Choice of Law in Matrimonial Property Disputes 1997

Civil Section Documents - Jurisdiction and Choice of Law Rules in Domestic Property Proceedings

Report of the
Working Group

May 14, 1997

Jurisdiction and Choice of Law Rules in Domestic Property Proceedings

Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act

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Jurisdiction and Choice of Law Rules in Domestic Property Proceedings

A. Deliberations at the 1996 Meeting

[1] This matter came before the Civil Law Section at its 1996 meeting. Discussion was based on a report prepared by the British Columbia Commissioners which made a number of proposals for drafting uniform legislation that would set out jurisdiction and choice of law rules for domestic property proceedings.

B. The Working Group

[2] The Conference directed that a Working Group be struck to consider the report of the British Columbia Commissioners and report back to the Civil Law Section at its 1997 meeting.

[3] The Working Group consisted of: Thomas G. Anderson, chair, Tim Rattenbury, Frédérique Sabourin, Greg Steele, Arthur L. Close, Q.C., Greg Blue, John McEvoy and Louise Lussier.

C. Report of the Working Group

[4] The Report of the Working Group takes the form of annotated uniform legislation (set out below). Square brackets and a distinctive type face in the annotations are used to indicate those issues upon which the Working Group was unable to reach unanimity, or notes which may be omitted from the annotations when a uniform act is promulgated by the Civil Law Section.

Part XX
Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act

Comment: This uniform legislation is drafted to be added as a Part to the statute in the enacting province or territory that deals with the division of property owned by one or both spouses on the break up or termination of their relationship.

Whenever a dispute crosses over borders, involving more than one territory, questions arise concerning where proceedings should or can be brought (which court has jurisdiction to hear the dispute) and which territory's laws govern the resolution of the dispute (choice of law). Both the common law and civil law developed detailed legal rules to deal with these very complex questions. Most Canadian territories have amended at least some aspects of these rules as they apply to resolving disputes about domestic property. Not all Canadian

territories have adopted the same approach to rationalizing the rules, and not all of the approaches adopted have been entirely successful.

This legislation sets out uniform principles to decide (a) when a court has jurisdiction to hear a dispute that concerns domestic property, (b) when a court that has jurisdiction should decline it, and (c) the selection of the territory whose law is to govern the disputes. The legislation applies where the dispute involves more than one Canadian territory as well as where it involves Canadian and non-Canadian territories.

[One member of the Working Group is opposed to addressing jurisdictional issues or, if they are to be addressed, prefers a rule that provides that proceedings can be brought in any jurisdiction selected by the applicant. The majority viewed this position as being inconsistent with (a) the policy adopted by the Supreme Court of Canada in Morguard, which holds that a court of a territory has jurisdiction if there is a real and substantial connection between the subject matter of the dispute and the territory, and (b) the policy underlying UCJPTA, which is that it is desirable to set out rules which help to determine when a real and substantial connection exists. The majority did not see how the ULC could adopt a policy respecting court jurisdiction that abandons the idea that there must be a real and substantial connection.]

Definitions and Presumptions

X.1. (1) In this Part

"regime of community of property" means any regime of domestic property which is imposed by law and which

(a) determines the extent to which each spouse has rights in and over all or certain of the domestic property owned by the other spouse during the marriage, and

(b) provides for the sharing of domestic property on the break up or termination of their marriage

and includes a regime of partnership of acquests, but does not include

(c) a regime of separate property, or

(d) a regime under which rights in or with respect to domestic property are deferred until, or after, the occurrence of an event signifying the break up or termination of the marriage,

"court" means the superior court of unlimited trial jurisdiction of [enacting province or territory]

"defendant" means a person who is or was in a marriage with the plaintiff and against whom a domestic property proceeding has been brought,

"domestic property" means real property or personal property wherever located owned by the plaintiff or defendant separately or as co-owners and acquired by them before or during their marriage,

"domestic property proceeding" means a proceeding brought in connection with an application for

(a) a division of,
(b) compensation in lieu of, or for foregoing, rights in, or
(c) a declaration as to rights in

domestic property,

"marriage" includes any relationship involving cohabitation that is recognized under the internal law of the territory selected under ss. X.6, X.7 or X.8 that governs domestic property rights on the break up or termination of the relationship,

"plaintiff" means a person who has commenced a domestic property proceeding,

"territorial competence" means the aspects of a court's jurisdiction that depend on a connection between

(a) the territory or legal system of the state in which the court is established, and

(b) a party to a proceeding in the court or the facts on which the proceeding is based.

