Revue de droit de l'Université de Sherbrooke

RDUS

THE TAXATION OF SPOUSES: A QUEBEC PERSPECTIVE

Pierre Dussault

Volume 5, 1974

URI : https://id.erudit.org/iderudit/1110823ar
DOI : https://doi.org/10.17118/11143/19412

Aller au sommaire du numéro

Éditeur(s)

Revue de Droit de l'Université de Sherbrooke

ISSN

0317-9656 (imprimé)
2561-7087 (numérique)

Découvrir la revue

Citer cet article

Dussault, P. (1974). THE TAXATION OF SPOUSES: A QUEBEC PERSPECTIVE. *Revue de droit de l'Université de Sherbrooke*, *5*, 52–80. https://doi.org/10.17118/11143/19412

THE TAXATION OF SPOUSES: A QUEBEC PERSPECTIVE *

par PIERRE DUSSAULT

B.A., LL.L. (Mtl.), LL.M. (Harvard), professeur agrégé,
Faculté de droit, Université de Sherbrooke.

TABLE OF CONTENTS

---

* This text has been presented at the Twenty-Sixth Annual Conference of the Canadian Tax Foundation held in Toronto in November 1974 and will be published in the Report of Proceedings of that Conference.

INTRODUCTION

If one were to give a complete perspective of the taxation of the family in Quebec, many special features of our provincial tax system could be brought up in that connection. For example, we could mention the non-adjustment of personal exemptions for inflation, the absence of personal exemptions for children under sixteen years of age, the non-taxation of family allowances and the gradual reduction of succession duties with a view to their eventual elimination.

Due to time limitations, I will restrict my comments to one very special type of problem encountered not only under Quebec's tax legislation, but also under federal income tax law, that is to say the taxation of capital gains in relation to the particular civil law institutions of community of property and partnership of acquests. Since the problems raised and their eventual solution could entail either preferences or hardships to some Quebec taxpayers, this in itself is sufficient justification for reviving an old discussion. While other aspects such as gifts by marriage contract might also warrant brief comment, I will avoid mentioning other aspects equally pertinent for Quebec, which have been covered by the other members of the panel.

I

THE PROBLEM OF INCOME-SPLITTING AND ITS BACKGROUND

Twenty-two years ago, at the Sixth Annual Conference of the Canadian Tax Foundation, a group of experts considered "the possibility that the *Quebec Civil Code* might provide a legal foundation for the splitting of income in Canada between husband and wife"[1]. At that time, the mere thought of such an approach appears to have provoked strong reactions and the idea that "the Dominion might abolish the community property system in Quebec" was brought up but quickly set aside as "highly unlikely"[2]. It was thought more likely that the government would simply ignore the existence of a community for purposes of tax assessment[3]. More positive comments were expressed however, particularly by Mr. Philip Vineberg who drew attention to the possibility of adopting

---

1 *Report of Proceedings of the Sixth Annual Tax Conference,* Canadian Tax Foundation, 1952, p. 47.

2 *Ibid.,* p. 50.

3 *Ibid.*

income-splitting provisions throughout Canada[4]. As you probably know, this had been done in the United States a few years prior to the Sixth Tax Conference[5] in order to cope with the disparities of tax treatment between residents of different states created by judicial decisions which upheld the effectiveness of legal community of property systems in certain states as an income-splitting device between the consorts[6].

Five years later, in 1957, a second Tax Appeal Board decision[7], this time involving a Quebec taxpayer (the celebrated *Sura* case), decided that effective income-splitting for tax purposes could result from the community of property. Unfortunately other decisions continued to uphold the Revenue's position that income falling into a legal community of property under the laws of foreign jurisdictions would be taxable in the hands of the husband[8]. A similar law conclusion was reached by the Exchequer Court in the *Sura* matter but only on the basis that the husband was the sole owner of the community property under the *Quebec Civil Code* [9] and that the wife could acquire a vested right in the common property only upon dissolution of the community. The Supreme Court did not accept this interpretation and instead acknowledged that both consorts under the Quebec community of property system would be

---

4 *Ibid.*

5 These provisions, now embodied in s. 6013 and ss. 2 (a) of the *Internal Revenue Code of 1954,* were enacted by Congress in 1948.

6 See, *inter alia, Poe v. Seaborn,* 282 U.S. 101 (1930) (Washington); *Goodell v. Koch,* 282 U.S. 118 (1930) (Arizona); *Hopkins v. Bacon,* 282 U.S. 122 (1930) (Texas); *Bender v. Pfaff,* 282 U.S. 127 (1930) (Louisiana); *U.S. v. Malcolm,* 282 U.S. 792 (1930) (California), in which States the community of property system was held to result in effective income-splitting. However, this benefit of income-splitting was not extended by the courts to consorts of states having provided for community as an optional system not so much due to a taste for Spanish law but for the tax benefits anticipated. See *Commissioner v. Harmon,* 323 U.S. (1944); moreover it was held that no splitting could be realized with respect to earned income of consorts having entered into a contract of joint tenancy with right of survivorship. See *Lucas v. Earl,* 281 U.S. 111 (1930).

7 *No. 445 v. M.N.R.,* 57 D.T.C. 478; see the comment by A. MAYRAND, *"La communauté de biens et le fractionnement du revenu pour fins d'impôt",* (1957) 17 R. du B. 515. See also *Around the Courts,* (1957) 5 Can. Tax J. 410. The first decision rendered was in *Reese v. M.N.R.,* 55 D.T.C. 488 and it involved the community of property under the laws of the State of California.

8 *Skelton v. M.N.R.,* 56 D.T.C. 147 (Idaho); *No. 676 v. M.N.R.,* 60 D.T.C. 42 (Washington); *Pope v. M.N.R.,* 60 D.T.C. 456 (Belgium); *Wertman v. M.N.R.,* 60 D.T.C. 462 (Poland).

9 *M.N.R. v. Sura,* 59 D.T.C. 1280.

considered as co-owners of the community property[10]. Notwithstanding this fact, the Court went further and held that the income from the common property would be taxed in the hands of the husband since only he could administer the community, could collect revenues and could freely dispose of it. As for the wife, her proprietary rights in said property were somewhat paralysed, or in the expression of the Court "stagnant" and "nearly sterile", before actual dissolution of the community occurred[11]. As the Court remarked:

> ". . . the Act does not address itself to capital or ownership of property. It addresses itself to the person and the amount of the tax is determined by the benefits the person receives"[12].

Although unsatisfactory on many points[13], the decision was nonetheless binding[14].

The greatest shortcoming of the *Sura* case though, was that it failed to place, as a matter of law, the consorts married under the regime of legal community of property on the same footing as other taxpayers. On the contrary, a very marked disadvantage could arise in certain circumstances, as for instance when the wife owned moveable property such as stocks or bonds before the marriage, since such moveable property would automatically fall into the community on the day of the celebration. According to the decision of the Supreme Court in *Sura,* it would necessarily be the husband who would assume the entire tax burden produced by the income of the property in question. By the same token, the same principle would have also applied to the income from the wife's private property since prior to July 1970, such income used to fall automatically into the community. However, it appears that the practice of the Revenue Department has been to tax the wife for such income[15].

