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# Married Couple, Single Recipient: Understanding the Exclusion of Gifts and Inheritances from Default Matrimonial Regimes

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# MARRIED COUPLE, SINGLE RECIPIENT: UNDERSTANDING THE EXCLUSION OF GIFTS AND INHERITANCES FROM DEFAULT MATRIMONIAL REGIMES

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*In most Canadian jurisdictions, default family property law regimes exclude gifts and inheritances from the property that will be divided between divorcing couples. In Quebec, this exclusion is not only present in the default regime (the partnership of acquests) but rendered mandatory by the public order nature of the "family patrimony"—a construct determining the property that will be shared equally between spouses upon their divorce. This article examines default regimes of family property in Ontario and Quebec and analyzes the justifications provided by the provincial legislators for excluding gifts and inheritances from the mass of assets that will be divided between the spouses. The article then traces the various ways in which gifts and inheritances, both within and outside the couple, have been restricted through Roman, civil, and common law, and finds that these restrictions are tied to a desire to maintain property within the spouses' natal families. Finally, the article argues that the exclusion of gifts and*

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*inheritances points to a conception of the family tied not to marriage and choice, but to "family" understood as bloodlines, which is out of step with today's contemporary values and betrays the portrait of marriage otherwise painted in family property legislation.*

## INTRODUCTION

Upon divorce, legal separation, or death,[1] separating spouses or their successors must go through the difficult process of separating their assets. The rules for dividing assets are set out either in the couple's marriage contract (when applicable) or by the default matrimonial regime of the jurisdiction in which the couple first domiciled.[2] In Quebec, the default matrimonial regime (the partnership of acquests) supplements the "family patrimony"—a construct of public order that lists specific kinds of property to be shared equally between spouses upon their divorce.[3] In Canada, matrimonial regimes fall under the

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1 Among other circumstances. For an exhaustive list of circumstances that will bring matrimonial regimes to an end, see e.g. arts 417, 465 CCQ; *Family Law Act*, RSO 1990, c F.3, s 5 [Ontario *FLA*].

2 But note that the public order provisions of the family patrimony apply only to couples who are Quebec residents at the time they file for divorce, separation, or at the time of their death (see arts 391, 3089 CCQ; Michel Tétrault, *Droit de la famille*, 4th ed, vol 1 (Cowansville, Que: Yvon Blais, 2010) at 156).

3 See arts 414–26 CCQ (family patrimony); arts 448–84 CCQ (regime of acquests). See also art 391 CCQ (public order nature of the family patrimony); art 432 CCQ (default nature of the partnership of acquests); *Droit de la famille – 08316*, 2008 QCCA 285, [2008] RDF 25 at para 17.

jurisdiction of the provinces,[4] most of which displaced common law provisions on family property through legislative reforms in the 1970s–1990s. Despite important differences between some of these regimes, in particular between the civilian regime of Quebec and the common law regimes, the basic organisational structure of default matrimonial regimes is the same: it is determined that a core mass of assets belongs to both spouses together and as such must be shared between them upon the end of the marriage, while other assets belong to the spouses individually and are thus excluded from the shared mass of assets.[5] Gifts and inheritances are consistently found among these excluded assets. In this article, we analyze the justifications for this exclusion provided or implied in reports published during the reform of matrimonial regimes, using mainly Quebec and Ontario as examples (Part I). We then trace the various ways in which gifts and inheritances within and outside the couple have been restricted through Roman, civil, and common law and find that these restrictions are tied to a desire to maintain property within the spouses' natal families (Part II). Finally, we argue that the exclusion of gifts and inheritances points to a conception of the family tied not to marriage and choice, but to "family" as bloodlines, which is out of step with today's contemporary values and betrays the portrait of marriage otherwise painted in family property legislation (Part III).

This article refers to legislation on "family property law", but the definition of who constitutes a "family" for

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4 See *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, s 92(13), reprinted in RSC 1985, Appendix II, No 5.

5 See *infra* note 23 and accompanying text.

the purposes of this legislation is dependent on the jurisdiction. The provincial and territorial acts on family property, and the provisions of the *Civil Code of Québec*, were all drafted with married couples in mind. Quebec's provisions on the family patrimony and the partnership of acquests also apply to couples joined in a civil union,[6] but do not apply to de facto (or "common law") spouses.[7] By way of contrast, British Columbia considers de facto spouses as a married couple for the purpose of its *Family Law Act*.[8] This article refers to "spouses," meaning thereby any couple to whom the relevant property division regime applies.

While this article focuses only on couples to whom a property division regime applies, our purpose is nonetheless to uncover something about the way our legislators consider the family more broadly: is the language of our legislation and its structure conceiving of the couple as a unit, or as a set of individuals, or as the temporary or permanent joining of two separate families? The answer to this question may be just as relevant for de facto spouses (or for other types of families that do not conform to traditional social norms) as it is for married ones. At a time where the rate of divorces remains stable but the average duration of marriages keeps decreasing,[9]

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6 See art 521.6 al 4 CCQ.

7 See *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 (commonly known as *Eric v Lola*).

8 See *Family Law Act*, SBC 2011, c 25, s 3(1)(b) [British Columbia *FLA*].

9 See Statistics Canada, *Marital Status: Overview, 2011*, by Anne Milan, Catalogue No 91-209-X (Ottawa: Statistics Canada, July 2013) at 11, Table 2 and 12, Table 3. See also Statistics Canada, *Families, Living*

where non-traditional families gain in social acceptance and are increasingly the subject of studies, and where couples are thus re-defining the meaning of marriage and family for themselves and for society, questions about the way legislators define and conceive of the "family" gain in importance, as do the reasons for the division of property upon the end of a marriage or other stable relationship.

## I. GIFTS AND INHERITANCES IN CANADIAN MATRIMONIAL REGIMES IN THE 19TH AND 20TH CENTURIES

In this Part, we first outline the conceptual way in which today's Canadian matrimonial regimes conceive of the couple's property and the way it should be divided (Part I-A), before providing an overview of the rules that were in place before these regimes and contextualizing the reforms that gave rise to them (Part I-B). This Part will then turn to the justifications that were provided at the time of the reforms for the exclusion of gifts and inheritances from the shared mass of assets (Part I-C).

### A. Exclusion of Gifts and Inheritances in Current Matrimonial Regimes

All Canadian provinces and territories have, through legislation, put into place default regimes for the division of family property at the end of a marriage. In common law provinces, common law rules were displaced by provincial

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*Arrangements and Unpaid Work*, by Anne Milan, Leslie-Anne Keown & Covadonga Robles Urquijo, Catalogue No 89-503-X (Ottawa: Statistics Canada, December 2011) at 16.

and territorial statutes starting in the 1970s,[10] and have been subject to modifications and sometimes broader reforms since.[11] In Quebec, matrimonial regimes have been present since the reception of the *Coutume de Paris* in 1664,[12] and were most recently modified in 1989 with the incorporation of the family patrimony as a public order overarching component of all matrimonial regimes.[13]

The default regimes in these statutes all adhere to the same basic organizational structure, which can be conceptualized as follows: before their marriage, each spouse-to-be owns a basket of individual property; there are thus two baskets, each belonging to one of the spouses and containing their individual property. At the end of the marriage, there are three baskets: the spouses each own their individual basket, and share together a third basket containing the property that ought to be divided between them—what we have referred to above as a shared mass of assets. Given that the spouses have presumably shared their property with each other during the marriage, as well as

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10 The first such legislation was Ontario's *Family Law Reform Act*, RSO 1980, c 152.

11 See e.g. Law Reform Commission of Nova Scotia, *Division of Family Property: Discussion Paper* (Halifax: LRCNS, 2016).

12 See Yves F Zoltvany, "Esquisse de la coutume de Paris" (1971) 25:3 Revue d'histoire de l'Amérique française 365 at 368; Michel Morin, "La réception de l'ancien droit et du nouveau droit français au Bas-Canada, 1774-1866" in H Patrick Glenn, ed, *Droit québécois et droit français : communauté, autonomie, concordance* (Cowansville, Que: Yvon Blais, 1993) at 3.

13 See *An Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses*, SQ 1989, c 55 [*An Act to favour economic equality between spouses*].

purchased new assets together, the classification of their assets into the various baskets can present a challenge. The primary purpose of matrimonial regimes is to classify the property into these different baskets, according to the rules of the regime. The shared basket, or shared mass of assets, bears different names depending on the regime and the statute—Ontario's *Family Law Act* terms it "net family property", [14] British Columbia's *Family Law Act* refers simply to "family property", [15] whereas others refer to it as "family assets"[16] or "matrimonial assets",[17] and Quebec's default regime under the *Civil Code of Québec* conceptualizes this shared core of assets as a combination of acquests and the family patrimony.[18] Once the contents of this shared basket have been ascertained, the regime will also determine the way in which it will be divided between the spouses and join their individual baskets, and the considerations upon which this division can be departed from.[19] Since this article will be focusing on the shared basket of property across various jurisdictions, we will use the terminology of "shared mass of assets" for consistency when referring to this concept across jurisdictions.

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14 See Ontario *FLA*, *supra* note 1, s 4(1).

15 See British Columbia *FLA*, *supra* note 8, s 84.

16 See e.g. *Family Property Act*, CCSM, c F25, s 1 [Manitoba *FPA*]; *Family Property and Support Act*, RSY 2002, c 83, s 4 [Yukon *FPSA*].

17 See e.g. *Family Law Act*, RSNL 1990, c F-2, s 18 [Newfoundland and Labrador *FLA*].

18 See arts 448–49 CCQ (acquests); arts 414–15 CCQ (family patrimony).

19 See e.g. Ontario *FLA*, *supra* note 1, s 5; British Columbia *FLA*, *supra* note 8, s 93–97; arts 416, 423, 467, 471 CCQ.