(2) Parties do not have a common habitual residence in a territory while they live separate and apart in the territory.

Comment: Once this Part is placed in the context of the domestic property legislation of the enacting province or territory, which will have its own set of definitions, many of these definitions may be unnecessary or require fine-tuning.

The definition of "regime of community of property" distinguishes between
(a) various regimes which recognize rights in domestic property arising immediately by virtue of the marriage and

(b) regimes which provide for

(i) separate property or

(ii) separate property during marriage and property division on the break up or termination of the relationship.

The legislation sets out one choice of law rule for domestic property proceedings that deal with property held in community of property (*see* s. X.7) and another choice of law rule for property not held in community of property (*see* s. X.8). The legislation sets out a choice of law rule that applies at the beginning of marriage where property is held in community of property because property sharing under such a regime commences at that time. For other property, the choice of law rule that applies is based on a test that applies at the end of the relationship.

The definition of "regime of community of property" only refers to situations where community of property is imposed by law. In cases where the spouses agree that their property will be held in community of property, s. X.6 would govern. It applies in all cases where an agreement is made.

Some territories have enacted legislation, or are contemplating enacting legislation, that allows the courts to divide property on the break up or termination of a common law, or a same sex, relationship. The term "marriage," consequently, is given an expanded definition.

The legislation applies when marriage terminates by, *e.g.*, divorce or, where recognized under the applicable law, the death of a spouse. The definition of "marriage" also refers to the "break up" of the relationship to ensure that the legislation also applies when the relationship does not terminate, but ends when, *e.g.*, a spouse obtains (a) a court order recognizing that the spouses' have separated from board and bed, or (b) an order of nullity, *[although one member of the Working Group had serious doubts concerning whether these events would be included without specific mention of them].*

The legislation sets out jurisdiction and choice of law rules for proceedings relating to domestic property. *See* the definition of "domestic property." For a court to make an order that finalizes all aspects of a dispute over domestic property, it must be able to have regard to property located outside its own territory, as well as outside Canada. To the extent that the order cannot be enforced outside the court's territory, other methods, described below, can be employed. *See* s. X.9.

The term "territorial competence" is used in the sections dealing with when a court has jurisdiction to entertain a proceeding. These sections are patterned after the *Uniform Court Jurisdiction and Proceedings Transfer Act ("UCJPTA")*.

Under this legislation, the test of first "common habitual residence" is used to select the law that applies to resolving a dispute over domestic property held in community of property. [*See* s. X.7] The test of last "common habitual residence" is used to select the law that applies to resolving a dispute over domestic property that is not held in community of property. [*See* s. X.8].

The fact that spouses lived in the same territory but did not cohabit, is not relevant for determining choice of law issues [*see* s. X.1(2)], although may be relevant for determining

whether the court has jurisdiction to hear the dispute. [*See* s. X.4]

The phrase "common habitual residence" has been interpreted to mean "the

place where the spouses most recently lived together as husband and wife and participated together in everyday family life." (*Pershadsingh* v. *Pershadsingh*, (1987), 9 R.F.L. (3d) 359, 361 (Ont. H.C.); *Adam* v. *Adam* (1994), 7 R.F.L. (4th) 63, 67 (Ont. Gen. Div.) confirmed on appeal (1996) 65 A.C.W.S. (3d) 756 (Ont.C.A.). It embraces the idea of cohabiting. S. X.1(2) confirms that this interpretation also applies in the context of this legislation.

Territorial competence

X.2 The territorial competence of the court in a domestic property proceeding is to be determined solely by reference to this Part.

Comment: Ss. X.2 to X.5 are patterned after sections in *UCJPTA*.

UCJPTA provides comprehensive rules for determining when the courts of a province or territory have jurisdiction to entertain a proceeding.