---

10 *Sura v. M.N.R.,* 62 D.T.C. 1006 at p. 1008. Because of the reasons for judgment this statement must however be considered only as an *obiter dictum.* This doctrine of co-ownership was relied upon recently in the case of *M.N.R. v. Estate of François Faure,* 73 D.T.C. 5237.

11 *Ibid., Sura,* pp. 1008-1009.

12 *Ibid.,* p. 1009.

13 See A. MAYRAND, *"Commentaires"*, (1962) 40 Can. Bar Rev. 256.

14 The decision was followed in *No. 738 v. M.N.R.,* 62 D.T.C. 32 (Quebec); see also *Bedford v. M.N.R.,* 64 D.T.C. 419 (California) in which the same reasoning was followed.

15 R. LETOURNEAU, *"Critique des arrêts - Reese v. M.N.R., 55 D.T.C. 488"*, (1956) 16 R. du B. 43 at p. 44; A. MAYRAND, *loc. cit.,* note 13, at p. 260.

One commentator of the *Sura* decision proposed[16] that for the sake of logic, one could invoke former subsection 21(1) (actual subsection 74(1) I.T.A.), in order to attribute to the wife a half of the income from the moveable property which fell into a community of property and upon which the husband acquired a half interest. In this hypothesis, could she not have been validly taxed on at least half the income from such property?

Although income-splitting was not realized by the legal regime of community of property under Quebec civil law, it is important to keep in mind that effective capital-splitting could and can still be achieved for gift tax, estate tax and succession duties purposes, since a gift of common property was held to have been made by both spouses, each for a half[17] . Likewise at death, since one consort could not bequeath more than his share in a community of property[18] , the share of the other consort would not form part of his estate for estate tax purposes due to the fact that it was not property over which he had powers of disposal[19] . By the same token, such property would not be liable to imposition under the Quebec *Succession Duties Act*[20] .

---

16 A. MAYRAND, *loc. cit.*, note 13, at p. 264. In *Wertman v. M.N.R.*, 64 D.T.C. 5158, this section was however held to apply to income from property substituted to property held to have been transferred by the husband to his wife by virtue of their marriage contract under a regime of community of property according to the laws of Poland and which property was later invested in their joint names.

17 At the federal level, see: *Leduc v. M.N.R.*, 67 D.T.C. 501; *Applebaum v. M.N.R.*, 71 D.T.C. 371. One can also refer to subsection 115 D (5) of Part IV of the I.T.A. (applicable to gifts made prior to 1972) and which deems a gift of common property to be made for one half by each spouse for the purpose of the refund applicable in cases where the gift tax paid exceeds the estate tax applicable on property given *inter vivos* but also falling into the estate because of certain presumptions.

For Quebec gift tax purposes, see: *Quebec Taxation Act*, s. 932.

18 Art. 1293 C.C.

19 Par. 3 (4) (e) *Estate Tax Act*, 1970 R.S.C., ch. E-9 as amended. In connection therewith one might look at a very interesting case decided by the Federal Court (now under appeal at the Appeal Division) in which it was held that since the whole community accrued to the survivor by virtue of a clause in a marriage contract, no part of the community was comprised in the estate of the deceased for estate tax purposes; *M.N.R. v. Estate of François Faure*, 73 D.T.C. 5236.

20 See generally: E. RIVARD, *"Les droits sur les successions dans la Province de Québec"*, P.U.L., Quebec, 1956, p. 85. S.25 and ss. 26(3) of the Quebec *Succession Duties Act*, R.S.Q. 1964, ch. 70 is also to that effect as regards certain dispositions of property assimilated to transmissions owing to death.

In a word, if income-splitting did not flow from the institution of community of property according to *Sura,* capital-splitting did and does occur under the tax laws governing gratuitous dispositions of property either *inter vivos* or *mortis causa.*

However, much has happened since that Supreme Court decision. On the civil law side (to mention only a few changes) full legal capacity was granted to married women in 1964[21], the legal matrimonial regime was changed from community of property to partnership of acquests (for consorts married on or after July 1st, 1970), and the spouses can now voluntarily change their matrimonial regime during the marriage[22]. On the tax side, federal estate and gift taxes are no longer applicable since January 1st, 1972[23] and the income tax base now comprises the taxable capital gains upon dispositions of capital property, including transfers by gift *inter vivos* and by death. The philosophy at both the federal and provincial levels (although its application has been postponed in the latter case) of taxing gratuitous transfers of capital property *per se,* has been changed to one integrating deemed gains on such transfers into the income tax base of the transferor in the year of gift or of his death.

Now, what does all this amount to so far? It has been noticed by many, that in subsections 39(a) and (b) defining capital gain and loss, the expression "from the disposition of any property *of the taxpayer*" is used, and that in paragraph 70(5) (a) it is stated that "the taxpayer shall be deemed to have disposed, immediately before his death, of each property *owned by him* at that time that was a capital property *of the taxpayer*". Many other sections, subsections or paragraphs also refer to the ownership of property[24]. If the Act did not formerly "address itself to capital or ownership of property" to determine taxability as stated by the Supreme Court in *Sura,* it surely does so now with respect to a capital gain or loss. Would it then be possible that such references to ownership in order to determine capital gain or loss, could result in the possibility of splitting that source of income between the consorts upon disposition (whether actual or deemed) of capital property into a

---

21 *An Act respecting the legal capacity of married women* (Bill 16), 12-13 Eliz. II (1964), ch. 66.

22 *An Act respecting matrimonial regimes,* (Bill 10), 1969 Q.S., ch. 77.

23 1970-71-72 S.C., ch. 63, Part II, s. 2, Part III, s. 14.

24 See, *inter alia,* 70(5) (b), (c), (d), (e); 70(6); 48(1), (3), (4); 54(e), (b), (g) I.T.A.

community of property? If the alienation is a transfer by gift or at death, it would be difficult to say otherwise since each consort was expressly described by the Supreme Court in *Sura,*[25] as a co-owner of the property of community. In civil law, as we will see, the husband cannot give common property *inter vivos* without the concurrence of his consort[26] and neither one can bequeath more than his or her share of said community[27].

It should be noted that similar problems also crop up with respect to partnership of acquests.

II

SALIENT FEATURES OF QUEBEC MATRIMONIAL LAW

For those not too familiar with the civil law system, I think a summary of the main characteristics of these institutions will help in understanding the tax problems resulting therefrom.

A) The legal matrimonial regimes: community of moveables and acquests and partnership of acquests

The *Civil Code* provides that spouses married before July 1st, 1970 without a marriage contract are subject to the regime of community of moveables and acquests previously known as the regime of legal community of property[28]. As to those persons married on or since July 1st, 1970, without a marriage contract, they are governed by a new regime entitled "partnership of acquests" which is based upon the principle of independence of administration while respecting a community of interest[29].

i) Community of moveables and acquests

Under this type of arrangement, the property of the consorts is divided into four different groups of assets: common property, the private property of each of the consorts, and the reserved property of the wife.

