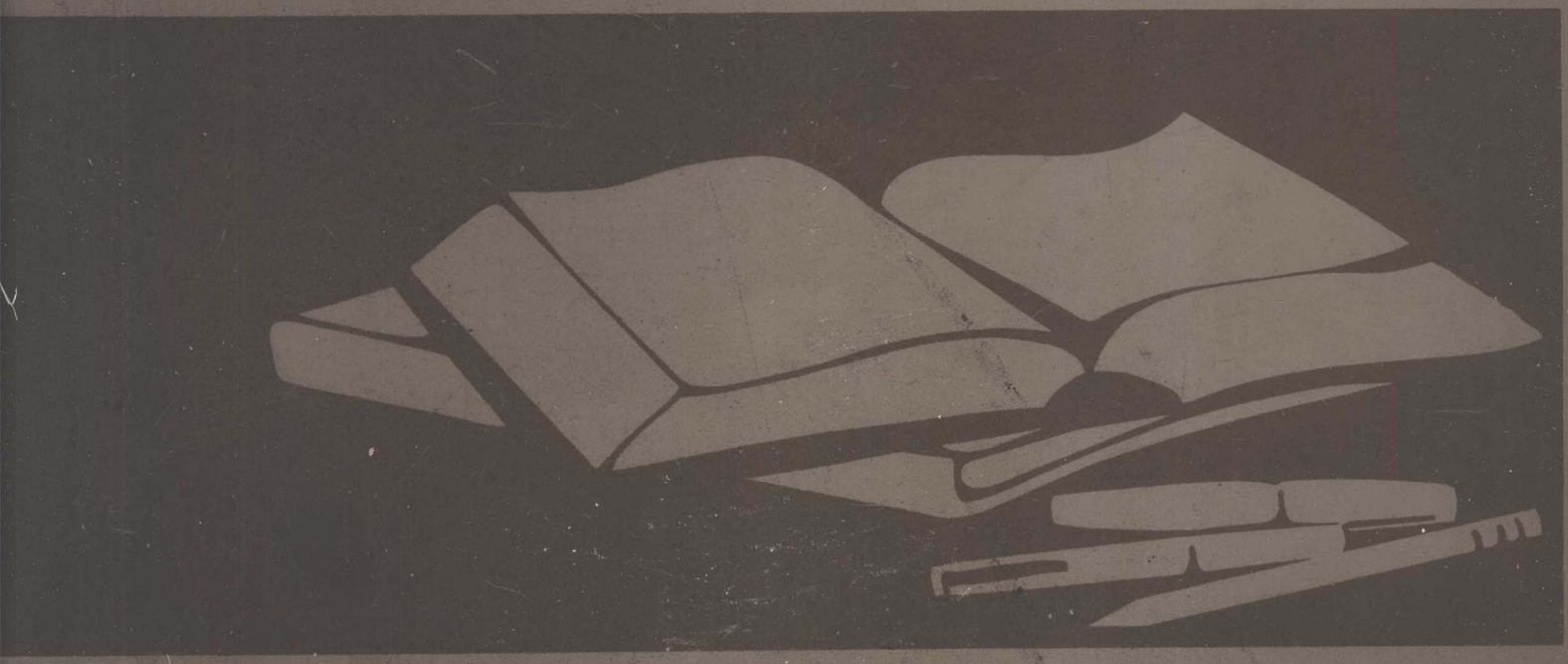

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FAMILY LAW UPDATE

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F A M I L Y L A W U P D A T E

FAMILY ASSETS

These materials were prepared by Professor Donald J. MacDougall of Vancouver, B.C., for Continuing Legal Education, December, 1982.

FAMILY ASSETS

C O N T E N T S

CONTENTS, continued

WHAT IS A FAMILY ASSET?