Territorial Competence Rules

X.3 The court has territorial competence in a domestic property proceeding that is brought against a defendant only if

(a) the defendant has instigated another proceeding in the court to which the domestic property proceeding is a counterclaim,

(b) during the course of the domestic property proceeding the defendant submits to the court's jurisdiction,

(c) there is an agreement between the plaintiff and the defendant to the effect that the court has jurisdiction in the domestic property proceeding,

(d) the defendant is ordinarily resident in [enacting province or territory] at the time of the commencement of the domestic property proceeding, or

(e) there is a real and substantial connection between [enacting province or territory] and the facts on which the domestic property proceeding against the defendant is based.

Comment: S. X.3 is based on *UCJPTA*, s. 3.

Real and substantial connection

X.4. Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [enacting province or territory] and the facts on which a domestic property proceeding is based, a real and substantial connection between [enacting province or territory] and those facts is presumed to exist if

(a) the domestic property that is the subject matter of the domestic property proceeding is located in [enacting province or territory],

(b) the last common habitual residence of the plaintiff and defendant was in [enacting province or territory],

(c) the habitual residences of both the plaintiff and the defendant when the proceedings are commenced are in [enacting province or territory]

(d) a petition with respect to the marriage of the plaintiff and defendant has been validly issued under the *Divorce Act* in [enacting province or territory].

Comment: *UCJPTA*, s. 10, sets out a number of factors from which it can be presumed that there is a real and substantial connection between the proceeding and the territory in which the court is located.

S. X.4 is based on *UCJPTA*, s. 10, although the listed items are specially formulated to apply to domestic property proceedings and are not found in *UCJPTA*.

A court whose jurisdiction derives solely from the fact that a minor portion of domestic property is located in the territory--item (a)--should ordinarily decline jurisdiction on principles of *forum non conveniens*. [*See* X.5]

Not all of the items listed in ss. X.3 and X.4 will necessarily be consistent with other parts of the law of the enacting province or territory. *E.g.*, a Quebec court would not have jurisdiction unless the spouses currently have either domicile or residence in Quebec. In the absence of domicile or residence, parties cannot confer jurisdiction on a Quebec court by agreement. Each jurisdiction must consider whether a subsection is needed, or should be omitted because it is inconsistent with other provincial law.

[One member of the Working Group thought that the UCJPTA formulation of the general jurisdictional ground (real and substantial connection) does not work for domestic property proceedings:

"On what "facts" is a domestic property proceeding "based"? When we put those words in UCJPTA I think we were primarily trying to describe the place where the 'wrongful act' which constituted the 'cause of action' occurred. But that doesn't really work in the domestic property context. I think that if we maintain the 'real and substantial connection' idea as a basis of jurisdiction under [the Act,] we need to re-think what the two elements are that the 'real and substantial connection' is 'between.'

The majority did not view the UCJPTA formulation as being confined to 'wrongful acts.' (UCJPTA addresses, e.g., when a court has jurisdiction to interpret a contract.) UCJPTA was intended to help define when a real and substantial connection between a dispute and a territory arises. The ambiguity pointed to exists in the SCC formulations (see Morguard). A domestic property proceeding must necessarily be based on "facts" no less than any other proceeding.]

[One member of the Working Group proposed extending jurisdiction to any situation in which a plaintiff could bring an application for support. In part, this suggestion was seen as a logical extension of the decision to recognize that a court hearing an application for a divorce order has jurisdiction to resolve a dispute over domestic property. The argument in favour of this approach is the convenience of consolidating family law proceedings. In the view of the majority, however, while in every situation in which a court has jurisdiction to grant an order of divorce it makes sense for the provinces to allow a consolidation of domestic property proceedings (because the federal government can confer on courts jurisdiction to make orders with respect to all aspects of family law other than the division of domestic property), the same considerations do not necessarily arise in all situations where a court has jurisdiction to make an award of maintenance. For one reason, the fact that the court has jurisdiction to award maintenance is no assurance that there is a real and substantial connection between the territory and the domestic property proceeding.]

[One member of the Working Group proposed extending jurisdiction to a court in any case where the applicant was resident in the territory. In the view of the majority, the residence of the applicant is not, in itself, an assurance that there is a real and substantial connection between the court and the subject matter of the proceedings. Note, however, that residence of the applicant in the territory will confer jurisdiction on a court to entertain a petition for divorce and, if such an application is made, the court would have jurisdiction to decide a dispute about domestic property by operation of subparagraph (d).]

