A Note on Deferred Community of Gains: The Theory and the Practice

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While the deferred community of gains regime is initially attractive, the provinces currently considering its adoption ought not to rush into it without first studying the experience of those countries which have already lived with the system.[1] One such country is West Germany which, it will be remembered, adopted a deferred community of gains, under the name of *Zugewinngemeinschaft,* in 1957 — almost twenty years ago — and has had more practical experience with it than any other country. What German lawyers think of it may thus be of interest to Canada, where Ontario, British Columbia, Saskatchewan, Alberta and some other common law provinces are at present contemplating the introduction of such a system. Quebec, of course, has a deferred community of gains, under the name of "partnership of acquests" (*société d'acquêts*),[2] as its statutory matrimonial regime, but only since 1970. Attendance at the first conference of the International Society on Family Law in West Berlin in April, 1975, provided me with an opportunity of discussing the merits of such a system with leading German lawyers.

In theory, a deferred community of gains is the ideal matrimonial property regime. A good marriage is, or should be, a partnership in the economic sphere, without encroaching in any way upon the wife's legal independence. During the marriage the spouses are, subject to obviously necessary safeguards against fraudulent dispositions, in the same position as under a system of separation of property. On the dissolution of the marriage by death or divorce, they pool and share the gains made by both of them during marriage.

One should think therefore that such a regime would meet with the universal approval of lawyers and public alike, and it comes as somewhat of a surprise to find that a great many German lawyers doubt its merits and consider that separation of property, combined

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[1] The author has previously urged against hasty adoption of the deferred community regime in *Deferred Community of Gains — A Note of Warning* (1974) 52 Can.Bar Rev. 482.

[2] Arts.1266c *et seq.* C.C.

with a legitimate portion for the surviving spouse on the dissolution of the marriage by death, is to be preferred.[3]

In what follows I am going to enumerate briefly some of the main difficulties which, to judge by the German experience, are likely to arise if a deferred community of gains were made the statutory matrimonial property regime in Canada.

1. While it would seem that no investigations have been made in Germany to find out what the German-in-the-street thinks of *Zugewinngemeinschaft*, it is generally agreed that professional and business people are not enamoured of it. Apart from other considerations, they do not like the idea that if the marriage should terminate by divorce after it has lasted a short time, they are obliged to share their gains with their ex-spouses.

It will be remembered that Professor Max Rheinstein, in referring to such a regime, had this to say:

> Is a fifty-fifty split proper under all circumstances including the case of a short-lived marrriage of, let us say, a highly paid movie star to a lazy bum?[4]

Almost every German lawyer with whom I talked is agreed that if *Zugewinngemeinschaft* remains, it should only take effect after the marriage has lasted a certain length of time — terms of three and five years were mentioned to me. I was told that in the Nordic countries, too, where a deferred universal community is the prevailing legal regime, there is a movement afoot to prescribe a "quarantine period" of three or five years before community comes into operation.

2. Where a marriage has lasted a long time, and the husband has progressed "from rags to riches", a deferred community of gains regime works well. Practically the whole of the husband's estate constitutes "gains" in which his wife shares on dissolution of the marriage. The position is different where he was a wealthy man from beginning to end of the marriage, without having added substantially to his fortune during its subsistence. Lacking "gains" to be divided, his wife of twenty or thirty years' standing is not entitled to any share in his estate, yet this is the very case where she should be. It may be objected that in these circumstances a

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[3] A recent review by Erik Jayme in (1975) 23 Am.J. of Comp.L. 378 of a German book on the new matrimonial property regime of France significantly opens with this sentence: "Ever since German law in 1957 adopted 'community of surplus' (*Zugewinngemeinschaft*) as its marital property system, German scholars have been looking to foreign law for better solutions."

[4] *The Transformation of Marriage and the Law* (1973) 68 Northwestern Univ.L.Rev. 463, 476.

Canadian court would probably award her maintenance under s.11 of the *Divorce Act*,[4a] where the marriage is dissolved by divorce, or under the respective provincial Dependants' Relief legislation, where it is dissolved by death, be it by means of periodical payments, or by means of a lump sum, and that in such a case she will in effect receive part of his estate. There is a considerable difference, however, between awarding the wife maintenance, which is, after all, by definition no more than provision for needed support, and giving her as of right a share in her husband's estate.

3. That under a deferred community of gains regime the wife, no matter how long the marriage may have lasted or how poor she may be, is not entitled to any share in her husband's estate if he has made no gains during the marriage, is especially hard on her if she has worked for years without proper remuneration in his business or on his farm; in other words, where the facts are as in *Murdoch*[5] except that there are no gains. The German courts have sometimes been able to help by finding that a partnership existed between the spouses but, on lines similar to those of the majority judgment in *Murdoch*, they consider that a partnership can only be implied if: 1) the wife has rendered services over and above those ordinarily expected of a wife; and 2) there is something to indicate that the spouses have, expressly or by implication, entered into a partnership agreement.

