order, and, if it thinks fit, but subject to section 57(2) and (3), make another order under section 57 in substitution for the order so set aside.

(2) In exercising its powers under this section, the court shall have regard to the interest of, and shall make an appropriate order for the protection of, a purchaser in good faith or other interested person."

<u>Section 59.</u> - General powers of court

"The court, in exercising its powers under this Part, may do any or all of the following:

(1) order payment of a lump sum, whether in 1 amount or by instalments;

(a) order payment of a weekly, monthly, yearly or other periodic sum;

(b) order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the court directs;

(c) *order that any necessary deed or instrument be excuted, and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;*

(f) *order that payments be made direct to a party to the marriage or union, to a trustee to be appointed, or into court or an account standing in the name of the party at a commercial bank or to such public authority as the court specifies in the order, for the benefit of a party to the marriage or union;*

(h) *make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order;*

(ha) *order that a specified transfer or settlement of property be made by way of maintenance for a child; and*

(i) *impose terms and conditions;*

(j) *make an order by consent;*

(k) *make any other like or dissimilar order as those mentioned in paragraphs (a) to (k) that the court thinks it necessary to make to do justice; and*

(l) *subject to this Act, make an order under this Part at any time before or after the making of a decree under another Part."*

Section 60. - Duty of court to end financial relations

"In proceedings under this Part, other than proceedings under section 56 or proceedings in respect of maintenance payable during the subsistence of a marriage, the court shall, as far as practicable, make such orders as will finally determine the financial

relationships between the parties to the marriage and avoid further proceedings between them."

3. In Practice

3.1 **Discovery** is an important aspect of property distribution.

- Provisions for parties to present Statements of Financial Circumstances, parties can require discovery and production of documents from the other party.
- Provision for third parties to provide information.
- Recognition that where there is a failure by a party to provide information the Court can make adverse assumptions against the party.

3.2 Indirect financial contribution

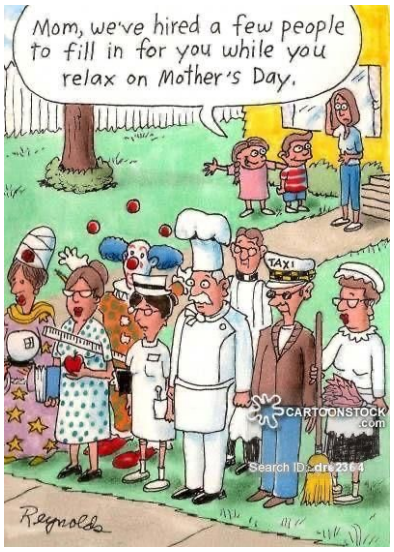
Circumstances where the property is in the name of one party, still usually the husband, and the wife made no direct financial contribution to the property the Court can consider indirect financial contribution - husband pays the mortgage, wife buys the food, children's clothes, etc. or works in the husband's business without pay.

3.3 Contribution of homemaker and parent

Circumstances where a party has made no financial contribution, direct or indirect, but has been the homemaker and parent. This provision has been controversial and hard for some to accept. However the provision is fair when one considers the circumstances of the wife giving up her career or

opportunity for a career, making meals, cleaning, washing, ironing, drop-offs, homework; this work frees the other party from those responsibilities.

On the recently celebrated Mother's Day, the sentiment of how mothers are the "*director of operations*", described what it involved – these legal provisions put teeth to that sentiment.



3.4 Decisions

- It is not a case that once married or in a union property would be divided automatically half and half;
- Decisions are based on the facts of each case , particularly the length of the marriage – 25 years and over versus a 4 year marriage; number of children, the extent of the contribution .

4. Conclusion

- Provisions recognizing marriages and long term cohabiting unions omit many relationships in which property issues can arise.

- Need in cohabiting relationships to bring an application within a year can lead to difficulties .
- Overall the provisions are forward thinking , beneficial and fair .

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