Discretion About the Exercise of Territorial Competence

X.5 (1) After considering the interests of the parties to a domestic property proceeding and the ends of justice, the court may decline to exercise its territorial competence in the domestic property proceeding on the ground that the court of another state is a more

appropriate forum in which to try the domestic property proceeding.

(2) The court, in deciding the question of whether it or a court outside [enacting province or territory] is the more appropriate forum in which to try a domestic property proceeding, must consider the circumstances relevant to the domestic property proceeding, including

(a) the comparative convenience and expense for the parties to the domestic property proceeding and for their witnesses, in litigating in the court or in any alternative forum,

(b) the law to be applied to issues in the domestic property proceeding,

(c) the desirability of avoiding a multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,

(e) the enforcement of an eventual judgment, and

(f) the fair and efficient working of the Canadian legal system as a whole.

Comment: S. X.5 is based on *UCJPTA*, s. 11. It restates the doctrine of *forum non conveniens*. *[Working Group members raised concerns about the formulation of subparagraph (2)(f), the use of the term "state" rather than "territory," and the use of the word "try" rather than the word "hear" or the phrase "adjudicate upon," but these have been retained because they are used in UCJPTA.]*

Principles of *forum non conveniens* should play an important role in domestic property proceedings that concern property in more than one territory, or where the spouses lived in more than one territory during the marriage.

While several courts may be able to assume jurisdiction on a variety of reasonable bases, if the policy of settling domestic property disputes by reference to a single law in a single proceeding is to work well, usually the dispute should be heard in the territory that is the most appropriate forum.

[One member of the Working Group doubted whether it was necessary to incorporate specific reference to a court's ability to decline jurisdiction on the ground of forum non conveniens and, if it was, the section should more clearly direct the court on when it should decide that a court elsewhere was a more convenient forum. The majority accepted the policy adopted by the ULCC as represented by UCJPTA.]

Choice of Law Rules: Contract

X.6. (1) If the plaintiff and defendant entered into a contract, either before the formation of, or during, their marriage, that specifies how domestic property is to be divided in the event of the break up or termination of their marriage, their rights in domestic property are determined by the contract.

(2) The contract referred to in subsection (1) is enforceable subject to the internal law of the territory determined in accordance with s. X.8.

Comment: Under both civil law and common law, parties may enter into a contract about domestic property.

Some provinces have legislation that allows a court to inquire into the fairness of a contract made on or during marriage that relates to the disposition of domestic property on marriage break up or termination. Subsection (2) provides a rule for determining which law governs on that issue. *See* s. X.8.

Suppose, *e.g.*, that an Alberta court has territorial competence to hear the proceeding, but the choice of law rules select Nova Scotia law. The Alberta court would apply Nova Scotia law, not Alberta law, to determine whether the contract is enforceable. *[One member of the Working Group was opposed to this policy.]*

Subsection (2) does not address the question of whether the contract was validly made, which would continue to be determined by rules of private international law.

Choice of Law Rules: Marriage and Community of Property

X.7. Subject to section X.6, if the internal law of the territory in which the plaintiff and defendant first had a common habitual residence during their marriage provides that some or all of their domestic property is held in a regime of community of property, then regardless of a change of residence, their rights in the domestic property that is subject to the regime of community of property on the break up or termination of their marriage are determined by the internal law of that territory.

Comment: S. X.7 is based on a principle of both civil law and common law. It is called the "doctrine of immutability of original regime."

The one difference is that the civil law and the common law tests for determining whether domestic property is held in community of property are based upon domicile at the time of marriage, which may be different from residence. The use of domicile as a test for resolving choice of law issues for matrimonial disputes has been expressly rejected in Canadian jurisdictions that have either (a) reconsidered choice of law issues, or (b) enacted legislation providing that a wife may establish a domicile independent of her husband.

The alternative selected is to adopt an approach based on the proper law of the marriage, determined by a test that has regard to where the spouses first had a common habitual residence while married.