---

25 *Loc. cit.,* note 10, p. 1008.

26 Art. 1292 C.C.

27 Art. 1293 C.C.

28 Art. 1268 C.C.

29 Art. 1260 C.C. On the philosophy of this new regime one can consult P.A. CREPEAU, *Les Principes fondamentaux de la réforme des régimes matrimoniaux,* Lois Nouvelles II, P.U.M., Montreal, 1970, p. 9. See also J. AUGER, *Les régimes de société d'acquêts et de participation aux acquêts, (1973) 4 R.D.U.S. p. 265.*

Common property

As a general rule, common property is presumed to include all property that is not private property[30]. More specifically, the community is composed of: The moveable property which the consorts possess on the day of the marriage, that which is acquired during the marriage or which falls to them by gift, succession or legacy, the income therefrom[31], the proceeds of the work of the husband during the marriage, (the proceeds of the work of the wife is being specifically classified as reserved property)[32] and the fruits and revenues from private property of the husband falling due or received during the marriage (the fruits and revenue from private property of the wife remain private until the husband requests that it be included into the community)[33]. In addition, the community includes immoveable property acquired during the marriage (except for immoveables destined as replacements of private property) and that acquired by a consort by gift or bequest from any person other than an ascendant[34]. Although the powers of the husband over the common property have been limited since July 1st, 1964 at which time married women were granted full legal capacity[35], he is still the sole administrator of the community and he may still, without the concurrence of his wife, sell, alienate or pledge the moveable property of the community except for stocks in trade or household furniture[36]. Similar powers with respect to the immoveables of the community have been removed and he now must obtain the concurrence of his wife. The concurrence of the wife is also necessary for *inter vivos* alienations by gratuitous title of both moveables and immoveables which are common property, save gifts of small sums of money and customary presents[37].

---

30 Art. 1273 C.C.

31 Art. 1272(1) C.C.

32 Art. 1272(2) C.C.

33 Art. 1272(3) C.C.

34 Arts. 1276 *et seq.* C.C.

35 *Supra,* note 21.

36 Art. 1292 C.C.

37 *Ibid.*

Private Property

The private property of each consort comprises *inter alia,* immoveables possessed on the day of the marriage or which are acquired by intestacy or by bequest or gift *inter vivos* from ascendants[38]. Likewise will also be excluded from the community, compensation received by a consort after the celebration of marriage as damages for wounds or bodily injuries[39]. Each consort has the administration and power to dispose of his or her private property, but the wife, upon request by her husband, must turn over to the community all unconsumed revenues generated by her private property as well as any property acquired through the utilization of such revenue[40].

Reserved property of the wife

The reserved property of the wife is expressly defined as the proceeds of her personal work (exclusive of joint work), the savings therefrom, and property, whether moveable or immoveable, which she acquires with same [41]. It is stipulated by law, on pain of nullity of any covenant to the contrary, that the administration, enjoyment and free disposal of such reserved property belongs to the wife. As a matter of fact she has over her reserved property the same powers that the husband has over the common property. Thus, she can sell, alienate and pledge the moveable reserved property, except stocks in trade and household furniture, without the concurrence of her husband but cannot without that concurrence, sell, alienate or hypothecate immoveables comprised in that category. It is also illegal to make *inter vivos* gifts of reserved property without the husband's consent[42].

One last point one should note is that when the concurrence of the other spouse is necessary, any unratified act done without such concurrence may be annulled upon request by the spouse whose consent was required, provided the request is made within

---

38 Arts. 1275, 1276 C.C.

39 Art. 1279a C.C.

40 Art. 1297 C.C. Before the amendment by Bill 10 applicable as of July 1st, 1970, such revenues from the wife's private property used to fall automatically into the community.

41 Art. 1425a C.C.

42 *Ibid.*

two years from the date upon which knowledge of the act is obtained. However, in no case can any action be brought more than two years from the date of dissolution of the regime[43].

ii) Partnership of acquests

The main characteristic of this regime, in force since July 1st, 1970, is that it resembles separation as to property during its existence, since each spouse may administer independently each their own property. On the other hand, upon dissolution, it resembles community of property because each spouse has a right to participate in the acquests acquired by the other. The property of each of the consorts is divided into two categories, one composed of acquests, the other of private property.

Acquests

The acquests of each of the consorts include property not declared to be private property by a special provision of the Code. More particularly, this category includes the proceeds of his or her work, property acquired during the marriage, and the income from all property received during the marriage[44].

As a general rule, it is provided that all property is deemed to be an acquest saving proof to the contrary[45]. In addition, property with respect to which neither consort can establish exclusive ownership will be deemed to be an acquest, held in undivided ownership each for one half[46].

Private property

The private property of a consort is composed of property owned or possessed on the day of the marriage and property acquired during the marriage by succession, legacy or gift. Moreover, by express stipulation, certain rights or objects which would normally be classified as acquests are placed in the private property category. Among such items are included clothing, certain life insurance and pension benefits, and rights to certain allowances, compensation or damages[47]. Special rules of

43 Art. 183 C.C. See also art. 182 C.C.

44 Art. 1266d C.C.

45 Art. 1266m C.C.

46 Art. 1266n C.C.

47 Arts. 1266e to 1266 I C.C.

compensation between private property and the acquests of each consort are provided for as in the case for example, when property is acquired partly with private property and partly with an acquest[48]. Each consort has, during the existence of the regime, the administration, enjoyment and free disposal of both his or her private property and acquests, but cannot, except for modest sums and customary presents, dispose of the acquests by gratuitous title *inter vivos* without the concurrence of the other consort[49]. Here again as in the case of community, unratified acts done without the concurrence of the other spouse when it is required, can be annulled upon request within two years of the date of knowledge but in any case not later than two years from the date of dissolution of the regime[50].

B) Ante nuptial agreements

The future consorts may, before the celebration of the marriage, enter into a contract passed before a notary by which they can choose a matrimonial regime more to their liking whether it be separation as to property, partnership of acquests, community of moveables and acquests, community restricted to acquests, universal community or any other type of arrangement they desire. The only limits to the couple's discretion is that the covenants cannot be contrary to public order or good morals or forbidden by any prohibitory law[51]. One could decide, for example, that the regime of community of property is preferable but that there will be separation of debts or else there will be an unequal partition of the community upon dissolution, or even that upon death, all the property in the community will accrue to the survivor[52].

Of all the possible variations, the regime of separation as to property seems most popular in practice. Quantitatively however, its importance has diminished in relation to the number of marriages since the introduction of the new regime of partnership

48 Arts. 1266f and 1266g C.C.

49 Art. 1266o C.C.

50 Art. 183 C.C. See also art. 182 C.C.

51 Arts. 1258, 1259, 1384 C.C.

52 Arts. 1384 *et seq.* C.C. Such stipulations are generally not regarded as gifts but as simple marriage convenants.

of acquests in 1970[53].