I. INTRODUCTION

In Quan v. Quan (Vancouver Registry No. 5936/D935859, November 4, 1981) Hardinge, L.J.S.C. commented:

> The definition of "family asset" in Section 45 of the Act is certainly sufficiently wide to encompass the great majority of any assets of either spouse in a marriage that would, at least during the continuation of the marriage, be regarded by most people as constituting a part of their mutual capital. Indeed, when read in conjunction with Sections 43 and 46 of the Act it is clear that, by its enactment, the Legislature has gone a very long way toward rectifying the imbalance in property rights between men and women whose marriages broke up in earlier days when the man had been essentially the breadwinner for the family and the woman the homemaker and child rearer. Wide as the Legislature has seen to open the door to enable deserving (and, perhaps, in some cases undeserving) wives to receive a share of the fruits acquired, at least in part, as a result of the direct labours of the husband and to which the wife may have made no direct contribution, it has not totally abolished the concept that there may be certain assets owned by one of the spouses that the other ought not to be entitled to a share of in the event the marriage breaks down. Had the Legislature not so intended, the definition of "family asset" it included in the Act would have been quite unnecessary. All that would have been required to have been said would have been that any property owned by either spouse is a family asset. The Legislature did not see fit to alter the law to that extent. It would be unjustifiable judicial legislation for me to so interpret the definition that was enacted.

Most lawyers would accept this assessment of the effect of the Family Relations Act 1978. However the language used to establish the boundaries between family assets and other assets is somewhat vague. This has led to some apparent inconsistencies in the judicial classification of particular assets. Moreover, even if an asset is determined to be a family asset, its distribution may be affected by the discretionary powers given to the court by s. 51 of the Act.

This paper will discuss the leading cases on sections 45 and 46 of the Act and the principles that the courts have developed to distinguish between family assets and other assets.

II. JOINTLY OWNED ASSETS

In Foy v. Foy (1981), 22 R.F.L. (2d) 331; 125 D.L.R. (3d) 764 and Beynon v. Beynon (1982), 135 D.L.R. (3d) 116; 27 B.C.L.R. 344 the B.C. Court of Appeal held that the Act applies to jointly owned property. It is true that s. 55(2) provides "(2) The rights under this Part are in addition to and not in substitution for rights under equity or any other law" but s. 55(1) provides that the Family Relations Act is to prevail over the Partition of Property Act and the Married Woman's Property Act in the case of conflict. Moreover s. 45(2) expressly refers to property owned "by one or both spouses" and s. 52(2)(g) authorizes a court to sever a joint tenancy.

The principal impact of these decisions arises from the application of s.51. In Beynon v. Benyon it was held that the jointly owned matrimonial home was a family asset but that the wife's share should be fixed at 25% of its value.

III. ORDINARILY USED FOR A FAMILY PURPOSE

Section 45(2) provides that "Property owned by one or both spouses and ordinarily used by a spouse or a minor child for a family purpose is a family asset". Before dealing with some of the peripheral questions that have arisen about s. 45(2), it should be noted that it does operate, almost automatically, on the basic family assets - the matrimonial home, the furniture, the car. Such assets are usually classified as family assets whether they were acquired during the marriage or owned by one of the parties prior to the marriage. Even in this core area problems can occasionally arise. For example, in Fong v. Fong (Vancouver Registry No. A802252, June 9, 1982) Anderson J. held that the husband's Rolls-Royce was his personal property and not a family asset despite evidence that when the husband went out with his wife they used the Rolls- Royce. He said:

> If this had been the only car in the family I may have come to a different conclusion. There was also a Cougar which was purchased for Mrs. Fong's use and a Capri which was used by all members of the family. On the facts as I find them, I cannot say that the Rolls-Royce was used for family purposes.

When we move to the other assets (e.g. a boat, a recreational property, jewellery, assets used in hobbies) the problem of the scope of "ordinarily used...for a family purpose" becomes more acute. The Act does not require use by the family. It is sufficient that the asset is used by "a spouse or a minor child". If the asset is in fact used by several members of the family the asset will almost certainly be classified as a family asset.

But when the asset is only used only by one member of the family (e.g. the Rolls-Royce in Fong v. Fong) it becomes necessary to examine what is meant by "ordinarily used...for a family purpose".

A court may emphasize the word "ordinarily" and hold that an asset was not a family asset because it was rarely, not ordinarily, used for a family purpose. But that assumes that we know what is meant by a "family purpose". In some provinces (e.g. Ontario) there is a statutory definition. For example s. 3(b) of the Family Law Reform Act (Ont.) defines "family assets" as follows:

> (b) 'family assets' means a matrimonial home as determined under Part III and property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes.