S. X.7 applies if the territory's law provides for community of property, which is given an expanded definition to embrace virtually every system which recognizes that one spouse has interests and rights in the property of the other by virtue of the marriage. *See*the definition of "regime of community of property." The only Canadian jurisdiction that has community of property is Quebec, and only spouses who married without contract before July 1, 1970 would be under a regime of community of property. Since then, if they do not enter into a contract, they are subject to a regime of partnership of acquests. The definition of "regime of community of property" specifically includes partnership of acquests. In most other cases, Canadian jurisdictions adopt principles of "deferred" community of property (*i.e.*, during the marriage, principles of separate property determine ownership. It is not until marriage break up that legislation calls for a division of property, or an adjustment of each spouse's net worth through an equalizing payment).

This rule is proposed to accommodate the conflict between (a) choice of law rules

adopted by the common law (which, with the exception of the rule that applies to spouses subject to community of property when they marry, look to the end of the relationship) and (b) those of the civil law (which look to the beginning of the relationship).

This rule does not apply to domestic property that is held as separate property. See the definition of "regime of community of property." Canadian legal policy is firmly in favour of community of property rules

or deferred community of property rules for dividing domestic property on marriage break up or termination. Consequently, a regime of separate property will govern the dispute only if either (a) the parties so agree, or (b) s. X.7 does not apply and separate property rules are required by the law of the territory selected in accordance with the choice of law rules in s. X.8.

The rule only applies to domestic property that is actually affected by the regime of community of property. In a jurisdiction such as Quebec, that has principles of community of property as well as separate property and partition of family patrimony at the break up or termination of the marriage, this rule would not apply to the domestic property that was held as separate property or that qualified as family patrimony. The law that applies to domestic property that is held outside of community of property is determined by s. X.8.

If the territory provides for community of property, but the spouses have made a marriage contract providing for a different regime, s. X.7 would not apply.

Choice of Law Rules: Proper Law of the Marriage

X.8. (1) Subject to sections X.6 and X.7, substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory where the parties had their last common habitual residence.

(2) If the territory selected by the application of subsection (1) is located outside Canada and is not the territory most closely associated with the marriage, the substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory that is most closely associated with the marriage.

(3) If there is no place where the parties had a common habitual residence, substantive rights of the plaintiff and defendant in a domestic property proceeding must be determined

by the internal law of the territory where the plaintiff last habitually resided.

Comment: Domicile is no longer a practical test for determining the proper law of the marriage. There is a consensus among Canadian common law provinces that have reconsidered the common law rules that the proper law of the marriage is determined by the common habitual residence of the spouses. If they resided in more than one location, it is the last common habitual residence. While the question of domicile depends upon a number of factors, including intention, residence is determined purely by the physical fact of maintaining a residence in a particular

territory. *[One member of the Working Group believes that the legislation should define what constitutes habitual residence to provide the courts with guidance for determining how to deal with temporary residence or situations where the spouses have multiple residences.]*

Procedural rules would be determined by the law of the territory in which the proceeding takes place.

Substantive questions, such as who qualifies as a spouse, the determination of when rights in property arise, whether property can be divided between the spouses and in which proportions, and valuing property for the purpose of determining compensation in lieu of, or for foregoing, rights of property, *etc.* would be determined by the law of the territory in which the parties last had a common habitual residence. *[One member of the Working Group would allow this rule to be displaced in identified situations (such as where both spouses, separately, move to another territory in which an application is brought. In that case, this member of the Working Group would apply local law.]*

[One member of the Working Group recommended that the legislation should set out specific rules for resolving issues that will arise where a territory's laws conflict with the law of the territory selected by the choice of law rules on who may apply for an order and when such an order may be made. E.g., a territory may not allow an application by a common law spouse, while the law of the territory that applies to resolve the dispute confers standing on a common law spouse. E.g., a territory may allow an application to be made on the death of a spouse, while the law of the territory that applies to resolve the dispute does not provide for an application in that situation. The legislation might set out a specific rule to deal with these issues as follows:

(4) The law of [enacting province or territory] may expand but not limit

(a) the class of persons who may bring an application under [this Act] and

(b) the situations in which an order in respect of domestic property may be made

in accordance with the internal law of the territory selected under [this Act].]