One additional aspect one should note here with regards to marriage contracts, is that they are not restricted solely to the selection of the matrimonial regime, but can and usually do provide for different agreements such as, responsibility for the expenses of the family during the marriage. Gifts, whether *inter vivos* or *mortis causa,* are also often included in the marriage contract[54]. Although gifts between consorts during the marriage are no longer prohibited[55], thus eliminating much of the impetus for their insertion in marriage contracts, gifts *inter vivos,* especially by the future husband still enjoy favor (perhaps to place the bride in a proper frame of mind). Such gifts do not however have immediate tax consequences since (as in the case of the former federal gift tax[56] for gifts made prior to 1972), the taxation of the gift under the provincial act takes place only when property is actually transferred in execution thereof[57] during or even after the marriage as when the marriage is dissolved by divorce[58]. For income tax purposes, the attribution rules of subsections 74(1) and (2) I.T.A. also apply as and when property is effectively transferred between consorts.

---

53 Estimates made for 1962 for example are that 73% of marriages were in separation as to property. See R. COMTOIS, *"Traité de la communauté de biens"*, Montréal, Recueil de droit et de jurisprudence, 1964, pp. 317-323 at p. 321. Recent estimates for the period between July 1st, 1970 to December 31st, 1973 show that 46.2% of the marriages are in partnership of acquests (6.6% by marriage contracts and 39.6% resulting from law in the absence of a contract), and only 53.3% in separation, M. RIVET, *La popularité des différents régimes matrimoniaux depuis la réforme de 1970"*, Study made for the Quebec Civil Code Revision Commission (as yet unpublished), pp. 16 and 23.

54 Art. 1257 C.C.

55 Former arts. 770 and 1265(2) C.C. in which such prohibition was enacted, were amended by arts. 16 and 27 of Bill 10, *An Act respecting matrimonial regimes,* 1969 Q.S., ch. 77.

56 Part IV I.T.A. (as applicable for years prior to 1972), paras. 113(1) (a), (g) and ss. 113(5). This rule was enacted to neutralize the decisions in *Dobell v. M.N.R.,* 50 D.T.C. 767 and *Houghton v. M.N.R.,* 56 D.T.C. 339 to the effect that gifts made in marriage contracts under Quebec civil law were perfect and taxable when made and not when property was transferred in execution thereof.

57 SS. 908(a) and 909(a) *Quebec Taxation Act.*

58 Divorce does not in itself entail nullity of a gift *inter vivos* contained in a marriage contract: art. 208 C.C. See, *inter alia, Dame Lerner v. Dame Blackburn,* (1971) C.S. 385 and comment by C. CHARRON, *"Libéralités et successions"*, (1971) 32 R. du B. 422.

III

SOME PROBLEMS RELATED TO THE TAXATION OF THE SPOUSES UNDER THE ORIGINAL MATRIMONIAL REGIME

Since the matrimonial regime, whether it be legal or conventional, takes effect from the day of the marriage notwithstanding any stipulation to the contrary[59], income tax consequences should follow as of that date. Starting with the more important regime in terms of the number of spouses affected, (i.e. separation as to property), individual taxation is the basic rule since both ownership and control over the property are left to each consort. No particular comments besides those already brought up by my colleagues appear necessary in this connection. One might add that joint ownership of property is possible to effect a division of the income therefrom and will not result in adverse tax consequences if the share of one spouse does not result from a transfer by the other[60].

As previously mentioned, community of property does raise very acute problems during its existence but fortunately these difficulties do not affect all the property of the consorts. Because private property is under the administration of each consort, who has full powers thereon, and is not subject to any right in favor of the other consort or to partition, the general rule requires that each consort be taxed on the income and capital gains flowing from it. Since the income from the wife's private property (over which she has control) no longer falls automatically in the community but must be requested by the husband, it seems that she should be, in principle, the one responsible for the tax on any income or capital gains derived therefrom. With respect to reserved property, the wife having over it the same powers that the husband has over common property, the application of the *Sura* principle would result in her individual responsibility for the tax on the income therefrom during the existence of the community. As for the capital gains however, we may be faced with the same problems as those arising with regard to common property, since reserved property

---

59 Art. 1261 C.C.

60 See ss. 74(1) and (2) I.T.A. On that point, one might refer to *Wertman v. M.N.R.*, 64 D.T.C. 5159.

will fall into the community and be subject to partition if the wife decides to accept the community upon dissolution[61].

As noted at the beginning of this paper, we are now facing some problems with respect to common property but only as to the taxation of capital gains since income from other sources which falls into the community was held taxable in the husband's hands by the Supreme Court in the case of *Sura.* With respect to capital gains or losses, different principles applicable here could lead to opposite results. One could argue that since it is the husband who is the administrator of the community and the only one who can dispose of its assets, albeit with the concurrence of his wife in certain circumstances, he is the one who should be taxed with respect to capital gains resulting therefrom, just as he is upon the income from such property. On the other hand, it is possible, by relying on the ownership criteria which seems embodied in the act itself and by applying *inter alia* the *dictum* of the Supreme Court in the *Sura* case with respect to ownership of common property[62], to argue that each spouse should be taxed on one half the taxable capital gain resulting from a disposition, whether actual or deemed of common property during the existence of the community. Both arguments have merit. As a capital gain on common property would accrue to the community and thus be subject to the control of the husband in the same manner as ordinary income falling into it, one would be inclined to think that the Department would want to apply the *Sura* principle and tax only the husband. But as the Act now stands, no easy solution can be given to this problem, particularly when a gain will result from the application of provisions such as paragraph 69(1) (b) I.T.A. in the case of a gift of common property, as such gift is generally considered to be made by both consorts each for one half. Moreover, how would a gain be determined when the moveable property of the wife, for example, has fallen into community? The husband would not have any "cost" or "adjusted cost base" for the property according to paragraph

---

61 Art. 1425f C.C.

62 *Sura v. M.N.R.*, 62 D.T.C. 1005 at p. 1007. It must be recognized however that this right is somewhat peculiar as it applies to a mass of assets and as each consort must remain in a state of indivision pending dissolution of the regime and is not able to alienate his undivided right in the assets before such dissolution.

54(a) I.T.A. because in such a case the property would have been acquired by the wife and would not have been transferred to the husband, or at least wholly transferred to him. To say the least, we may anticipate many debates on this problem.

Now, what about the partnership of acquests, whether it be legal or conventional? As mentioned earlier, during the existence of this regime each consort has over both his private property and his acquests quite the same powers as those persons married under the regime of separation as to property, except as regards disposition by gifts *inter vivos* of acquests, in which case the concurrence of the other spouse in required[63]. As independence and almost full capacity are thus given to each consort during the existence of the regime, the principle enunciated by the Supreme Court in *Sura* would result in the individual taxation of income. It must be recognized that each spouse has, however, definite rights upon the acquests of the other, as they cannot be donated without his or her concurrence. The fact that acquests can be dealt with in other situations without the concurrence of the other spouse does not negate this. In fact, when the Supreme Court rendered its judgment in *Sura* in 1962, the husband was then able to alienate (save by gifts *inter vivos*) the common property without the consent of his wife, and this did not affect the determination that the right of the wife on the common property was one of co-ownership[64]. It would seem today as was the case with the community of property that the *Civil Code* is more concerned as regards the partnership of acquests with the powers of each spouse over his or her acquests than with the determination of proprietary rights upon such property[65]. However, as one spouse cannot give his or her acquests *inter vivos* without the concurrence of the other, in order to safeguard the latter's rights to such acquests upon dissolution, some people thus view the rights of each consort in the acquests of the other as a partial right of ownership strongly resembling the partial right of ownership of the wife in

---

63 Art. 1266o C.C.

64 Since July 1st, 1964, concurrence of the wife is now required for acts of alienation with respect to immoveables: art. 1292 C.C.