The shared mass of assets is usually composed, across Canadian jurisdictions, of property acquired during the marriage by one of the spouses or by both spouses together,[20] and property used by the family.[21] In some jurisdictions, the shared mass of assets is defined by listing the types of property that are excluded from it, rather than those which are included, but its contents remain generally the same.[22] In all cases, the legislation sets out a list of exclusions. The content of this list varies between jurisdictions, but all of the regimes list gifts and inheritances made to one spouse by a third party as an exception to the shared group of assets.[23]

## B. The Place of Gifts and Inheritances in Canadian Marriage Prior to the Reforms

Until 1851, married women in Canada had no legal capacity to hold property, as they were subsumed into the

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20 See e.g. Newfoundland and Labrador *FLA*, *supra* note 17, s 18(1)(c); *The Family Property Act*, SS 1997, c F-6.3, s 2 sub verbo "family property"; *Marital Property Act*, SNB 2012, c 107, s 1 sub verbo "marital property" at (b) [New Brunswick *MPA*]; art 449(1) CCQ.

21 See e.g. New Brunswick *MPA*, *supra* note 20, s 1 sub verbis "family assets", "marital property" at (a); art 415 al 1 CCQ.

22 See e.g. *Family Law Act*, SNWT 1997, c 18, s 35 [Northwest Territories *FLA*]; *Family Law Act*, RSPEI 1988, c F-2.1, s 4.

23 For regimes which exclude gifts and inheritances from the shared mass of assets, see e.g. 415 al 4, 450(2) CCQ; Ontario *FLA*, *supra* note 1, s 4(2); Newfoundland and Labrador *FLA*, *supra* note 17, s 18(1)(c)(i); British Columbia *FLA*, *supra* note 8, s 85(1)(b)–(b.1); Manitoba *FPA*, *supra* note 16, s 7(1), 7(3). For regimes that do not exclude gifts and inheritances outright, but list them as a reason to vary the division of property awarded to each spouse at the end of the marriage, see e.g. Yukon *FPSA*, *supra* note 16, s 4.

legal personality of their husband.[24] In the common law, their situation is often described by reference to a quotation from William Blackstone:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme-covert* ... and her condition during her marriage is called her *coverture*.[25]

Due to the "legal disabilities"[26] that made them unable to hold property, wives' rights as regards their property were vested in their husband, who gained the right to manage and gain profits from the property.[27] This included the wages gained by the wife if she worked during the marriage.[28] Wives' interests in their property were

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24 See Ontario Law Reform Commission, *Report on Family Property Law* (Toronto: OLRC, 1993) at 3.

25 William Blackstone, *Commentaries on the Laws of England*, vol 1 (1765) at 442. See also Clara Brett Martin quoted in Constance Backhouse, "Married Women's Property Law in Nineteenth-Century Canada" (1988) 6:2 L & Hist Rev 211 at 212.

26 Alan M Sinclair & Margaret E McCallum, *An Introduction to Real Property Law*, 6th ed (Markham, Ont: LexisNexis, 2012) at 119.

27 See Constance Backhouse, *supra* note 25 at 213.

28 See Ontario Law Reform Commission, *supra* note 24 at 3.

protected through three types of institutions: coverture, dower, and curtesy.[29]

Canadian wives' first rights to hold property were granted through a series of provincial reforms that started in 1851 with New Brunswick's *An Act To Secure to Married Women Real and Personal Property Held in Their Own Right*.[30] This statute granted wives from New Brunswick ownership rights over the property they owned "before or accruing in any way after marriage," with the exception of property given to them by their husband during the marriage.[31] Similar acts followed in Prince Edward Island, Nova Scotia, and Vancouver Island in the 1860s.[32] These acts consisted in what Constance Backhouse terms "marriage breakdown legislation" and only meant to offer women some solace in cases where their marriage was imperiled by their husband's absence.[33] They were followed by a wave of "protective legislation" intended to apply such rights to all married women, and a third wave of "egalitarian legislation" that finally

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29 See Bora Laskin, *Cases and Notes on Land Law* (Toronto: University of Toronto Press, 1964) at 70ff.

30 SNB 1851 (14 Vict), c 24 [*Married Women Property Act*]. See also Constance Backhouse, *supra* note 25 at 218.

31 *Married Women Property Act*, *supra* note 30, ss 1–2.

32 See *An Act to Protect the Rights of Married Women, in Certain Cases*, SPEI 1860 (23 Vict), c 35, ss 1–2 (Prince Edward Island); *An Act for the Protection of Married Women in Certain Cases*, SNS 1866 (29 Vict), c 33 (Nova Scotia), ss 1–2; *An Act to Protect the Property of a Wife Deserted by her Husband*, SBC 1862 (26 Vict), c 116.

33 See Constance Backhouse, *supra* note 25 at 217–21.

challenged the doctrine of marital unity.[34] Once such statutes passed, the de facto matrimonial regime in each province and territory became a separate property regime, whereby property rights remained vested in the spouse with title to that property.[35] There was no shared mass of assets to include or exclude gifts and inheritances from, and therefore gifted and inherited property was treated like any other property.

Quebec wives' rights were similarly restricted by their limited legal capacity and the marital authority of their husbands under the *Coutume de Paris*[36] and the *Civil Code of Lower Canada*.[37] Their interests were protected through the civil law dower (*douaire*).[38] Quebec wives' legal emancipation was only achieved in 1964, with an act amending several articles of the *Civil Code of Lower Canada* and granting them "full legal capacity as to [their]

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34 See *ibid* at 221, 230. Elements of the second wave were present in New Brunswick's *Married Women Property Act*, *supra* note 30, and were central to Ontario's *Married Women's Property Act*, SO 1884 (47 Vict), c 19. The third wave was started by Ontario's 1872 statute *An Act to Extend the Rights of Property of Married Women*, SO 1871-71 (35 Vict), c 16.

35 See Ontario Law Reform Commission, *supra* note 24 at 4.

36 See Zoltvany, *supra* note 12 at 369. See also David Gilles, "La condition juridique de la femme en Nouvelle-France: essai sur l'application de la coutume de Paris dans un contexte colonial" [2002] 1 Cahiers aixois d'histoire des droits de l'Outre-mer français 77 at 93.

37 See arts 174–77 CCLC; J Émile Billette, *Traité théorique et pratique de droit civil canadien*, vol 1 (Montréal: publisher unknown, 1933) at 144; Gilles, *supra* note 36 at 81.

38 See Mireille D Castelli, "L'évolution du droit successoral en France et au Québec" (1973) 14:3 C de D 411 at 445–52.

civil rights, subject only to such restrictions as arise from [their] matrimonial regime."[39]

Along with the *Coutume de Paris*, Quebec inherited a default matrimonial regime from French Law in 1664. This regime—that of the community of property[40]—was carried over to the *Civil Code of Lower Canada* [41] and remained the default regime until 1970.[42] The community of property was composed of all the moveables belonging to the couple (whether obtained before or during the marriage, purchased or received by the spouses as a gift or an inheritance), all income from this property, and immoveables acquired during the marriage. [43] The community therefore excluded the product of a spouse's labour and their immoveables (whether obtained by gift or inheritance, or owned before the marriage). Gifts and inheritances of immoveable property by an ascendant were, however, subject to a presumption that they should not go to the community of property, but to the donor's presumptive heir (the spouse who would have inherited this

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39 *An Act Respecting the Legal Capacity of Married Women*, LQ 1964, c 66, s 1, amending art 177 CCLC. For a brief overview of the major elements of the evolution of family law since 1964 in Quebec, see Tétrault, *supra* note 2 at 15–20.

40 See Zoltvany, *supra* note 12 at 368.

41 See arts 1271–1367 CCLC, as amended by *An Act respecting matrimonial regimes*, SQ 1969, c 77 [*Act respecting matrimonial regimes*].

42 See *Act respecting matrimonial regimes*, *supra* note 41. See also art 1271 CCLC, as amended by *Act respecting matrimonial regimes*, *supra* note 41 (setting out the default status of the regime).

43 See art 1272 CCLC, as amended by *Act respecting matrimonial regimes*, *supra* note 41.

property at the death of the donor[44]), unless the donor stated clearly their desire for both spouses to be recipients of the gift, or for the spouse *who was not* their presumptive heir to be the beneficiary of the gift.[45] The *Civil Code of Lower Canada*'s dispositions on the community of property could be displaced by entering a marriage contract that would arrange for the division of property in case of death or separation.[46] Marriage contracts were commonly entered to arrange for separation as to property regimes and were irrevocable.[47]

After the enactment of federal divorce legislation in 1968,[48] consultations were commenced in all common law jurisdictions to address the impact of divorce on married spouses, with reforms starting with Ontario's first statute on family law (the *Family Law Reform Act*).[49] These reforms were motivated by the desire to bring more

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44 See Robert P Kouri et al, eds, *Private Law Dictionary and Bilingual Lexicons*, 2nd ed (Cowansville, Que: Yvon Blais, 1991) sub verbo "presumptive heir".

45 See art 1276 CCLC. See also Part II-A-1, below.

46 See art 1260 CCLC, as amended by *Act respecting matrimonial regimes*, *supra* note 41. Note that before 1970, once a marriage had been celebrated, it was impossible to change regimes (*ibid*). See also 1257 CCLC.

47 See art 1260 CCLC, as amended by *Act respecting matrimonial regimes*, *supra* note 41; Lionel Smith, "Intestate Succession in Quebec" in Kenneth GC Reid, Marius J De Waal & Reinhard Zimmerman, eds, *Intestate Succession* (Oxford: Oxford University Press, 2015) 52 at 58.