A special rule is adopted where a non-Canadian territory is involved. It might be thought that more problems will arise from easy mobility within a federation such as Canada than between Canada and another nation. In a federation, people will relocate fairly freely--resulting in relatively casual

ties between the laws of any one territory and the marriage--while movement between different nations is complicated by immigration laws and the ability to earn a living. But within the Canadian federation there is a basic similarity in approach on when rights to domestic property will be determined by separate property principles. In contrast, a change in common habitual residence between nations might result in fundamentally different legal principles applying. Consequently, movement from one nation to another raises more difficult questions than movement between Canadian territories. Where the parties move to another nation, the policy suggested is that the court should inquire into whether the law of the last common habitual residence is that of a territory most closely associated with the marriage. *[One member of the Working Group points out that the law of the territory most closely associated with the marriage may have, by the time of the application, become quite irrelevant to the dispute. Moreover, it may require the application of laws that might be considered objectionable in the territory. This member of the Working Group would prefer an approach which would require the courts to, as a matter of overriding policy, ensure that the division of property took into account the respective contributions of the spouses in money or money's worth to the acquisition of the property, such as, conceivably, is the effect of New Brunswick legislation (see, s. 44(2) and s. 42 of the N.B. Marital Property Act).]*

The *Convention on the Law Applicable to Domestic Property Regimes*, adopted by the Hague Conference on Private International Law in 1978, sets out precise choice of law rules where the laws of two or more nations might apply in cases where the spouses have not made an agreement. These rules place restrictions on how easily the governing laws of one nation will be replaced by those of another. The basic rule is that property rights on the break up of a marriage are determined by the law of the territory where the spouses first establish an habitual residence after they marry. The laws of another territory in which they establish an habitual residence will be applied, however, if the habitual residence extends for 10 years or more, or it is the territory of their common nationality. As of July 9, 1996,

the *Convention* had been ratified by France, Luxembourg and the Netherlands and signed by Austria and Poland. *[The committee does not advocate Canada becoming a signatory to the Convention. It is mentioned as a point of contrast to the policy the committee recommends the ULC adopt.]*

The test of "common habitual residence" cannot be applied if the parties never cohabited. *See* s. X.1(2).

If the spouses never cohabited, the proper law is determined by the territory where the applicant last habitually resided. *[One member of the*

Working Group suggests that alternatives to this approach should be considered.]

The references to internal law are to ensure that principles of *renvoi* do not apply.

Property Located Outside Territory

X.9. (1) A court with territorial competence to entertain a proceeding relating to domestic property may dispose of all issues relating to ownership and division of the domestic property.

(2) Where the court has territorial competence to entertain a proceeding relating to domestic property, some of which is located outside [enacting province or territory], the court may

(a) reapportion entitlement to domestic property within [enacting province or territory] to compensate for rights in domestic property located outside [enacting province or territory],

(b) order the party who has legal title to domestic property located outside [enacting province or territory] to pay compensation to the other party in lieu of division,

(c) make an order in connection with domestic property located outside of [enacting province or territory] that is enforceable against the party that owns the domestic property, including an order preserving the domestic property, respecting possession of the domestic property or requiring the owner to convey or charge all or part of the owner's interest in it

to the other party, or

(d) if the internal law of the territory in which the domestic property is located allows for the recognition and enforcement of an order for non-monetary relief made by a court of another territory, make an order for non-monetary relief.

Comment: Canadian courts routinely use the techniques set out in paragraphs (a) and (b) for arriving at a fair division of domestic property, although in some cases there is doubt concerning a court's ability to do so. Any such doubt would be put to rest by specifically incorporating these powers into the relevant legislation.

The option under paragraph (c), the *in personam* order, is often overlooked. It is open to the court to make an order requiring a person to perform a specific obligation. If the person subject to the order fails to obey it, contempt proceedings can be brought against that person to enforce it. Such an order is effective if the person is within the court's territory. It is an equitable jurisdiction that has been recognized since the 18th Century: *see, e.g., Penn* v. *Lord Baltimore*, (1750) 1 Ves. Sen. 444.

The policy underlying paragraph (d) is that a local court can make an order

pertaining to the ownership or division of domestic property located outside the territory, if the territory in which the domestic property is located adopts legislation similar in policy to [the proposed *Uniform Enforcement of Canadian Decrees Act*.]

This provision is less useful in those provinces that adjust property rights on marriage break up or termination by requiring one spouse to make an equalizing payment to the other spouse. But even in those provinces, legislation allows the court to make a non-monetary order to facilitate separating the finances and property of spouses on marriage break up or termination.