65 Arts. 1266o to 1266q C.C. are entitled: "OF THE ADMINISTRATION OF THE PROPERTY AND THE LIABILITIES FOR DEBTS".

community property[66]. To say the least, the rights of each consort on the acquests of the other are actualized by the prohibition[67]. The fact that partition in the acquests of the other does not only accrue at death, but also following a dissolution of the regime by formal voluntary change, or by divorce, separation as to bed and board, or separation as to property likewise tends to confirm this point of view. While the individual taxation of each consort for capital gains arising on disposition of both private property and acquests might be viewed as a simple and ready answer, several arguments advanced for the splitting of capital gains in the case of community of property could also be invoked here.

IV

THE DISSOLUTION OF THE ORIGINAL MATRIMONIAL REGIME DURING LIFETIME OF THE SPOUSES AND ITS EFFECTS ON TAXATION

A) Voluntary change of matrimonial regime

Since July 1st, 1970, consorts may now change their original matrimonial regime, whether it be legal or conventional, by a contract made before a notary which is then homologated by the Court and registered in the central register of matrimonial regimes[68]. The primary effect of such a change is obviously a dissolution of the original regime[69], and the financial arrangements between the spouses are thereafter governed by the rules pertinent to the new regime selected. By the same token, gifts contained in the original marriage contract can also be modified with the consent of all interested parties[70].

---

66 R. COMTOIS, *"Les principales dispositions du Bill 10"*, Cours de perfectionnement 1970, Chambre des notaires de la Province de Québec, p. 95 at pp. 103-104 and in *"Le Bill 10 – Incidences fiscales"*, Cours de perfectionnement 1971, Chambre des notaires du Québec, p. 103, at pp. 110-111.

67 R. COMTOIS, *loc. cit.*, note 66; G. BRIERE, *"Les dispositions essentielles du Bill 10 sur les régimes matrimoniaux"*, Lois Nouvelles II, P.U.M., Montréal, 1970, p. 23, at p. 26.

68 Arts. 1265 *et seq.* C.C.

69 Arts. 1266r and 1310 C.C.

70 Art. 1265 C.C.

In the hypothesis that the original matrimonial regime was separation as to property, there would be no particular consequences resulting from a change as long as there were no transfers of property between the consorts in execution of gifts or otherwise[71].

In practice however, a voluntary change of regime usually occurs when the spouses are initially married under the regime of community of moveables and acquests and subsequently desire to be governed by separation as to property[72]. Upon dissolution of the community, while each spouse retains his or her private property, the wife has an option to accept or renounce the community[73]. If the wife renounces the community, it will accrue to her husband but she will then retain her private and reserved property[74] and be entitled to claim what is due to her by the community[75]. If she chooses to accept the community, partition of the community (which would then include reserved property) will follow[76]. Except in cases where spouses have otherwise provided by marriage contract, the assets of the community will be subject to equal partition between the consorts by following the general rules set forth for the partition of assets among co-heirs in a succession[77]. One basic rule of partition is that it is not considered a transfer of property; it does not convey but only declares ownership. Therefore, each partitioner is deemed to have been the owner of the property comprised in his share with retroactive effect from the moment

---

71 Despite some arguments to the contrary, it would seem that the choice of a new matrimonial regime such as community of moveables and acquests should be regarded as a simple marriage covenant and not as a gift for succession duties purposes, as when the spouses have initially adopted that regime upon marriage. See *inter alia*, R. COMTOIS, Cours de perfectionnement 1971, *loc. cit.*, note 66, at p. 115; A. COSSETTE, *"Planification successorale"*, Cours de perfectionnement, La Chambre des notaires du Québec 1972, pp. 101-102; J. MONET, *"Vos biens, votre décès et les impôts"*, Beauchemin, Montréal, 1974, pp. 243-244.

72 According to estimates made for the period between July 1st, 1970 and December 31st, 1973, 78.1% of modified regimes are community of moveables and acquests and in 96.3% of the cases, separation as to property is the new regime selected. M. RIVET, *loc. cit.*, note 53, at p. 28.

73 Arts. 1338 *et seq.* C.C.

74 Art. 1425f C.C.

75 Art. 1381 C.C.

76 Arts 1354 *et seq.* C.C.

77 Art. 1363 C.C.

indivision or "earmarking" has been created or made and to have never had the ownership of other property[78]. From a tax point of view, it is doubtful whether it could be decided, despite the wide meaning ascribed to the word "transfer" [79] or even to the verb "dispose"[80] that a transfer or disposition could take place here as one cannot divest himself and vest in another property which is deemed not to have been owned by him. To illustrate one resulting problem however, let us suppose that the share of a wife after dissolution, acceptance and partition of a community of property comprises shares or bonds which have appreciated in value. What principles should we then apply for taxation purposes in order to determine the cost or adjusted cost base of those shares or bonds as regards the wife? If it is not possible to say that said shares or bonds have been transferred by her husband as a means of applying subsection 73(1) I.T.A. (since the wife is deemed by partition to have always been the owner thereof), it would seem that the only other workable solution under the present Act might be to say that the wife should be deemed to have assumed the adjusted cost base with respect to such property as it then existed before the dissolution of the regime. On the other hand, the attribution rules of subsections 74(1) and (2) I.T.A. would not apply, since there would have been no transfer of such property to her. Following the same logic, if part of the common property attributed to the wife comprises depreciable property, it would seem that she could then be deemed, as regards such property, to have a capital cost and an undepreciated capital cost equal to the capital cost and the undepreciated capital cost as they existed prior to dissolution. However, the attribution rules of subsections 74(1) and (2) I.T.A. would again be inapplicable since said property, or for that matter, any other property attributed to her by partition, would not have been transferred by the husband but attributed to the wife by partition.

---

78 Art. 746 C.C. See *M.N.R. v. Estate of François Faure*, 73 D.T.C. 5236 where it was held for purposes of par. 3(4) (e) of the *Estate Tax Act* that a clause stipulating that the surviving consort should be entitled to the whole of a community of acquests operated retroactively to the date of the marriage contract, and had the effect of excluding the entire community from the deceased husband's estate.