The Family Relations Act contains no definition of family purpose so we must turn to case law for guidance on the meaning of family purpose. In McLennan v. McLennan (1980), 17 R.F.L. (2d)

44; 20 B.C.L.R. 193 Catliff, L.J.S.C. held that furniture, purchased after separation by the husband and wife out of their separate incomes was not within the definition of a family asset. He proposed an interpretation of family purpose which has been adopted in some later cases:

> In my view the words "family purpose" mean a purpose connected with the whole family, not merely one or more individuals in it. While property may actually be used by only one member of the family, the purpose for its use must be related to the family group which ceases to exist in normal circumstances when spouses separate. I say "in normal circumstances" because it is possible that notwithstanding separation, property may be used for a purpose connected with both separated parts of the family, e.g. the post-separation purchase of recreational property for use by the whole family, though not necessarily at the same time. What disqualifies the husband's furniture - acquired after separation - as a family asset is not, in my view that the wife never participated in its use but that it was never acquired for purposes connected with the whole family.

Some comments should be made about that statement.

1. The Act appears to require a distinction to be drawn between (i) personal and (ii) family assets.

2. Catliff, J. explained that "family purpose" means that "the purpose for its use must be related to the family group" or "for purposes connected with the whole family". While this, clarification helps a little these descriptions are themselves vague and there remains uncertainty about their scope.

3. Because of the emphasis on purpose it is likely that a particular asset (e.g. a boat) may be classified as a family asset in one case and a personal asset in another. Consequently it is dangerous, albeit convenient, to attempt to categorize particular types of assets (e.g. boats, jewellery, etc.).

4. The courts will require information about the purpose underlying the use. But in peripheral cases there will rarely be adequate evidence of the purpose underlying the use of a particular asset. It is not sufficient to identify the reasons for acquiring the asset - because an asset may be acquired for personal use, such as a home acquired by a bachelor, and later be used for a family purpose and become a family asset. But individuals rarely analyze their changing motivations and a court which has to determine whether a particular asset was used for a family purpose may have to make that determination on the basis of (i) recent, perhaps self-serving statements of intent; (ii) past, perhaps casual and ill-considered, statements of intent; and (iii) whatever objective evidence there is as to who used the asset and in what circumstances.

IV. ORDINARILY USED

One cannot assume that any statutory language is surplusage that can be ignored. Even if an asset is used for a family purpose it will not be a family asset unless it is "ordinarily used" for such a purpose.

In Elsom v. Elsom (1982), 35 B.C.L.R. 293 Locke, J. had to deal with a boat that the husband owned in England. He quoted from the judgment of Steinberg U.F.C.J. in Taylor v. Taylor (1978), 6 R.F.L. (2d) 341:

> It would appear to me that the words "ordinarily used" in s.3 (b) [of the Ontario Act] should be interpreted in the same manner as Rand, J. interpreted the words "ordinarily resident" [in Thompson v. MN.R., [1946] S.C.R. 209]. Therefore, paraphrasing Rand J., ordinary user must mean user in the course of the customary life of the person concerned and should be contrasted with special or occasional or casual use.
>
> And continued:
>
> If this family unit had stayed together and prospered and the young boy grown up to ordinary course with his parents, considering the interest Elsom has and obviously will retain in his English origin interests and enterprises I cannot but think that this boat constituted part of what would be called the ordinary lifestyle of a comparatively wealthy family (Appeal Book, vol. 2 p.276). The unit is now broken; but up to the time of separation I think the boat was used as I have indicated above, though less frequently than would have taken place in the future.

It is likely that B.C. courts will continue to refer to Ontario cases on the interpretation of "ordinarily used" (see, for example Victoria and Grey Trust Co. v. Stewart (1981), 22 R.F.L. (2d) 283).

V. FOR A FAMILY PURPOSE

The courts' decisions in peripheral cases are not consistent. It is tempting to say that this is because evidence of intent is critical to the determination of the purpose underlying the use in the particular case. No doubt this is a partial explanation of the cases. To that extent lawyers should be scrupulous to ensure that evidence of purpose is brought to the attention of the court. But most of the inconsistencies seem to stem from the vagueness of the statutory language and the unsatisfactory evidence which the courts will have available on the purpose underlying the use of the asset.