48 See *Divorce Act*, SC 1968-69 (16 Eliz II), c 24.

49 *Supra* note 10 (replacing *The Family Law Reform Act, 1978*, SO 1978, c 2).

equality between spouses upon their divorce and responded to the grossly unfair results of property division upon the divorce of women who had given up paying work opportunities to dedicate themselves to their family or the family business.[50] The statute put in place the foundations of a regime that valued spouses' work both outside and within the home. In Quebec, the partnership of acquests became the default regime in 1970[51] and the family patrimony was created in 1989.[52] Both of these reforms also meant to respond to the inequalities created by the regime of separation as to property.[53] Indeed, wives who separated or divorced under such a regime after having spent their married life working in the home—unpaid—found themselves with little property in their personal

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50 See especially *Murdoch v Murdoch* (1973), [1975] 1 SCR 423, 41 DLR (3d).

51 See *Act respecting matrimonial regimes*, *supra* note 41.

52 See *An Act to favour economic equality between spouses*, *supra* note 13. See also Anne Revillard, "Du droit de la famille aux droits des femmes : le patrimoine familial au Québec" (2006) 62:1 Dr et soc 95 at 100 (for an overview of the political process leading to the adoption of the law).

53 See Civil Code Revision Office, *Report on Matrimonial Regimes* (Montreal: Éditeur officiel du Québec, 1968) at 10; *MT v J-YT*, 2008 SCC 50 at 16, [2008] 2 SCR 781, Lebel J (describing the family patrimony as a response to the vulnerability of wives); Christine Morin, *L'émergence des limites à la liberté de tester en droit québécois : étude socio-juridique de la production du droit* (Cowansville, Que: Yvon Blais, 2009) at 321–27.

patrimony.[54] In 1986, Ontario brought in a new, reformed *Family Law Act*.[55]

Both Ontario reforms and the introduction of the "net family property" (Ontario's shared mass of assets) were claimed to have been influenced by Quebec's regimes in their conceptualization of a mass of assets as owned individually during the marriage, yet re-qualified as either belonging to one of the spouses, or both, at the time of its dissolution. This manner of conceptualizing the property—as a deferred-sharing regime—was said to take inspiration from the civil law's approach in the partnership of acquests.[56] On the other side of the border, it was claimed that the family patrimony was emulating Ontario's notion of "family assets".[57] Some authors further claimed that the qualification of property as part of the family patrimony due to its purpose (rather than its nature) was incompatible with the ethos of the civil law, and directly inspired from the recent Ontario reforms.[58] Quebec's new notion of

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54 See Revillard, *supra* note 52 at 96; Mireille D Castelli et Dominique Goubau, *Le droit de la famille au Québec*, 5th ed (Sainte-Foy: Presses de l'Université Laval, 2005) at 123–24.

55 Ontario *FLA*, *supra* note 1 (replacing the *Family Law Act, 1986*, SO 1986, c 4).

56 See Mary Jane Mossman, *Families and the Law: Cases and Commentary*, 2nd ed (Concord, Ont: Captus Press, 2015) at 692.

57 See Danielle Burman, "Politiques législatives québécoises dans l'aménagement des rapports pécuniaires entre époux : d'une justice bien pensée à un semblant de justice—un juste sujet de s'alarmer" (1988) 22:2 RJT 149 at 172. The notion of "family assets" is defined in s 3(b) of the *Family Law Reform Act*, *supra* note 10.

58 See e.g. Burman, *supra* note 57 at 174–75. See also Nicholas Kasirer, "Testing the Origins of the Family Patrimony in Everyday Law" (1995) 36:4 C de D 795 at 822–23 [Kasirer, "Testing the Origins"];

marriage as a joint economic partnership was also claimed to have been inspired by notions of Equity.[59] The conversation between these advances in legislation between Ontario and Quebec might also serve to explain the similarity of both regimes in their exclusion of gifts and inheritances from the shared mass of assets.

### C. Today's Family Law Regimes Promote the Joint Effort of the Spouses

Neither the *Civil Code of Québec*, the *Civil Code of Lower Canada*, nor the various family property statutes implemented as a result of the reforms in common law provinces provide explanations for the exclusion of gifts and inheritances from the shared mass of assets. The contemporary legislative debates in common law provinces are equally silent.[60] The reports and academic articles commenting on the reform processes in Quebec and Ontario, however, provide some indications as to why the exclusions were put into place.

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Pierre Ciotola, "Le patrimoine familial et diverses mesures destinées à favorises l'égalité économique des époux" [1989] 2 CP du N 21 at para 12 (stating that the legislation that put in place the family patrimony originated from Anglo-Canadian statutory law and common law).

59 See Kasirer, "Testing the Origins", *supra* note 58 at 797–98. See also Nicholas Kasirer, "Couvrez cette communauté que je ne saurais voir: Equity and Fault in the Division of Quebec's Family Patrimony" (1994) 25:4 RGD 569 at 584.

60 See e.g. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 33-1 (6 June 1985) (Alan Pope), online: <www.ola.org/en/legislative-business/house-documents/parliament-33/session-1/1985-06-06/hansard> [*Hansard Debates* (Pope)].

In reforming the default matrimonial regimes, both the *Civil Code of Lower Canada* and the common law statutes provided a new definition of marriage, centred on the notion of the family as an economic unit. They suggested that the division of assets upon divorce is focused on granting spouses an equal share of the property they had acquired as participants in the marriage—whether through the earnings of their paid labour, or the value of their work within the home.[61] The Ontario statute, in a formulation that also inspired the Northwest Territories, equates marriage with "a form of partnership" or an "economic relationship".[62] While the *Civil Code of Lower Canada* and *Civil Code of Québec* do not contain such a statement of principle, the law that created the family patrimony stated that "[t]he object of this bill is to favour equality between spouses and to underline the character of marriage as a partnership."[63]

The Ontario Law Reform Commission ("the Commission"), in its 1993 *Report on Family Property Law*,

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61 See Ontario *FLA*, *supra* note 1, s 5(7); Ontario Law Reform Commission, *supra* note 24 at 11; 396 CCQ.

62 Ontario *FLA*, *supra* note 1, Preamble; Ontario Law Reform Commission, *supra* note 24 at 1, 5. See also Northwest Territories *FLA*, *supra* note 22, Preamble.

63 *An Act to favour economic equality between spouses*, *supra* note 13, Explanatory Notes. See also Burman, *supra* note 57 at 172, quoting Suzanne Vadboncœur, ed, *Rapport sur la fiscalité, la prestation compensatoire et le partage des biens familiaux en mariage* (Montréal: Barreau du Quebec, 1987) at 2; *MT v J-YT*, *supra* note 53, Lebel J; Kasirer, "Testing the Origins", *supra* note 58 at 803–04 (arguing that this idea was already present prior to the reforms, although the language of economic partnership is new); Burman, *supra* note 57 at 174.

justified the exclusions listed in subsection 4(2) of the *Family Law Act* on the grounds that those assets "are not the product of the marriage partnership."[64] Since Ontario's *Family Law Act* was meant "to ensure that spouses share the value of assets accumulated during the marriage,"[65] it seemed logical to the Commission that the types of property listed in subsection 4(2) (which also include, *inter alia*, damages for a personal injury, the proceeds of a life insurance, and some pensionable earnings) be excluded from such sharing. In Quebec, authors commenting on the reforms that created the family patrimony similarly made reference to the fact that gifts and inheritances do not result from the work of the spouses towards the marriage.[66] The rationale expressed for the consideration of gifts and inheritances as private property (rather than acquests) in the regime of acquests is not as clear, with some authors simply deciding not to explain the exclusion,[67] and others

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64 Ontario Law Reform Commission, *supra* note 24 at 72. See also Hanoch Dagan & Carolyn J Frantz, "Properties of Marriage" in Hanoch Dagan, *Property: Values and Institutions* (Oxford: Oxford University Press, 2011) at 219 ("[t]he most common justification given for treating gifts and inheritances differently is that neither requires spousal labor. Title to such property is 'lucrative' rather than 'onerous'").

65 Ontario Law Reform Commission, *supra* note 24 at 11. See also *Hansard Debates* (Pope), *supra* note 60; Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 33-1, No 28 (22 October 1985) (Terry O'Connor), online: <www.ola.org/en/legislative-business/house-documents/parliament-33/session-1/1985-10-22/hansard-1>.

66 See e.g. Castelli & Goubau, *supra* note 54 at 131; Tétrault, *supra* note 2 at 227–28.

67 See Castelli & Goubau, *supra* note 54 at 159.

seeming to state that their "personal value" justifies that they be considered private property.[68]

In both the common law and the civil law, while gifts and inheritances are excluded from the shared mass of assets, the income from this property is only excluded if the donor or testator expressly specified that it should be so.[69] The provisions that plan for this inclusion suggest that the work of the spouses is not the only metric that is considered to justify the classification of property as part of the shared mass of assets. Indeed, the income arising from the gifted or inherited property during the marriage could presumably well be due to the combined efforts of the spouses, yet the statutes and the *Civil Code of Québec* only include this property into the shared mass of assets by default, leaving the final decision as to the inclusion or exclusion of this income to the testator or donor. Ontario's Commission justifies the importance accorded to the will of the testator in this decision by pointing out that imposing such a division may affect the heir's ability to retain the property if they have insufficient means to reimburse their divorcing spouse for half the capital growth or income without selling the property.[70] In this same discussion, the Commission also makes reference to the emotional significance of the property that might be lost due to such a division of the

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68 See Tétrault, *supra* note 2 at 520.

69 See Ontario *FLA*, *supra* note 1, s 4(2); art 450(2) CCQ (qualifying this income as an acquest). Compare Alberta's *Matrimonial Property Act*, which includes the increase in value of property received as a gift or an inheritance in the shared mass of assets (RSA 2000, c M-8, s 7(3)(a)).