79 See, *inter alia, St. Aubyn v. A.G.*, (1952) A.C. 15; *Fasken Estate v. M.N.R.*, 49 D.T.C. 491.

80 See, *inter alia, Victory Hotels v. M.N.R.*, 62 D.T.C. 1378 and cases referred to at p. 1385.

If the original matrimonial regime that has been dissolved by voluntary change is a partnership of acquests, there are additional problems, since upon such dissolution, each spouse retains his private property but has an option to renounce or accept partition in the acquests of the other notwithstanding any agreement to the contrary[81]. If one consort renounces to the acquests of the other, the latter retains all his acquests but is not deprived of the option to participate in the acquests of the former[82]. If there is an acceptance on one side or the other or on both sides, compensation must be made between the private property and the acquests of each consort in order to determine the acquests that will be subject to partition. Again the rules applicable are those relating to partition among co-heirs, unless the consort who holds the property prefers to keep it and disinterest his spouse by paying in value the whole or a part of what accrues to the share of the other[83]. In default of a partition in value, then the assets themselves will be subject to partition. If the rights of each consort on the acquests of the other are considered similar to the rights of consorts under community of property, then again whatever property one spouse receives will not accrue to him or her as a result of a transfer by the other but will be derived from a partition which does not convey but only declares ownership. In this case, the solution might also be that no matter what cost, capital cost, adjusted cost base and undepreciated capital cost, a capital property may have had during the existence of the regime, it should be attributed to the consort who gets the property following partition. Moreover, since said consort would not become owner of any property following a transfer by the other spouse, the attribution rules of subsections 74(1) and (2) would again be inapplicable as regards any property attributed to one spouse upon partition.

The effects of these solutions with respect to community of moveables and acquests and partnership of acquests at the time of dissolution would be some type of indirect "roll-over" but without application of the attribution rules that would result from the direct "roll-over" provisions of subsection 73(1) I.T.A.

---

81 Art. 1266s C.C.

82 Arts. 1266v and 1266s C.C.

83 Art. 1267c C.C.

(which actually contemplate transfers of property). On the other hand, if, in the latter case, each spouse is considered the sole owner of his or her acquests, the acceptance of partition in the acquests of the other might well be held to result in a "transfer" or "disposition" of property, due to the wide interpretation generally ascribed to such words[84]. In that hypothesis, subsections 73(1) and 74(1) and (2) would apply to the property that has changed hands.

B) Separation as to property, separation from bed and board and divorce

The spouses married under the regime of partnership of acquests may obtain either a separation as to property when it is revealed that the application of the rules of partnership of acquests is contrary to the interests of the household[85]. In the case of spouses married under any community of property regime, the wife alone has the right to demand a judicial separation as to property when her interests are imperilled, when her husband has abandoned her, or when she is forced to provide alone or with her children, for the needs of the family[86]. Dissolution of the regime would occur retroactively on the day the action is instituted[87] and the consorts would thereafter be in the same situation as the consorts conventionally separate as to property[88]. The tax effects upon dissolution and partition of a community of moveables and acquests or a partnership of acquests would be the same as a dissolution following a voluntary change of matrimonial regime.

Judicial separation from bed and board can only be obtained for specific causes as adultery, outrage, ill-usage or grievous insult and cannot be based on the mutual consent of the parties[89]. One effect of a judgment in separation from bed and board

84 See the cases referred to in notes 79 and 80.

85 Art. 1440 C.C.

86 Art. 1441 C.C.

87 Art. 1442 C.C. Moreover to have its effect the judgment should be carried into execution unless it is joined to a judgment of separation from bed and board or results from such judgment. See also arts. 1266r and 1310 C.C.

88 Art. 1448 C.C.

89 Arts. 186 to 191 C.C.

is the dissolution of a community or partnership of acquests as of the date of judgment, thus creating a separation as to property[90]. Divorce, on the other hand, will not only dissolve the matrimonial regime but the marriage as well and will produce its effects only from the date of final judgment[91]. Again the comments made with regard to the tax effects of dissolution and partition of a community or partnership of acquests following a voluntary change would be equally applicable here. However, if partition upon dissolution of a partnership of acquests is ever considered to entail a "transfer" or "disposition" of property, divorce could create an additional problem for such a transfer or disposition would necessarily take place after final judgment at a moment when the parties are no longer consorts. As no proceeds of disposition would be received or deemed to have been received, except if one can apply to the former consorts subparagraph 69(1) (b) (i) I.T.A.[92], the consequences could be somewhat puzzling as a consort whose acquests are subject to partition might be in a position to claim a capital loss or even a "terminal loss" depending on what type of capital property is involved[93].

A separation as to bed and board or a divorce will not affect the right of one consort to demand execution of gifts *inter vivos* made by marriage contract and which have become exigible, unless the Court, in either case and upon request by one party, decides to defer payment of such gifts, to reduce them or even

90 Arts. 208, 1266r, 1310 C.C. Dissolution cannot be provoked before the judgment by convention unless by the formal procedure of art. 1265 *et seq.* Renounciation to community by the wife or to partition by both spouses under the regime of partnership of acquests cannot on pain of nullity be done before such dissolution. Arts. 1266s and 1338 C.C.

91 Arts. 208, 211, 1266r, 1310 C.C. Here again dissolution of a community of property or partnership of acquests cannot happen before final judgment, and renounciation or acceptance must be done only after dissolution on pain of nullity: arts. 1266s and 1338 C.C. See A. MAYRAND, *"Conventions de séparation entre époux"*, (1970-71) 73 Rev. du Not. 411 at p. 423.

92 Former consorts are no longer related persons and since partition in a partnership of acquests and the resulting consequences are provided by law it would seem difficult to say that as a matter of fact these persons are not dealing at arm's length, so as to apply par. 251(1) (b) and subsection 69(1) (b) (i) I.T.A.

93 As the point was raised before one might wonder whether or not there is a disposition if there are no proceeds. See P.N. THORSTEINSSON, *Capital Gains*, 1971 Conference Report, Canadian Tax Foundation, at p. 70. See also *Lord Elgin Hotel Ltd. v. M.N.R.*, 64 D.T.C. 637 at p. 641.

declare them forfeited [94]. As for those gifts *inter vivos* (as well as those made in contemplation of death), in a marriage contract which have not yet become exigible, a separation of bed and board or a divorce will not entail nullity thereof but the Court may, according to the circumstances and upon request by one party, declare them forfeited[95].

If, following separation as to bed and board, an *inter vivos* gift is thus executed by transfering capital property to the consort entitled to it, the "roll-over" provision of subsection 73 (1) I.T.A. and the attribution rules of subsections 74 (1) and (2) I.T.A. will apply for income tax purposes. As for Quebec's gift tax, it would also be exigible if the taxable value of the gifts in the year exceeds $5,000, such an amount being the annual deduction permitted for gifts to a spouse[96]. Consorts thus have an interest, despite their grievances and unless otherwise ordered by the Court, to arrange for the execution and payment of exigible gifts exceeding $5,000 over a few years so as to benefit from the annual deduction.

If gifts *inter vivos* contained in a marriage contract are executed after the final judgment of divorce, the consorts will then be treated as strangers; "roll-over" provisions and attribution rules would then be inapplicable for income tax purposes, and the donor would not be able to claim the $5,000 yearly deduction for Quebec gift tax purposes. Here, it is possible, despite the danger of such a procedure, that consorts arrange for the execution and payment of gifts *inter vivos* made in a marriage contract and which have become exigible while they are still married, unless of course, a special request is to be made to the Court to postpone the payment to reduce them or to declare them forfeited.