To illustrate this let us consider three groups of cases:

(1) heirlooms, jewellery, furs

(2) hobbies

(3) investments

1. HEIRLOOMS, JEWELLERY, FURS

The courts have had difficulty in deciding whether heirlooms, jewellery and furs are family assets. It is not uncommon for them to be excluded from division under s.51 (d) as "gifts or inheritances" (e.g. Grant v. Grant (1982), 28 R.F.L. (2d) 457 ; Peskett v. Peskett (1979), 14 R.F.L. (2d) 154). Such decisions assume that the jewellery was a family asset subject to division. And there are cases to that effect. In Jarvis v. Jarvis (1979), 14 B.C.L.R. 324; 14 R.F.L. (2d) 1 a fur jacket purchased expressly for wear at the annual dance given by the husband's employer was held to be a family asset. Similarly in Hauptman v. Hauptman (1981), 32 B.C.L.R. 119 McLachlin J. concluded that the wife's furs and jewellery were family assets:

> The evidence discloses that they were bought in part for the creation and maintenance of harmony in the family Another reason for buying them, disclosed by the evidence,

> was the importance particularly to Dr. Hauptman, of making a favourable impression on colleagues and friends; this was a family which not only wished to live well but to be perceived as living well. These purposes were not personal to Mrs. Hauptman, rather they were family purposes.

Other cases in which jewellery was presumed to be a family asset are Peskett v. Peskett (supra) and Lee v. Lee (1980), 11 F.L.D. 493.

On the other hand in Fong v. Fong (1982), 28 R.F.L. (2d) 349 Anderson, L.J.S.C. held that neither the wife's, nor, inferentially, the husband's jewellery became family assets. In reaching that conclusion he noted the family's affluent lifestyle, the wife's admitted power to dispose of, or exchange, particular items and the husband's generosity to other family members. All of this was inconsistent with the husband's argument that they were purchased for a family purpose (i.e. as investments). Other cases in which jewellery and furs were held not to be family assets are McAllister v. McAllister (1980), 11 F.L.D. 518, Basi v. Basi (Victoria S.C. Registry Nos. 80/628 and 10928, April 7, 1981) and Simpkins v. Simpkins, [1981] 5 W.W.R. 598; 29 B.C.L.R. 340.

2. HOBBY CASES

The courts have had some difficulty in determining whether assets used in the course of some hobby or pastime are used for a family purpose.

In Robertshaw v. Robertshaw (No. 2), [1980] 2 W.W.R. 215; 17 B.C.L.R. 137 a boat and recreational property which only the husband used were held not to be family assets. In Beynon v. Beynon (1980), 23 B.C.L.R. 209 paintings occasionally displayed in the family home were held not to be a family asset. In Mayuk v. Mayuk (1980), 25 B.C.L.R. 57 the husband's photographic equipment used solely by him as a hobby was, on that account, held not to be a family asset. In Silverwood v. Silverwood (1981), 27 B.C.L.R. 392 it was held that the husband's printing equipment was not used for a family purpose.

On the other hand in Pongracz v. Pongracz (1980), 12 F.L.D. 71 the husband owned equipment for car racing. Houghton, L.J.S.C., said that "even if the [husband] alone was involved in the automotive hobby a hobby is a family purpose and thus the hobby assets are family assets". In Papineau v. Papineau (1981), 24 R.F.L. (2d) 375; 31 B.C.L.R. 363 Esson J. held that the husband's stamp collection was a family asset saying "the hobbies of each partner to the marriage can fairly be regarded as a family purpose". In Hauptman v. Hauptman (1981), 32 B.C.L.R. 119 McLachlin, J., relied on the Papineau case to hold that Dr. Hauptman's photographic equipment was a family asset. More recently a husband's gun collection (Leach v. Leach (Victoria S.C. Registry No. 202/81, May 17, 1982) and a wife's piano (Doyharcabal v. Doyharcabal Vancouver S.C. Registry Nos. A 802806 and 5936/D142593, June 24, 1982) were held to be family assets.

It may be possible to explain these cases in terms of the evidence of family purpose in the particular case. More often than not, however, that evidence will be slight and unsatisfactory.