70 See Ontario Law Reform Commission, *supra* note 24 at 73–74.

increase in value,[71] although this aspect of the loss is deemed—to the Commission—justifiable in order to protect the policy considerations that justify dividing this increase in the first place.[72] The mention of freedom of testation and personal or sentimental value to justify the exclusion or inclusion of property into the shared mass of assets points to a need to balance different legislative priorities and legal doctrines against the objectives put forward by the legislative reforms. It also reflects a potential conflict between the need to maintain coherence within private law and within the matrimonial regime itself.

The reforms being justified by a push for greater equality between spouses and a desire to reward the work of both spouses in the household, the justification for these exclusions naturally had to be centred on these same principles.[73] Yet, given the law's long-standing discomfort

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71 See *ibid* at 77.

72 Such policy considerations mostly refer to the need to ensure consistency with the way the increase in value/income from the property is divided in cases of property inherited or received as a gift prior to marriage (see *ibid* at 76–77).

73 In Ontario, see *ibid* at 5–6. See also Susan J Heakes, "Gifting Real Property to Married Children: The Creation of Legal Fictions to Avoid Section 4(2) of the *Family Law Act*" (2006) 25:2 Can Fam LQ 169 at 170 ("[t]here has been no contribution by the spouse to the acquisition of the gifted home and in ignoring that it has been gifted, the spouse receives an arguably undeserved windfall in the event of separation or death"). In Quebec, see Burman, *supra* note 57 (commenting on the new family patrimony during the reforms). See also Tétrault, *supra* note 2 at 227–28 ("[l]'article 415, al. 4 C.c.Q. prévoit l'exclusion de biens qui, même s'ils ont une vocation familiale, ne sont pas

with gifts and inheritances, where transactions seem to flow only in one direction, without consideration or return,[74] it is not surprising that jurists would be hesitant to discuss the ways in which the recipient of the gift or inheritance might have "earned" such generosity. While the exclusion of gifts and inheritances could have been justified by prioritizing the will of the testator or donor over the logic central to the matrimonial regimes, the decision to justify this exclusion within the framework of the family property statutes leads to the conclusion that the recipient must have "earned" the gift or inheritance somehow. Although gifts and inheritances, as liberalities, consist by definition of a "transfer, *without a counterprestation*, of property to the advantage of another,"[75] it is generally admitted that gifts are part of a broader network of exchanges and expectations.[76] By this logic, the recipient would have earned the gift or inheritance through actions directed to the donor or testator prior to the transfer or expected to happen after the transfer—acts unrelated to the transfer itself, but related to the *relationship* between the donor or testator and the recipient. Indeed, for the purpose of legal consistency, only a focus on the relationship between the parties, rather than the actions that might have justified the transfer, could support the exclusion. A foray into the history of gifts and inheritances in married couples

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comptabilisés pour le motif qu'ils n'ont pas été acquis en fonction de l'association économique des époux, donc par leurs efforts").

74 See Richard Hyland, *Gifts: A Study in Comparative Law* (Oxford: Oxford University Press, 2009) at para 6, 8 ("a distrust of gift giving has often haunted the law" at 6).

75 Kouri et al, *supra* note 44, sub verbo "liberality" [emphasis added].

76 See Hyland, *supra* note 74 at 7.

confirms that relationships play a central role in explaining this exclusion.

Prior to focusing on the historical treatment of gifts and inheritances in family contexts, however, we must address potential counterarguments to our focus on family relationships as the central determinant of the exclusion of these gifts and inheritances from the shared mass of assets.

First, gifts and inheritances are not the only types of property consistently excluded from the shared mass of assets. Property such as awards for a personal injury, proceeds of a life insurance, and some pensionable earnings are also frequently found on the exclusions list in common law provinces.[77] The motives behind their exclusion has been the subject of as little discussion as that of gifts and inheritances, but may seem more intuitive. Damages for personal injury, for instance, seek to compensate an individual for a loss that they have suffered

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[77] For the exclusion of damages, see e.g. Ontario *FLA*, *supra* note 1, s 4(2)3 ("damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages"); British Columbia *FLA*, *supra* note 8, s 85(1)(c); Manitoba *FPA*, *supra* note 16, s 8(1); Newfoundland and Labrador *FLA*, *supra* note 17, s 18(1)(c)(ii); Northwest Territories *FLA*, *supra* note 22, s 35(2)(b). For the proceeds of life insurance, see e.g. Ontario *FLA*, *supra* note 1, s 4(2)4 ("proceeds or a right to proceeds of a policy of life insurance, as defined under the *Insurance Act*, that are payable on the death of the life insured"); Northwest Territories *FLA*, *supra* note 22, s 35(1)(c)(ii). For the exclusion of pensionable earnings, see Ontario *FLA*, *supra* note 1, s 4(2)7 ("unadjusted pensionable earnings under the *Canada Pension Plan*"). Other provinces' legislation will include all pensionable earnings (see e.g. British Columbia *FLA*, *supra* note 8, s 84(2)(e); Yukon *FPSA*, *supra* note 16, ss 4(e)–(f).

in their personal capacity. They are not shared because what they represent—what they seek to "replace"—could not be shared in a mass of assets. One need only think of the loss of a limb or loss of enjoyment due to a trauma. As put by McKinlay J. in *Mittler v. Mittler*: "[t]he purpose can only be to permit spouses to retain for their own purposes property which is completely personal to them, and to which they are entitled for the purpose of replacing some aspect of their enjoyment of life which cannot be truly shared with any other individual, no matter how close the relationship."[78] A distinction is drawn between "general damages for pain and suffering together with any special damages that can be attributed directly to the personal injury, as opposed to lost income or other loss to the family."[79] The rationale behind the exclusion of general damages for a personal injury cannot be transposed to that of gifts and inheritances because these do not "replace some aspect of [the recipient's] enjoyment of life" that cannot be truly shared with a spouse. If stretched, the comparison could apply to the bequest from a close relative of an item bearing very personal memories, but it could not be applied to any gift from a live third party. The rationale for excluding gifts and inheritances must then be sought elsewhere.

The exclusion of unadjusted pensionable earnings from the Canada Pension Plan (CPP) from Ontario's *Family Law Act* can be explained on jurisdictional grounds. CPP credit-splitting is already rendered mandatory as of 1987 by article 55.1 of the *Canada Pension Plan*, which

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78 (1988), 17 RFL (3d) 113 at para 72, 12 ACWS (3d) 125 (Ont HC).

79 *Hunks v Hunks*, 2017 ONCA 247 at para 27, 97 RFL (7th) 89.

provides that "in the case of spouses, following a judgment granting a divorce or a judgment of nullity of the marriage, [a division of unadjusted pensionable earnings shall take place] on the Minister's being informed of the judgment and receiving the prescribed information".[80] The exclusion of the proceeds of life insurance follows from that of inheritances, as they are funds received upon the death of an individual, predestined to a specific beneficiary. These two exclusions therefore shed no light on the motives behind the exclusion of gifts and inheritances.

Second, it might be argued that all subsection 4(2) types of property are excluded simply because they do not respond to the chief criterion for what makes a shared asset; that is, one that is created by the joint efforts of the spouses. This is the explanation given by the Ontario and Quebec commentators. This explanation seems appealing, but as we have just seen, it does not apply to all the exclusions. Moreover, when applied to gifts and inheritances, it results from a generalization about the circumstances that give rise to these transfers. Yet, it is easy enough to consider a hypothetical situation where the efforts of a spouse permitted the other spouse to dedicate more time and energy to the care of an elderly or ailing relative, friend, or neighbour, who later thanked them with a gift or inheritance. This joint effort goes unrecognized under the current laws. As to the increase in value of gifted or inherited property during a marriage, the Ontario and Quebec legislators themselves recognized that the joint efforts of spouses are likely its cause; yet, they can easily be put aside by the clear intention of a donor or testator.

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80 *Canada Pension Plan*, RSC 1985, c C-8, s 55.1(a). See also *Payne v Payne* (1988), 16 RFL (3d) 8 at para 10, 11 ACWS (3d) 174 (Ont HC).

It is clear that the joint efforts of spouses are not completely antithetical to the reception or increase in value of gifts and inheritances, but they are afterthoughts at best—when their presence is not completely dismissed by the legal provisions in place. Indeed, the legislature has placed the joint efforts of the spouses second to the intention of the testator or donor in cases where both spouses may be to thank for the actions that prompted the transfer or the increase in value of the property. This translates a presumption that in most cases gifts and inheritances have nothing to do with the joint efforts of the spouses. Our article now turns this presumption on its head and asks: if gifts and inheritances are not the result of the joint efforts of the spouses, what are they? Are they the result of individual endeavour? Are they so closely tied to an individual in their personal capacity that they are considered an extension of their being (as are damages for personal injury)? Through our exploration of the historical treatments of gifts and inheritances, we find that the answer lies between these possibilities: gifts and inheritances are treated as unrelated to the joint efforts of spouses because they are used as a protective mechanism for the bloodline's property. This answer in turn leads us to question the exclusion altogether.

## II. GIFTS, INHERITANCES, AND THE FAMILY IN HISTORY

As we have seen, gifts and inheritances are, according to the dominant commentary, not a result of the joint efforts of the spouses. While gifts are perceived by some commentators as the result of labour in a long-term relationship, or as a transaction within a series of market-

type exchanges,[81] this transactional type of analysis is not compatible with the matrimonial regimes' exclusion of gifts and inheritances, which do include the fruits of labour of each spouse in their joint mass of assets. If gifts and inheritances cannot be defined, for the purposes of current matrimonial regimes, as born from the labour of either spouse nor of that of the couple, then they must arise from the relationship that links the donor or testator and the recipient. There are multiple ways that married couples can interact with gifts and inheritances: they can be the recipients of these liberalities, or they can be the donors or testators (and as such, they can select their spouse or a third party as a recipient). This Part will look at the way spouses' ability to interact with gifted or inherited property has been restricted at various points in Roman, civil, and common law (Part II-A) and argue that these restrictions all share a common purpose: the desire to maintain the bequeathed property within the family, conceived as a bloodline (Part II-B).