---

94 Art. 208 C.C.

95 *Ibid.* Art. 216 C.C. also provides that separation of bed and board or divorce will not deprive the children of any advantages resulting from the law or the marriage covenants of their parents but these rights will become open in the normal way as if there had been no separation or divorce.

96 *Quebec Taxation Act,* Part VIII s. 919.

C) Separation agreements

Although the predominating opinion is to the effect that such agreements would be null in Quebec[97], interesting arguments are nevertheless advanced to sustain their validity upon meeting a certain number of conditions[98]. Although spouses cannot dissolve a regime of community of property or partnership of acquests at will, except by following the conventional change by notarial deed procedure[99], a separation agreement can and often does regulate certain financial aspects of the relationship between the parties. Alimony is a classic example. Provided the other requirements are met, such agreements, entered into by Quebec taxpayers are generally recognized by the Revenue Department, since it permits the deduction of alimony. It has even been recently held that separation from bed and board proceedings in Quebec could be viewed as equivalent to a written separation agreement. However, as alimony was not agreed upon by the parties or their attorney, but resulted from a unilateral commitment by the husband pending examination of his means, the deduction was refused[100]. Still on the topic of alimony resulting from separation agreements, one must note that for provincial gift tax purposes, an amount paid to a separated spouse or former spouse will not be deemed a gift if the amount is not excessive having regard to the legal or moral obligation of the individual paying it and even if he has no legal obligation to pay the amount[101].

V

THE DEATH OF ONE OF THE CONSORTS AND ITS TAX EFFECTS

As in the case of marriage itself, the matrimonial regime is also dissolved by death[102]. If the spouses were married under

97 See the discussion in A. MAYRAND, *"Conventions de séparation entre époux"*, *loc. cit.*, note 91, at p. 417. This opinion is based *inter alia* on the text of article 186 C.C. which states that "separation from bed and board can only be demanded for specific causes; it cannot be based on the mutual consent of the parties". Other provisions such as art. 813 C.C.P. and art. 9 of the *Divorce Act* are also invoked.

98 A. MAYRAND, *loc. cit.*, note 91, at pp. 416 *et seq.*

99 Arts. 1265 *et seq.* C.C.

100 *Zarbatany v. M.N.R.*, 74 D.T.C. 1134.

101 *Quebec Taxation Act*, Part VIII, s. 916.

102 Arts. 1266r and 1310 C.C.

the regime of separation as to property, the tax implications with respect to capital gains would be relatively straightforward and are spelled out in subsections 70 (5) and following of the I.T.A. If, however, the spouses were married under the regime of community of property, it is important to remember that if the wife dies first, her heirs would also have an option to accept or renounce the community[103] . Under the regime of partnership of acquests, the heirs of the dead consort, whether it be the wife or the husband, also enjoy the option of accepting or renouncing partition in the acquests of the surviving consort[104] . Moreover, in a succession which is wholly or partially intestate, the wife cannot accept both the community or participation in the acquests of her husband as the case may be, and the succession of her husband, when in fact she must share in the succession with the descendants, the ascendants or the collaterals of her husband, inclusive of nephews and nieces in the first degree[105] . In such a case, in order to be able to inherit from her husband, the wife must renounce all rights in any community of property or partnership of acquests that may have existed, as well as to all other advantages resulting from the law. She would also have to forego any benefit contained in her marriage contract and any proceeds of insurance policies made in her favor by the deceased[106] . The same rules apply to the husband when his wife is the first to die, except that since he does not have an option to renounce to a community of property, in order to be able to succeed, he will have to return his share of the community into the succession of his deceased wife, except in the case when the wife's successors or heirs renounce to the community.

In order to avoid unnecessary detail, suffice it to say that there exist at least thirty-five different hypotheses in which the composition of the estate of a deceased person will vary depending upon whether it is the husband or wife who dies first, the matrimonial regime, and finally the different option to accept or renounce partition when the regime is a community or a partnership of acquests.

---

103 Art. 1338 C.C.

104 Art. 1266y C.C.

105 Art. 624c C.C.

106 *Ibid.*

The problem here is essentially to determine and identify the capital property of the deceased taxpayer that will be subject to the "deemed disposition" at death provisions of subsections 70 (5) *et seq.* I.T.A. To illustrate this difficulty, let us look at one situation: What property owned by a deceased husband immediately before his death would he be deemed to have disposed of immediately before his death when he is married under the regime of community of property? It will surely include his private property, but what about common property? No proper answer to that question can be given before the wife has made known her decision whether to accept or renounce the community. The property that the deceased transfers at his death would thus be determined only after dissolution of the regime by death, the nature of the subsequent option by the wife, and finally, the effects of partition in case of acceptance. In such a case, subsections 70 (5) *et seq.* should only apply to property that is effectively comprised in his estate and which would be transmitted owing to his death. Hence, if the wife accepts the community, the property comprised in her share would not be subject to the "deemed disposition" provision of subsections 70 (5) or even 70 (6), since such property would not have been transferred by her husband but would be deemed to have belonged to her following acceptance and partition of the assets of the community.

The partnership of acquests is still more puzzling since the property that a deceased owns immediately before his death might not necessarily be the property that he will transmit at his death. This would be the result if one considers that each consort is the sole owner of his acquests before the dissolution of the regime by death. Again here, I will concentrate on only one hypothesis: the death of a husband married under the regime of partnership of acquests when partition of acquests is accepted on both sides. In other words, partition is accepted by the husband's heirs and takes place not in value but in nature[107] . If we say that a husband married under the regime of partnership of acquests is the sole owner of both his private property and his acquests at the moment of death, the quantity

107 Even when partition in value is contemplated, when dissolution occurs by death of one consort, article 1267c C.C. states that: "The surviving consort may require on payment in cash of any balance that his share includes such dwelling house, household furniture and industrial, agricultural or commercial establishment of a family nature as form part of the mass for partition".

and identity of property that he will transmit to his heirs will vary if both sides decide to share each other's acquests, as it would comprise: 1) his private property; 2) a half of his acquests and 3) a half of the acquests of his wife. On the other hand, it is rather difficult to argue that a person enjoys the absolute ownership of his property immediately before his death when, due to the right of another person, he cannot transfer the whole of such property at his death and conversely can transfer a part of the property belonging to his spouse.