3. ARE INVESTMENTS FOR A FAMILY PURPOSE?

Somewhat controversially the courts have held that investments can be "property...ordinarily used

for a family purpose". Frankly one must wonder whether the legislature intended s.45 (2) to stretch that far. It is arguable that s. 45(2) was intended to cover tangible property used, a physical sense, by members of the family. If it is not so limited, its scope is almost unlimited, given the inherent vagueness of "family purpose".

In Sinclair v. Sinclair (1979), 13 R.F.L. (2d) 352 Provenzano, L.J.S.C. was prepared to hold that a condominium in Alberta, bought for an investment and tax shelter, was used for a family purpose and thus a family asset. Locke, J., applied this reasoning in McDougall v. McDougall (New Westminster S.C. Registry No. D 010837, July 6, 1982) to hold that a duplex was a family asset. Perhaps the most controversial decision in this group is Jones v. Jones (Prince George S.C. Registry No. 5927-03191, May 11, 1982) in which it was held that a business developed by the husband was a family asset because it was his intent to create an asset of substantial value to provide for the retirement of himself and his wife.

In these cases the same result could have been reached under s. 45(3)(e) and s. 46. In the Sinclair and Jones cases the courts expressly referred to this alternative basis for their decisions. It is submitted that it would have been preferable if this had been the sole basis of the decisions. Given the vagueness of "family purpose" a broad interpretation of s.45 (2) is likely to lead to uncertainty and inconsistent decisions. Whether or not a particular asset is a family asset would depend on the courts interpretation of any evidence of intent rather than on any coherent social policy.

In Samuels v. Samuels (1981), 22 R.F.L. (2d) 392; 30 B.C.L.C. 186 Catliff, L.J.S.C. held that the fact that the family used the income from certain properties which the husband inherited did not make the properties themselves family assets: "Section 45(2) is concerned with how property is ordinarily used, not with how income derived from it is ordinarily spent". Locke, J. followed Samuels v. Samuels in McDougall v. McDougall (New Westminster S.C. Registry No. D 010837.

VI. DEFINING THE ASSET

Suppose that a house, which is a family asset because it has been ordinarily used for a family purpose, is situated on approximately 2.7 acres of fenced land. Adjoining this is a further 145 acres that has been used for various purposes. Locke, J. had to deal with these facts in Elsom v. Elsom (1982), 35 B.C.L.R. 293. He held that although there was some evidence that horses were kept on the adjoining land and that Mrs. Elsom had walked through some of it on occasion there was "simply not enough evidence of family usage to establish that land other than the 2.7 acres ought to be taken as land constituting part of the family dwelling". Locke, J. dealt with a similar problem in Laxton v. Laxton (1981), 21 R.F.L. (2d) 126; 26 B.C.L.R. 57.

VII. THE EFFECT OF A CHANGE IN USE

Can it be argued that an asset, which was a family asset because it was ordinarily used for a family purpose is no longer a family asset because of a change of use?

In Martelli v. Martelli (1981), 130 D.L.R. (3d) 300; 26 R.F.L. (2d) 1; 33 B.C.L.R. 145 the wife argued that the matrimonial home, which she owned, was not a family asset because the parties separated prior to 31st March, 1979, when the Family Relations Act was proclaimed in force. The house had not been "ordinarily used...for a family purpose" since that date. Lambert, J.A.,

delivering the judgment of the Court, said that s.84 required the courts to give the Act a retroactive operation.

> Its purpose is to make sure that if a separation or divorce occurs after 31st March, 1979 then all its consequences will be covered by the new Act...
>
> I do not have to consider in this appeal whether it is a rule that once an asset is a family asset it is always a family asset (unless otherwise dealt with in a marriage agreement, a separation agreement, or a court order under Part 3 of the Act). It is enough that I am satisfied that, apart from the transitional problems, the Lincoln Street property would not have lost its character as a family asset after the husband and children ceased to use the property for their purposes. My reason for reaching that conclusion is set out by Catliff, L.J.S.C. in Fennings v. Fennings (1979), 17 B.C.L.R. 267; 12 R.F.L. (2d) 78 at 78, namely that a de facto separation often results in cessation of the use of an asset for a family purpose before the triggering event, but if that caused the property to cease to be a family asset then the purpose of the Act would be frustrated. I leave for another day the question of whether a family asset can cease to be a family asset and, if so, how.