## A. Gifts, Inheritances, and the Married Couple

The exclusionary provisions we have analyzed thus far created a clear distinction between gifts made to a spouse by a third party, and gifts made to the spouse by the other spouse. In focusing on the former, they make no restrictions on spouses' ability to make gifts to one another, or to make gifts to third parties. At various points in the past, however, family and succession law have restricted gratuitous transactions between the spouses' families by limiting gift-giving and testamentary freedom in these

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81 See Dagan & Frantz, *supra* note 64 at 219. See also Hyland, *supra* note 74 at 20–21.

three different types of interactions—which we will analyze in turn (Parts II-A-1 to II-A-3), although we will see that the structure of property law also contains certain rules intending to have the same effect (Part II-A-4).

### *1. Gifts and Inheritances from Third Parties*

Canadian legislation on family property specifically excludes gifts and inheritances made by a third party.[82] This includes gifts or inheritances bequeathed by the spouses' relatives, by friends, or by strangers, but excludes gifts or inheritances bequeathed by one of the spouses (whether to the other spouse or to a third party). Although the notion of third-party donor or testator is broad, it seems that the relationship most often envisaged is that of an ascendant[83] transferring property to their descendant.

The *Civil Code of Québec*'s predecessor was more precise in discussing gifts made by third parties and incorporated both rules applicable solely to gifts made by an ascendant to a descendant, and rules for other third parties. Article 1276 of the *Civil Code of Lower Canada* specified that gifts and inheritances composed of immoveable property made by ascendants of one of the spouses to either one of the spouses, or to both spouses, were deemed to have been made only to the donor's

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82 See Ontario *FLA*, *supra* note 1, s 4(2)(1); British Columbia *FLA*, *supra* note 8, s 85(1)(b.1); *Family Law Act*, RSA 2003, c F-4.5, s 7(2)(a); arts 415 al 4, 450(2) CCQ; *Droit de la famille – 1463*, [1991] RJQ 2514, [1991] RDF 698 (CA).

83 See Kouri et al, *supra* note 44, sub verbo "ascendant" ("(*Pers.*) Progenitor of a person. For ex., mother, father, grandparent").

presumptive heir—whether the deed listed them, their spouse, or the couple as a recipient. As such, an immoveable (a house or a parcel of land, for instance) received by either one of the spouses or by the couple from the ascendant of one of them would presumptively belong to the spouse meant to inherit it. This presumption was subject to the exception of an explicit declaration by the donor or testator that they wished to do otherwise and grant the title to the spouse of their presumptive heir or the couple. Article 1276 further added that immoveables gifted to or inherited by either spouse or by the couple from any individual whom they were not descendants of would be treated in the opposite way and enter the community without exception. As such, the *Civil Code of Lower Canada*'s default disposition was to include all gifts and inheritances received from individuals unrelated to the couple into their joint mass of assets (the opposite of our current statutes' approach), and exclude those gifts and inheritances made by ascendants of the spouses, taking special care to place them within the individual mass of assets of the descendant—not necessarily that of the intended recipient—by disregarding the name on the deed if need be or if insufficiently clear. The article thus stated a clear presumption in favour of the ascendant-descendant relationship. While today's exclusions in the *Civil Code of Québec* have extended the definition of excluded gifts and inheritances to moveables as well as immoveables (perhaps as an acknowledgement that family wealth is decreasingly tied to land) and to gifts and inheritances by strangers as well as those by ascendants (perhaps conceding that families fit less and less in traditional moulds), the spectre of the family land and family house remain the historical backdrop for such exclusions, and the examples discussed by both common law and civil law authors and legislators

remain tied to the family and to transfers from ascendants to the spouses.[84]

The *Civil Code of Lower Canada*'s differentiation of gifts and inheritances from ascendants, and those from nonascendants, accords with the view that gifts and inheritances are excluded because of the relationship between the donor or testator and the recipient, rather than because of the labour expended to acquire the gift. A third party external to the family was not understood to have a bond strong enough with the recipient to justify the gift or inheritance, so this transfer must have been justified by actions, and should be incorporated into the community. Even today, the exclusion must be justified by a family-like relationship; though today's law incorporates a more inclusive and broader notion of these relationships.

### *2. Gifts and Inheritances between Spouses*

Today's inclusion of gifts between spouses in the shared mass of assets is justified by the concern that excluding such transfers would allow spouses to bypass the default matrimonial regimes by allowing them to exclude property from the shared mass of assets indirectly.[85] In the past,

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84 See e.g. Robert M Halpern, ed, *Property Rights and Obligations under Ontario Family Law* (Toronto: Canada Law Book, 2002) at 494–96; Heakes, *supra* note 73 at 169, n 1 ("[t]he Gifting of real estate from parents to their children [is] the classical form of intergenerational family wealth distribution because of land's historical position as the almost exclusive store of economic value in ancient society").

85 In the civil law, interspousal gifts are included in the shared mass of assets through the family patrimony (see Tétrault, *supra* note 2 at 227–28; Castelli & Goubau, *supra* note 54 at 131; *Droit de la famille – 1463*, *supra* note 82). In most statutes equivalent to Ontario's *Family*

interspousal gifts have played different roles: at common law, gifts between spouses were impossible until wives became legally capable of holding and transferring property; gifts from a husband to his wife were void, and wives had no property to transfer.[86] A similar limitation existed in some northern regions of France during the *Ancien Régime*, based not on technical limitations of legal capacity, but rather on a clear desire to keep the property of the wife's family and that of the husband's separate.[87]

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*Law Act*, only gifts and inheritances from third persons are excluded from the shared mass of assets—interspousal gifts are thus included. See e.g. Ontario *FLA*, *supra* note 1, s 4(2)(1); British Columbia *FLA*, *supra* note 8, s 85(1)(b.1). Inheritances between spouses pose a different problem, unrelated to their potential inclusion in the shared mass of assets (as the inheritance would only come to be once the core of assets has ceased to exist due to the death of one spouse). Rather, interspousal inheritances create a problematic overlap between the recipient's shared mass of assets and the inheritance that the recipient receives from the deceased spouse.

86 See Hyland, *supra* note 74 at para 554. Note that an exception was possible: a husband could make a gift to the wife's dower.

87 See *ibid* at para 546 [footnotes omitted]:

> Because, at the time, a wife was not considered part of her husband's family and did not inherit from him, the goal of the prohibition seems to have been to prevent property from passing between unrelated families. Successions law was based on lineage. The customary maxim was *paterna paternis, materna maternis*—the father's property was to descend to the father's kin and the mother's to the mother's. The marriage bed, as Le Roy Ladurie wrote, was simply a piece of furniture. The customs smiled on children, not on love.

See also Billette, *supra* note 37 ("[l]'ancien droit qui ne négligeait pas les occasions de protéger les biens de famille et de les conserver dans la branche d'où ils venaient, ne manqua pas . . . [d'adopter la

This was the case of the *Coutume de Paris*, adopted in Quebec in 1664, and carried on to the *Civil Code of Lower Canada*.[88] Other regions allowed such gifts but considered them revocable until the death of the donating spouse. The rest of France also embraced this latter practice when the *Code civil des Français* was adopted in 1804, and the "conservation of property within the families became a principle to be fought."[89]

The prohibition on interspousal gifts in civilian systems was itself inherited from Roman law.[90] Women married under Roman law could enter one of two kinds of marriage: *cum manu* (a matrimonial regime in which their legal status was tied to that of their husband) or *sine manu* (in which their legal status remained tied to their father). The question of interspousal gifts was moot for wives married *cum manu*, as they were subsumed under their husband's power (*potestas*) and could not own property on their own until their husband's death. However, it became increasingly relevant as marriages *sine manu* became more

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prohibition des donations entre époux], non seulement pour les donations, mais aussi pour les testaments" at 179).

88 See Zoltvany, *supra* note 12 at 369; Gilles, *supra* note 36 at 121; arts 770, 1265 CCLC; Burman, *supra* note 57 at 157. See also Billette, *supra* note 37 at 179 (stating that this rule was also extended to testamentary gifts between spouses). But see Castelli, *supra* note 38 at 416 (arguing that the prohibition of interspousal gifts was not due to a desire to maintain the property of the bloodlines separate, but to protect the spouses from being tied to a gift made in an instant of passion or under undue pressure from the other spouse).

89 Billette, *supra* note 37 at 179 [translated by author]. See also art 1096 CcF; Hyland, *supra* note 74 at para 547.

90 See Billette, *supra* note 37 at 179.

prevalent (towards the end of the Roman Republic).[91] Wives married *sine manu* became legally independent (*sui juris*) at the death of their father or the patriarch of their family (*paterfamilias*). Thus, they could own, transfer, and receive property while married. In such a marriage, normal gifts (*dona*) would be conceivable between spouses but would be subject to an absolute prohibition.[92] While no clear justification exists for this prohibition,[93] its effect was clearly to keep the property of each spouse's bloodline separate.[94]

### *3. Gifts and Inheritances to Third Parties*

Today's Canadian common and civil laws do not restrict spouses' ability to make gifts or select heirs (outside of some specific provisions meant to ensure that a spouse does not waste the family property before a separation in order to avoid its equal or fair partition).[95] In contrast, many civilian jurisdictions maintain a regime of forced

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91 See Hyland, *supra* note 74 at paras 541–42.

92 See *ibid*; John P Dawson, *Gifts and Promises: Continental and American Law Compared* (New Haven: Yale University Press, 1980) at 14–15.

93 See Hyland, *supra* note 74 at para 543, listing many possible justifications for the prohibition but noting that "none of the justifications was convincing, even when considered from the point of view of the Roman jurists."