Conversely, where one of the spouses has made substantial gains, the other spouse, on dissolution of the marriage, is entitled to share in them irrespective of the circumstances — even where the spouses have been living apart for years or where the spouse who has made the lesser gains has committed adultery or has treated the other spouse with cruelty. The German courts, however, have discretionary powers to refuse participation where it would be grossly inequitable to permit it.

4. When *Zugewinngemeinschaft* was introduced in Germany, it was widely believed that one of the major difficulties would be the calculation of the gains made by the spouses. It was for this reason that a rule was introduced[6] that on the dissolution of the marriage by death, the surviving spouse was to have the right to take, in addition to his or her legal inheritance portion, one-quarter of the estate of the first-dying in lieu of a half share in the gains of the marriage.

[4a] R.S.C. 1970, c.D-8.
[5] [1975] 1 S.C.R. 423, (1973) 41 D.L.R. (3d) 367 (S.C.C.).
[6] BGB §1371.

The anticipated difficulties of determining the gains of the marriage have not materialized, with one notable exception: how to deal with inflationary increases in the value of assets. The trend of legal opinion is that, unlike increases in value due to other factors (*e.g.*, in the value of land owing to urban development), inflationary increases are not genuine (*echte*) gains and therefore do not fall into the community of gains. While this may or may not be theoretically sound, in practice it has been found to be virtually impossible to ascertain after a long marriage what gains were "genuine" and what gains were not.

5. If a deferred community of gains regime is introduced, provision must be made to deal with the benefits of a private pension or annuity scheme. Where a marriage which has lasted a long time is dissolved by divorce, and the husband remarries, it is only fair and equitable that his first wife who has, after all, directly or indirectly made a major contribution to the building-up of the pension or annuity fund, should participate in its benefits, and more particularly, that if her husband (now ex-husband) dies before her, a major part of the widow's pension should go to her. In Canada as in England, the courts have used their power to refuse a divorce under the general hardship clause[7] to compel divorce-hungry husbands to make sufficient provision for their wives,[8] but this can hardly be regarded as more than a make-shift solution.

6. I understand that the Ontario Law Reform Commission proposes to include damages in tort for personal injuries recovered by one of the spouses from a third party among the gains to be divided. I also understand that in Louisiana, where a similar rule prevails, enterprising wives (and presumably husbands) have discovered its full beauty. By divorcing her husband, a wife can get rid of a permanent invalid and obtain, as a reward for her action, half of the compensation awarded to him.

Compensation for personal injuries is what it says: compensation for loss, and not a windfall gain. The Quebec Civil Code rightly provides that:

> [C]ompensation received by a consort ... as damages for injury, personal wrongs or bodily injuries as well as the right to such compensation ... shall ... be private property.[9]

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[7] *Divorce Act*, R.S.C. 1970, c.D-8, s.9(1)(f).

[8] See, *e.g.*, for Canada, *Johnstone* v. *Johnstone* (1969) 7 D.L.R. (3d) 14 (Ont. H.C.); *Ferguson* v. *Ferguson* (1970) 1 R.F.L. 387 (Man. Q.B.); *Ceicko* v. *Ceicko* (1969) 5 D.L.R.(3d) 360 (Man. Q.B.); and *Bigelow* v. *Bigelow* (1972) 22 D.L.R.(3d) 729 (Man. Q.B.); and for England, *Mathias* v. *Mathias* [1972] 3 All E.R. 1 (C.A.).

[9] Art.1266i C.C.

7. I understand that suggestions have been made that where the spouse who made the lesser gain (as previously stated, usually the wife) happens to die first, the surviving spouse should not be obliged to share his or her gains equally with the other's heirs. This proposal is based on a misconception of the nature of community. The idea underlying a community regime, universal or partial, instant or deferred, is that husband and wife are partners. It follows that the wife's share in the community or balancing claim (again assuming that she was the spouse who made the lesser gains) is something which she has earned by her labours. To deprive her heirs of all or part of it is equivalent to depriving a partner in a business of his share in its assets and profits because he has happened to die before the other partners. It is on this ground that every lawyer in Germany with whom I discussed *Zugewinngemeinschaft* considered that the rule that the surviving spouse may opt to take a quarter of the estate of the first-dying in lieu of his or her share in the community of gains, ought to be scrapped. It enables surviving spouses to escape the duty of sharing their gains with the heirs of their partners.

I wish to state in conclusion that all the problems outlined above, and others which consideration of space prevented me from mentioning, are not necessarily fatal to a deferred community of gains. They can be dealt with by appropriate devices. My submission is not that a deferred community of gains regime is unworkable, but that, as shown by practical experience elsewhere, there are certain situations for which remedial provision must be made if it is to work satisfactorily.