Thus we may adopt two different positions with respect to subsections 70 (5) *et seq.* The first is that the "deemed disposition" provision was meant to apply only to the capital property that the deceased owned immediately before his death. Hence under the regime of partnership of acquests, (if one accepts the theory that each consort is the sole owner of his acquests before dissolution of the regime), the result would be that the husband, in this case, would be deemed to have disposed immediately before his death of all his private property and of all his acquests. The second position is that subsection 70 (5) or (6) is applicable only to property that the deceased owned or would be deemed to have owned and which is transmitted by virtue of his death[108] . In the case where the wife chooses to participate in the acquests of her deceased husband, and/or the successors of the latter did likewise, such property would include his personal property, a half of his acquests and a half of his wife's acquests. Another argument which also supports this latter point of view arises from the fact that in order to apply subsection 70 (5) or (6), one must not only identify and classify property as "depreciable" or "not depreciable", "personal use property" and "listed personal property", in addition one must also identify the person acquiring such property by virtue of the death of the taxpayer. This is especially evident since subsection 70 (5) is applicable to all persons acquiring property by virtue of the death of the taxpayer, excepting of course, the consort, either directly or through a trust created for the exclusive benefit of that consort, in which case subsection 70 (6) or (7) would apply. Since, in the hypothesis of the husband's death, the right of the wife to demand partition of the acquests of her husband is not a benefit

108 "Deemed disposition" at death provisions definitely seem to be tied up to the fact that property to which such provisions were to apply was no longer subject to estate tax upon death. See Honorable E.J. BENSON, Minister of Finance, *Summary of 1971 Tax Reform Legislation,* p. 33.

deriving from his death, but rather a right which devolves from the dissolution of the matrimonial regime, which can occur during the lifetime of the spouse or through the death of one of them, then the death must be viewed as a term and not a condition for the exercise of her right. Consequently, subsection 70 (6) would not apply to property that she acquired as her share following the partition of her husband's acquests and the problems would be the same in the present situation as in the case of dissolution during the lifetime of the spouses. If, on the other hand, the heirs or successors of the husband decide to request partition of the acquests of the wife and thus wind up with half of "her" acquests, as well as half of the husband's acquests, this property would be subject to subsection 70 (5) as they would have acquired said property by virtue of the death of the husband and their inheritance from him. While such a solution seems the most logical, one may assume that the courts would be somewhat obliged to determine whether each spouse has a partial right of ownership in the acquests of the other or whether, on the contrary, each spouse is the sole owner of his own acquests, as he is of his private property since radically different consequences would result from each point of view. Obviously, the application of subsections 70 (5) and (6) to property that a taxpayer owned immediately before his death and which is acquired by virtue of his death would render this determination absolutely necessary. However, if one were to say that each consort was the sole owner of his own acquests before dissolution and consequently that subsections 70 (5) and (6) would apply to all such acquests, one would have to admit here that, due to the language used in these provisions, the property acquired by one consort through participation in the acquests of the other would be acquired as a consequence of the death of the other spouse[109] . Yet, this is not so in law as there is no

---

109 The English version of subsection 70(6) uses the expressions "property ... (that) ... has on or after his death *and as a consequence thereof,* been transferred or distributed to ..." and "... *to have become vested indefeasibly in*". In the French version, the expressions used are "bien ... (qui) ... a été, *lors de son décès* ou postérieurement *et par suite de ce décès,* transféré ou transmis lors d'un partage" and *"a été par dévolution irrévocablement acquis* ...". These expressions clearly indicate that the property referred to is property that has been transmitted by the deceased and acquired by the consort or by a trust by way of succession. It might also be noted that the language used in subsection 70(6) resembles the language contained in paragraphs 7(1) (a) and (b) of the *Estate Tax Act.* In the Notice of Ways and Means Motion (# 49(b)) tabled May 6th, 1974 before dissolution of Parliament, an amendment was

transmission of such property[110]. Moreover, partition in the acquests of the surviving consort by the deceased consort's heirs would then have to be subject to provisions of the *Income Tax Act* governing other transfers or dispositions, since the deceased would not be considered to have had any right of ownership in the acquests of his consort immediately prior to his death. As no proceeds of disposition would be received or deemed to have been received except in the latter case, if one were to apply subparagraph 69 (1) (b) (i), some very strange results could also occur here as in the case of divorce.

Before concluding with a discussion of some of the tax problems occasioned by the death of a consort, one should bear in mind that there is no special status given to the spouses under Quebec succession duties legislation[111]. However, as a direct line beneficiary, a consort will benefit as others in that category from a complete exemption if the aggregate value of the estate does not exceed $150,000[112]. For succession duties purposes, the share of a consort in a community of property is not included in the succession of a deceased since "the ownership, usufruct or enjoyment whereof" is not transmitted owning to death[113]. The same principle would also be applicable to the partnership of acquests regime[114].

CONCLUSION

As we have seen, the application of the present income tax provisions may often come into conflict with certain aspects of the civil law, especially in the field of matrimonial law. The problems we have raised are merely illustrative and not

---

however proposed to the effect that for the purposes of subsections 70(6) and 104(4) "a trust shall be considered to be created by a will if it is created under the terms of the will, by a disclaimer or by an order of a court pursuant to legislation of any province providing for the relief or support of a testator's dependants". While the terms of such an amendment would cover some situations arising out of death in the Common law provinces, they would clearly not cover partition in a partnership of acquests under the civil law.

110 See, *inter alia*, *Sura v. M.N.R.*, 62 D.T.C. 1005 at p. 1008; *M.N.R. v. Estate of François Faure*, 73 D.T.C. 5236 at p. 5240.

111 *Succession Duties Act*, R.S.Q. 1964, ch. 70 (as amended).

112 *Ibid.*, ss. 11(1). See also ss. 11(3), (5).

113 See note 20. Section 29 of the *Successions Duties Act* provides however that "where the wife's heirs renounce the community, the duties due by the husband shall not be less than those which said heirs should have paid".

114 See COMTOIS, Cours de perfectionnement 1971, *loc. cit.*, note 66, at p. 110.

exhaustive. Doubtlessly, several others can be found without great effort. Moreover, the type of problem encountered would be the same under the Provincial as well as the Federal tax legislations. If some of these problems can be solved by technical amendments to the legislation, others will require a complete re-assessment of the repercussions of the civil law institutions upon the taxation of the spouses. In both situations one should seek to eliminate not only undue preferences, but also undue hardship.

There appear to be two main reasons why these problems arose. Firstly, the constant policy of the government has been to take the individual rather than the family or the consorts as the basic income tax unit. Secondly, the effects of fundamental civil law institutions which permit the family or the consorts to pool their interests and property for their mutual benefit appear to have been completely overlooked in the reform process of integreting capital gains in the income tax base. Eventually, one will have to acknowledge the fact that whatever the circumstances or the type of matrimonial regime, persons who marry generally form a type of partnership or community of interest. Perhaps the solutions that will be advanced with respect to problems occasioned by Quebec law, especially in regard to the taxation of capital gains in the areas mentioned will encourage the government to re-examine and revise its policy with respect to the taxation of the family, as was the case in the United States during the 30's and 40's. In presenting its White Paper on Tax Reform in 1969, the federal government indeed indicated its intention to reconsider this area of taxation of the family but only after the basic reforms proposed would have been in effect and as a second step in the reform process[115]. I think that this aspect of taxation requires overhauling and I do not think that non-recognition of many civil law institutions (as once was suggested) would generally be considered acceptable. Today, a more positive approach is now possible, even though it was suggested twenty-two years ago. I hope that my remarks have contributed, in some small measure, to a first step in that direction.

---

115 Hon. E.J. BENSON, *Proposal for Tax Reform*, 1969, p. 15.