94 This is the justification that John Dawson prefers: "There must have been another reason: much more concern than the surviving sources show over the diversion of assets from one family line to another, enriching the family of the acquisitive spouse" (Dawson, *supra* note 92 at 14).

95 See e.g. arts 422, 471 CCQ.

heirship inherited from Roman law, which mandates that the heirs of the deceased necessarily inherit a specific share of the estate.[96] Such regimes are meant to "protect[] the heirs against the alienation of family resources"[97] and are arguably working from a presumption that the property in question does not belong to the individual entirely, but is meant to belong to the family. The family is conceived as a bloodline (the intended heirs are the children), whose interests supersede those of the testator in such a case. In Quebec, three types of restrictions upon a spouse's ability to make gifts or bequeath property to third parties outside the bloodline were inherited from the *Ancien Régime* and are clearly meant to protect the property of the bloodline: the *réserve coutumière*, the *légitime*, and the *édit de secondes noces*. There are no equivalents for these restrictions in the common law.

Quebec inherited the *réserve coutumière* from French law, where it had evolved in the middle ages—though, per J.-Émile Billette, it was "a tradition that went back to the furthest eras of civilization."[98] The *réserve coutumière*, which has now fused with the *légitime* to

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96 See Hyland, *supra* note 74 ("[i]f the decedent has made gratuitous transfers in excess of the disposable share, bequests are reduced, and, if that reduction proves insufficient, inter vivos gifts too are recalled" at para 1343). France, for instance, maintains a "réserve héréditaire" (art 912 C civ).

97 Hyland, *supra* note 74 at para 1343. See also Germain Brière, *Donations, substitutions et fiducie* (Montréal: Wilson & Lafleur, 1988) at 9 (suggesting that gifts are dangerous because they can reduce the property that will be left to heirs, and that restrictions upon an individual's ability to make gifts indirectly protects that individual's family).

98 Billette, *supra* note 37 at 85 [translated by author].

create the *réserve héréditaire* in French law, was set aside in 1774 in Quebec.[99] The *réserve coutumière* consisted of four fifths of an individual's estate, which were to be inherited by their kin. If the property left in the deceased's estate after all bequests had been subtracted was insufficient to cover the *réserve coutumière*, gifts and legacies to third parties would be reduced to satisfy it.[100] The purpose behind these provisions was clearly the desire to maintain property within the family, which was conceived of as kinship.[101]

The *légitime*, originating from Roman law, reflected a moral obligation that the deceased owed to their descendants.[102] The *légitime* was calculated from the property that the deceased had left *ab intestate* and that was disposed of by gift or legacy. If the estate was insufficient to cover the minimum amount owed as the *légitime*, descendants could recall legacies as well as gifts made during the lifetime of the deceased in order to satisfy the *légitime*.[103] Both the *légitime* and the *réserve coutumière* had a conception of the family centred on blood ties and

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99 See *Quebec Act, 1774* (UK), c 83, reprinted in RSC 1985, Appendix II, No 5 [*Quebec Act*]. See also Castelli, *supra* note 38 at 441.

100 See art 292 *Coutume de Paris*; P-B Mignault, *Le droit civil canadien*, t 4 (Montréal: Librairie de droit et de jurisprudence, 1899) at 19; Billette, *supra* note 37 at 87.

101 See Billette, *supra* note 37 at 86–87.

102 See *ibid*.

103 See art 298 *Coutume de Paris*; Brière, *supra* note 97 at 9; Mignault, *supra* note 100 at 19–21. The *légitime* was abolished in 1801 by the *Acte pour expliquer et amender la Loi concernant les Testaments et Ordonnances de dernière volonté* (UK), 41 Geo III, c 4.

aimed at maintaining the property inherited within that family.[104]

The concern about maintaining property within bloodlines is particularly salient in the context of the third restriction inherited from the *Coutume de Paris*: the *édit de secondes noces* (the "*édit*"). The *édit* originated in Roman law and was imported into French law by statute in 1560. As its name suggests, this restriction upon testamentary freedom was concerned with spouses (in particular, widows) entering a second marriage. The *édit*'s focus was on ensuring that the property inherited from the deceased spouse not be transferred to the new spouse's family, but that it be inherited (for the most part) by the children of the first marriage.[105] The restriction intended that, upon the death of their remarried parent, the children of the first marriage would receive as large a part of this parent's estate as that awarded to any individual from their parent's new family.[106] It also prohibited spouses who remarried from transferring the property of their deceased spouse to their new spouse by gift or bequest and from alienating this property to the detriment of the children from their first marriage.[107] Thus, the *édit* increased the likelihood that property would be inherited by the children of the first

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104 See Sylvio Normand, "La codification de 1866: contexte et impact" in H Patrick Glenn, ed, *Droit québécois et droit français: communauté, autonomie, concordance* (Cowansville: Editions Yvon Blais, 1993) 43 at 50–51; Castelli, *supra* note 38 at 422.

105 See Mignault, *supra* note 100 at 22; Billette, *supra* note 37 at 89.

106 See Mignault, *supra* note 100 at 22–24; Brière, *supra* note 97 at 9; Billette, *supra* note 37 at 89.

107 See Brière, *supra* note 97 at 9; Billette, *supra* note 37 at 89.

marriage, rather than be transferred into a different bloodline.

These practices limiting individuals' ability to make gifts and bequests were eventually abolished in Quebec due to their incompatibility with the principle of testamentary freedom, which, as a result of the common law's influence in Quebec, was a major element of the reform of Quebec's civil law when the *Civil Code of Lower Canada* was drafted.[108] The historical importance of freedom of testation in the common law explains the absence of such dispositions in common law Canada.

### *4. Property Law and the Bloodline's Inherited Lands*

The ramifications of the exclusionary logic of the bloodline family and of the importance of maintaining property (especially real property rather than its equivalent value) within the bloodline can be gleaned in other aspects of property law in both Quebec and the common law provinces. Until 1855, for instance, through the right of *retrait lignager* (the "*retrait*"), an individual whose family member had sold an immoveable family asset to a third party was able—as of right—to intervene in the transaction within a year and a day after its completion to reclaim that property (by reimbursing its purchaser).[109] This right was only applicable to immoveables that had been owned by a spouse before their marriage or that they had inherited from an ascendant during the marriage.[110] Although the *retrait*

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108 See Billette, *supra* note 37 at 88.

109 See Normand, *supra* note 104 at 50; Castelli, *supra* note 38 at 444.

110 See Normand, *supra* note 104 at 50.

was rarely executed,[111] its existence is a clear indication of the great importance attached to the link between the family and its property by French law, which was imported into Quebec with the *Coutume de Paris*. This was eloquently noted by Maximilien Bibaud in objecting to its abolition:

> Le retrait lignager était fondé sur la raison du sang et n'était établi que pour conserver dans les familles les héritages, qui en sont le relief et qui forment une partie des marques de leur ancienneté, comme l'observe notre feudiste canadien Cugnet. Mais nous sommes aujourd'hui sous un gouvernement tout différent de celui qui avait implanté en Canada toutes les vieilles institutions françaises. Bien loin de se montrer jaloux de conserver les biens dans les familles, il a voulu qu'on pût déshériter ses enfants sans raison en faveur d'un étranger, sans que ces héritiers naturels pussent proférer la moindre plainte. . . . Le retrait se trouve directement contraire au génie de nos compatriotes anglo saxons, qui les porte à éloigner tout obstacle à l'expédition assurée des affaires et des transactions, et un Anglais qui achète s'imagine bien devenir le propriétaire incommutable du fonds qu'il acquiert.[112]

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111 See Castelli, *supra* note 38 at 432.

112 Quoted in Normand, *supra* note 104 at 50.

With the *retrait lignager*, even the sale of property was thus confined to narrower limits in the interests of keeping property within the family bloodline.

As pointed out by Bibaud, no similar right existed to protect heirs in the common law.[113] Yet, looking at the kinds of interests granted to wives and husbands in inherited property shows that this system was also structured in a manner that promoted the retention of inherited property within the bloodline, despite wives' incapacity to hold property. In Canadian common law jurisdictions, as long as wives had no legal status, they could not own personal property. Under the default regime (without entering into a prenuptial agreement or being the beneficiary of a trust) wives "w[ere] seised [of their freeholds], becoming entitled [instead] to their use and to rents and profits."[114] A wife was no longer capable of disposing of the land without her husband's consent, whereas he could dispose of it to the extent of his own interest, which was limited by curtesy if the wife had a child.[115] If the wife died, the husband would thus have a life estate in the land;[116] if the husband predeceased the wife, she would recover her rights over the land. Personalty, on the other hand, would pass to the husband upon marriage and he could dispose of it absolutely. Thus, while personal property would be lost to the wife upon marriage, there seemed to be a concern to keep real property in the hands of the wife if she outlived her

113 See *Ibid*.

114 Laskin, *supra* note 29 at 70.

115 See *ibid* at 71.

116 See *ibid* at 70–71.

husband and if the land had been gifted to her or inherited by her, as opposed to her husband, or to ensure that her descendants inherited the land if she predeceased him. This concern cannot simply be attributed to a desire to secure housing and provide for the wife's basic needs once she became a widow, as the mechanism of dower was meant to serve this purpose.[117] Rather, it might hint at a desire to maintain a link between the wife and her inherited or gifted property, with the husband's life interest being a necessary element to ensure the land could be managed during their marriage. Once wives were granted legal personality in the common law, spouses lived in a de facto separate property regime: each continued owning the property they had accumulated before marriage, and each held titles to the property they received during the marriage. There was no mass of shared assets from which to exclude gifts and inheritances.

### B. Historically, Restrictions on Gift Giving and Testamentary Freedom Protected the Bloodline's Property

While the notion of joint efforts and partnership in a marriage is relatively new (as is that of equality between the spouses), the exclusion of gifts, inheritances, or property otherwise perceived as belonging to a bloodline from a common mass of assets to be divided upon the separation of the spouses (through divorce, death, or other types of circumstances) has been around since Roman Law at least. As we have seen, many types of provisions have

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117 See *ibid* at 72–73. Dower granted the wife a life interest in one-third of her husband's freeholds of inheritance if she survived him; it is deemed to have been replaced, mainly, with homestead legislation.

attempted to keep this type of property within the family, perceived as a bloodline, including: the *réserve coutumière*, the *légitime*, the *édit de secondes noces*, the prohibition of gifts between spouses, and the relabeling of gifts to a spouse when they are descendants of the donor or testator. The exclusion of gifts and inheritances from the common mass of assets to be divided upon a couple's separation fits with the evolution of this framework and is arguably the newest iteration of the desire to maintain the property within the family-as-bloodline. The exclusion in today's matrimonial regimes shares with the *Civil Code of Lower Canada*'s provisions on the relabeling of gifts or inheritances to a descendent spouse the fact that, although mandatory, it is not a prohibition: there are clearly laid out ways to bypass it. This can be done by the donor or testator if they are clear in their intent to make the gift to both spouses, or by the recipient if they spend, invest, or repurpose the gift or inheritance in such a way as to make it enter the joint mass of assets.[118] A prenuptial or divorce agreement can also vary these rules, and allow the spouses to share the value of the gifted or inherited property.[119] In this sense, the exclusion of gifts and inheritances found in current matrimonial regimes is following the trend of protecting the property of the bloodline by preventing the spouse who married into the bloodline from sharing this property when the marriage ends. However, current matrimonial regimes are also infused with a greater interest in the will of the spouse or spouses and respect for the will of the testator or donor.

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118 See e.g. art 450(2) CCQ; Ontario *FLA*, *supra* note 1, s 4(2)(2).

119 See e.g. art 431 CCQ; Ontario *FLA*, *supra* note 1, s 4(2)(6).

The exclusion of gifts and inheritances is a logical fit in Quebec civil law, given the tenuous relationship between French civil law and liberalities. Although freedom of testation had done away with much of the legislation restricting bequests, the mistrust towards these sorts of transactions—the sense that they do not quite fit within the structure of private law, that they are a danger to the family[120]—remains in the structure of the civil law, and most likely in the minds of legislators and judges. While the common law has done less to outlaw gratuitous transactions within the family, likely due to its more pronounced belief in freedom of testation, its historical reluctance to accommodate gratuitous transactions certainly suggests that, in seeking inspiration from the civil law's regime for family property law, this exclusion seemed like a logical fit. The fact that the exclusion is one of the most consistent aspects of Canadian matrimonial regimes is, consequently, not surprising and conveys a message about the law's current conception of families and the individuals that compose them. The exclusion of gifts and inheritances from the shared mass of assets has a symbolic and communicative value as much as it does a practical one. As such, we ought to consider whether this exclusion has struck the right balance between the promotion of autonomy and equality of the spouses, freedom of testation, and the promotion of marriage as a partnership.

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120 See Hyland, *supra* note 74 at 9–10 ("[t]he survival of the family as an institution seems to depend on confining gift giving within narrow limits" at 10).

## III. EXCLUDING GIFTS AND INHERITANCES TODAY: PRIORITIZING BLOODLINE OVER PARTNERSHIP?

The reforms to matrimonial regimes in Canada introduced many new notions into both the civil and common law traditions. While the regime of acquests was an old structure imported from the *Ancien Régime*, it was a revolutionary regime to introduce into the common law. The family patrimony was just as revolutionary in the civil law; there is still no equivalent to it in France or other civil law jurisdictions. Contrasting with these innovations is the exclusion of gifts and inheritances, an awkward fit that imports the remnants of the old system into the new: the maintenance of gifted and inherited property within the bloodlines into a system that values partnership, equity, sharing, and choice. The justification of this exclusion of gifts and inheritances as not resulting from the joint efforts of the couple rests on the traditional notion of the family as bloodline. Thus, the current system sends messages that are imprinted with this anachronism. Parts I and II of this article analyzed in some depth the exclusion of gifts and inheritances from matrimonial regimes and its origins. Part III will now take a step back and focus on the trajectory of the private law's conception of the family by using a framework presented by the works of Mireille Castelli and Christine Morin in the context of the law of successions (Part III-A). We will then transpose our previous analysis of the exclusion of gifts and inheritances into this framework (Part III-B) and find that the exclusion of gifts and inheritances from the shared mass of assets is indeed an outlier that should perhaps be addressed (Part III-C).

## A. Succession Law and the Family: Shifting the Balance between Blood, Individual, and Couple

In an analysis of succession law published in 1973, Mireille Castelli put forward three conceptions of individuals' relationships with their patrimony, which she used to study the evolution of succession law in Quebec and France since the *Coutume de Paris*.[121] Christine Morin, in a thesis published in 2008, used this same framework to analyze the evolution of succession law until recently.[122] Both authors used this framework to study an individual's relationship to their property in the civil law through the prism of the patrimony which is at the heart of the civilian concept of property. However, the three conceptions of the relationship between individual and property that they describe can easily be transposed to the couple in both the civil and common law. The three conceptions outlined by Castelli are the those tied to the bloodline (*conception lignagère ou familiale*, according to which the property owned by an individual is also the subject of rights belonging to members of the individual's bloodline family), the individual (*conception personnelle*, whereby only the individual holds rights to their property), and the couple (*conception conjugale*, which considers that the property of an individual is in some ways "co-owned" and meant to profit their spouse).[123]

The bloodline conception was the prevalent framework in the *Coutume de Paris*, which had put in place

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121 See Castelli, *supra* note 38.

122 See Morin, *supra* note 53.

123 See Castelli, *supra* note 38 at 413–17.

multiple structures to ensure that property remain within the bloodline family.[124] The personal conception is reflected in the abolition of some restrictions on gift-giving and inheritance law, such as the lifting of the prohibition of interspousal bequests with the 1774 *Quebec Act*,[125] which Castelli attributes to the fact that that legislator no longer feared the mixing of bloodlines' property.[126] According to the author, this is an intermediary stage, where the family remains more closely associated with the bloodline than the couple or the marriage. The conjugal conception would consider the spouse's property as destined for the use of the family, which is then conceived of as mainly the couple, and to some extent their children.[127] The conception of the bloodline family needs to be shed in order for the conjugal conception to take hold.[128] Castelli argues that the emergence of the conjugal conception in Quebec is tied to the great mobility of its population; as a result, husbands often placed their wives in charge of their affairs and property while they were away, and made them their universal legatee.[129] Morin sees the conjugal conception reflected most strongly in the reforms leading to the

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124 See Castelli, *supra* note 38 at 413–14. See also above, Part II-A, for an overview of these measures. Castelli point out, however, that these legislated provisions were in conflict with the individualistic practice of Quebeckers (see *ibid* at 414). See also Christine Morin, *supra* note 53 at 74–78.

125 *Supra*, note 99. See Castelli, *supra* note 38 at 433; Christine Morin, *supra* note 53 at 80.

126 See Castelli, *supra* note 38 at 415.

127 See *ibid* at 416, 474.

128 See *ibid* at 417.

129 See *ibid* at 466.

creation of the family patrimony: although the *Civil Code of Québec* continues to conceive of the patrimony as individual, "the *Code* confers a conjugal character to the property that composes the family patrimony since their value is divisible between the spouses at the end of their union and the owner cannot oppose themselves to the division."[130] The family patrimony accords with Castelli's conjugal conception since it takes the spouse in consideration first and foremost, and while children may benefit indirectly from the family patrimony they are not its intended beneficiaries.

According to Castelli and Morin, the *Coutume de Paris* therefore symbolically embodied the bloodline conception through the instruments we have analyzed in Part II-A, although in practice Quebeckers have always been tied more closely to the individual conception. The conjugal conception would also have roots that extend to the beginning of the colony, although its growth has been slower than that of the individual conception, and it has only flowered with the creation of the family patrimony.

### B. Excluding Gifts and Inheritances: Primacy of Blood or Spouse's Choice?

There is no doubt that the provisions from the *Coutume de Paris*, Roman law, and the structure of property law in common law studied in Part II-A, above, subscribe exactly to what Castelli termed the *conception lignagère*, where "spouses are . . . above all else, members of two different

130 Christine Morin, *supra* note 53 at 355–56 [translated by author].

families with opposing interests."[131] The notion of the family as a bloodline suggests that we consider the family in terms of ascendants and descendants, or the vertical relations on a family tree, rather than the horizontal links that connect spouses. The historical examples of prohibitions of interspousal gifts (found in both civil and common law) or the re-classification of a gift upon separation in the *Civil Code of Lower Canada* clearly point to a fear of letting the property of a bloodline fall into the hands of another through marriage, and the prioritization of the bloodline over the marriage (even at a time when the most common reason for ending a marriage was death, rather than separation or divorce).

The promise of equality that came with the abolition of the husband's overarching personality and authority over the household, and that of the differential duties of the spouses, brought with it the suggestion that spouses be seen as individuals in marriage, that their individual personality and rights not be affected by the fact of marriage, nor their chance to an equal share in the couples' property upon divorce. With their own rights and personality, spouses are perceived as individuals in society, outside of the couple where before only the husband was able to bind the family. The fact that spouses retain the property they had before marriage in their individual mass of assets is a testament to this focus on the individual, as is matrimonial regimes' unanimous decision to keep damages for personal injury as part of individual masses of

131 Castelli, *supra* note 38 at 467 [translated by author].

property.[132] Reforms first to succession law and then to matrimonial regimes in Quebec and in the common law have indeed, as Castelli and Morin suggest, done away with many of the restrictions to gift giving and freedom of testation, in a move that is suggestive of the individual or personal conception put forward by Castelli. Where gifts and inheritances are concerned, the *Civil Code of Lower Canada*, the *Civil Code of Québec*, and the common law have all made space over the past few decades for the will of the spouses to override that of the donor and allow for the mixing and transfer of property between the bloodlines during and at the end of marriage.

Moreover, in putting forward a definition of marriage that equates the couple with a partnership, our current matrimonial regimes appear to be embracing the conjugal conception: the notion of "partnership" values the joint efforts of the two spouses and divides the property between them under the assumption that the partners desired it to be shared. The mandatory sharing of the family patrimony, in particular, pushes this conception the furthest. While we agree with Morin's assertion that the idea of the family patrimony truly embodies the conjugal conception,[133] and indeed find that this conception is present to some extent in all Canadian matrimonial regimes, the content of the family patrimony and of the shared mass of assets in the statutory regimes, in our opinion, mitigates this conception.

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132 See e.g. Ontario *FLA*, *supra* note 1, s 4(2)(3); British Columbia *FLA*, *supra* note 8, s 85(1)(c); Northwest Territories *FLA*, *supra* note 22, s 35(2)(b); art 454 al 1 CCQ.

133 See Christine Morin, *supra* note 53 at 355–56.

Even though spouses can transfer property between bloodlines much more freely today than they could ever before, a clear act is still required to transfer property from a spouse's individual mass of assets to the joint mass: the default is still that which respects the separation of property coming from bloodlines. Moreover, the current system requires that to maintain their inherited or gifted property as part of the individual mass of assets, a spouse must make "selfish" choices in handling that property: if it is used to benefit the couple or their children the gifted or inherited property will join the shared mass of property. If it is managed separately, it will remain in the recipient spouse's individual mass of assets. Thus, as far as this exclusion is concerned, the family-as-bloodline remains the default conception of the family, and the individual conception is introduced only by the recipient's clear choice. The conjugal conception is only a side-effect of this choice; that is, the property will only belong to the couple if an individual choice is made by the spouse to spend it for that purpose.

It strikes us that while the regimes *prima facie* put forward a conception that matches a conjugal understanding of the family and of spouses' relationship with their property, the exclusion of inherited and gifted property from the shared mass of assets is an anachronism that draws the spouse back to a bloodline conception of the family. As stated by Castelli, "[i]t is thus that even some institutions which, at first sight, would seem very favourable to partners and in contradiction with our affirmation, prove to be, in fact, deviations of old institutions which tend towards a conception tied to

bloodlines." [134] We believe that the exclusion of inheritances and gifts from the shared mass of assets in current matrimonial regimes forms one of these institutions which, although they seem at first glance in accordance with the ethos of the matrimonial regimes, are remnants of ancient institutions and carry with them the equally ancient concept of family equated to bloodlines. In our opinion, the presence of this anachronism undermines the importance granted to both the individual conception (notions of autonomy and choice) and the conjugal conception (notions of equity and sharing) that are also embedded in the matrimonial regimes.

### C. Remnants of the Bloodline: Reconsidering the Exclusion of Gifts and Inheritances

We return to a question asked at the outset of this article: insofar as our matrimonial property regimes' exclusion of inheritances and gifts is the remnant of a conception that equates the family with the spouse's bloodline, do we find that our legislation and its structure conceives of the couple as a unit, as a set of individuals, or as the temporary joining of two separate families? Moreover, if there is a disconnection between the objective and the conception set out by the regimes, and that embodied by the exclusion of gifts and inheritances, what ought to be done to remedy it?

Our current regimes clearly state that they consider the couple a form of partnership, and their property as the result of their joint endeavours. The matrimonial regimes and the *Civil Code of Québec* provide that spouses ought to contribute equally to the partnership, in accordance with

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134 Castelli, *supra* note 38 at 413 [translated by author].

their means.[135] The definition is purposive: the spouses contribute to the partnership and they have a common goal. The way in which the shared masses of assets are populated is also purposive: assets that are acquired while the couple is married are presumed to be acquired to serve the family; assets that would be part of the individual mass of property but are spent on the family join the common mass of assets. The purpose of the partnership is thus the wellbeing of the family, as the family of choice, the couple, and, where applicable, their descendants. In their daily lives, the spouses retain their individuality in their activities, but the purpose of these activities is centred on the family as a unit, which is reflected in the deferred-sharing scheme. Marriage under the default Canadian regimes thus sees the couple as a hybrid between a set of individuals and a nuclear family unit, the personal and the conjugal conceptions.[136] The mandatory family patrimony of Quebec, however, embodies a stronger notion of unity, both symbolically due to its name, as well as practically due to its mandatory nature. The term "patrimony" is the name, in civil law, of the metaphorical container that each person has and in which they carry the property they own. The term has a close affiliation with the notion of personality: each person has one and only one patrimony, and each patrimony is associated with only one person.[137]

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135 See e.g. art 396 CCQ.

136 In Castelli's perspective, the state of the law concerning liberalities in 1970s Quebec already matched the conjugal conception (Castelli, *supra* note 38 at 472). We note, however, that Castelli's focus was solely on the law of successions, whereas our focus on matrimonial regimes and its interaction with liberalities paints a slightly different picture.

137 See art 2 CCQ.

The notion of family patrimony thus suggests that the *Civil Code of Québec* looks at the family as it would a person.[138] The exclusion of inheritances and gifts is all the more jarring in the current context, because it speaks to a conception of the couple not as a set of individuals or a unit, but as a pair of separate families joining for period of time, while attempting to keep their property separate.

Let us return to a comment by Castelli: "[r]eleasing the patrimony from the shackles of the conception of bloodlines and its causes . . . is the most essential step towards admitting the partner into the family."[139] Could we argue that the exclusion of gifts and inheritances from the shared mass of assets is one such obstruction which prevents the spouses from fully entering one another's families—or the family which they create together?

If the exclusion of gifts and inheritances is a remnant of a conception of the family that our matrimonial legislation has shed in the pursuit of granting greater freedom of testation and equality regardless of gender—as we have argued that it is—we might indeed wonder whether excluding gifts and inheritances in today's regimes is still desirable. On the one hand, we might consider that gifts and inheritances are often the marker of a symbolic and emotional attachment between an individual and a lost loved one.[140] Would it be fair to

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138 The language of "family patrimony" is currently used in Quebec as well as in Yukon's French version of the *Family Property and Support Act* (*supra* note 16).

139 Castelli, *supra* note 38 at 417 [translated by author].

140 See Générosa Bras-Miranda, "La couleur des biens hérités" in Générosa Bras-Miranda & Benoît Moore, eds, *Mélanges Adrian*

require that a divorcing spouse have to potentially separate from the last tangible memory they have of a parent, just as the family they have created together with their spouse is disintegrating? Might we wish to draw a distinction between gifts and inheritances that are likely to hold significant monetary value rather than emotional?[141] On the other hand, our understanding of what "family" means evolves with our society, and is increasingly inclusive: marriage no longer takes account of sex or gender; de facto spouses are treated as spouses whose relationship has been formalized for the purposes of most legislation on family law outside of Quebec; rules on filiation are increasingly inclusive across the country; and kinship and ties created otherwise than by blood are playing a growing role in legacies.[142] In such a context, do we want to maintain an exclusion which, while attempting to keep the memory of a deceased loved one alive by keeping aside and intact the property they have left a spouse,[143] perpetuates the notion that blood is the basis for defining families?

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*Popovici : les couleurs du droit* (Montréal: Thémis, 2009) 11 at 14, 20–21; Jacques Beaulne, *Droit des successions*, 5th ed (Montréal: Wilson & Lafleur, 2016) at para 12.

141 See Jean Carbonnier, "Le statut des bijoux dans le droit matrimonial" in Raymond Verdier, dir, *Écrits* (Paris: Presses Universitaires de France, 2010) 403 at 420 (arguing that jewelry received as a gift during marriage cannot be considered family heirlooms due to their monetary value).

142 See e.g. Sue Westwood, "Complicating Kinship and Inheritance: Older Lesbians' and Gay Men's Will-Writing in England" (2015) 23:2 Fem Leg Stud 181.

143 See Bras-Miranda, *supra* note 140 at 29.

## CONCLUSION

Current matrimonial regimes are the result of an attempt to infuse matrimonial law with substantive, rather than formal, equality among spouses upon their divorce or separation. The introduction of divorce in federal legislation, followed by high-profile cases showcasing the unequal and unfair results of contemporary matrimonial regimes, have led to multiple reforms of the default matrimonial regimes in all Canadian provinces and territories, constructed around the idea of marriage as an economic partnership. In the context of these reforms, the exclusion of gifts and inheritances has been justified on the basis that such property is not born from the common efforts of the spouses. Our analysis of the tenuous relationship gifts and inheritances entertain with married couples has endeavoured to show that if these gratuitous transactions cannot be justified by the spouses' efforts, it is because private law has repeatedly considered them in the context of transfers from ascendants to descendants and has consistently raised obstacles to gratuitous transactions outside of this relationship.

Our analysis has focused on the married couple, which, according to our current matrimonial regimes, is a partnership of joint endeavours that carries with it a sense of equity and sharing, and a common goal—the wellbeing of the family. Yet, our regimes still exclude gifts and inheritances made to only one spouse, the single recipient: when it comes to gifts and inheritances, the regimes forget the marriage and turn to old habits and conceptions; the spouse is no longer a half of a couple, or even a single individual, but a family member belonging to a bloodline, the property of which is to be protected. In our view, this

exclusion of gifts and inheritances from the shared mass of assets of married couples is the symbol of an outdated conception of marriage and the family, a remnant that should lead us to question how we understand what constitutes a family and how we can foster equality, equity, and solidarity within that framework.