VIII. ONUS OF PROOF-USE

In doubtful cases an asset should be assumed to be ordinarily used for a family purpose because s.47 provides that the onus is on the spouse opposing a claim under s.43 to prove that it is not so used.

In McKinney v. McKinney (1980), 17 R.F.L. (2d) 308 the wife claimed that certain life insurance policies had been used for a family purpose. Spencer, L.J.S.C. (as he then was) upheld her claim in these words.

> No evidence of that (as collateral for a loan) or any other use was given in this case but the wife claims the policies as family assets in her pleadings and the onus is placed upon the defendant pursuant to s.47 [am. 1979, c.2, s.25] of the Act to prove that the property in question was not ordinarily used for a family purpose. No evidence having been led on that score, I find that the insurance policies were family assets.

There are, however, cases in which the courts have said that one spouse "has met the onus of s.47". For example in Laxton v. Laxton (1981), 21 R.F.L. (2d) 126; 26 B.C.L.R. 57 Locke J. said that the husband had proved that part of a farm, the so-called 19-acre bog or bottom land, had not been ordinarily used for a family purpose and hence was not a family asset.

Inferentially the same reasoning must have been used in all cases where an asset was held not to have been ordinarily used for a family purpose. However the courts do not always refer to s. 47.

IX. PARTICULAR ASSETS

Sections 45(3) and 46 extend the definition of family assets to include certain specific assets,

which might not be regarded as family assets under the "ordinary use" test. The most important addition is that provided by s. 45(3)(e) and s. 46 - "a right, share or an interest of a spouse in a venture to which money or moneys worth was directly or indirectly, contributed by or on behalf of the other spouse". That will require extended discussion. Before examining s. 45(3)(e) we should consider s. 45(3)(a) - (d).

1. SECTION 45(3)(a), (b)

Section 45(3)(a) and (b) are intended to cover the situations where an asset is not a family asset under s. 45(2) because it is not "owned by one or both of the spouses" but one of the spouses has an induced indirect interest in the asset through shares in a corporation, or a trust or a power of appointment. In fact most of the reported cases involve assets owned by a corporation.

Under s. 45(3)(a) "a share in a corporation" is a family asset "where a corporation...owns property that would be a family unit if owned by a spouse". Watts v. Watts (1980), 22 B.C.L.R. 91; 18 R.F.L. (2d) 184 provides a simple illustration of this section in operation. The husband owned shares in Middlepoint Park Estates Ltd. The company owned real estate which was used by the husband and wife as recreational property. Spencer, L.J.S.C. held that the husband's shares were a matrimonial asset.

A more complex situation arose in the recent case, Capozzi v. Capozzi (Vancouver S.C. Registry No. 5936/D 935363, September 14, 1982). In this case the husband owned shares representing a one-third interest in S. Ltd. which in turn held a one-third interest in C. Ltd. Two of the assets owned by C. Ltd. were a discotheque, "Tramps" (in whose development both the husband and wife participated) and a house used as the matrimonial home. The wife claimed that she was entitled to half of the husband's one-ninth interest in C. Ltd. Wetmore, L.J.S.C. directed the Registrar to ascertain the value of Tramps and the matrimonial home. The husband's shares in S. Ltd. were family assets to the extent of one-ninth of such values.

Wetmore, L.J.S.C. commented:

> The argument is that the corporate veil cannot be pierced in circumstances such as this because the asset does not exist for the benefit of one shareholder, but for all. With respect I do not think that is the scheme of the legislation. There is no attempt to lift the corporate veil and in essence strip assets used by one shareholder for a family purpose. The scheme is merely to look to the value of that asset and charge the spouse's shares in the company to the value of that asset.
>
> ...The scheme of the section clearly indictes the singular "corporation" includes the plural and further should even be interpreted as if the word "through" existed before the words "a corporation". The clean intention of the Act is to vest in the non-owning spouse an equity in assets used for family purposes. The simple expedient of setting up a chain of corporations should not be permitted to frustrate that legislative intent.

Section 45(3)(b) was invoked by Stewart, L.J.S.C. in Christensen v. Christensen (1980), 19 R.F.L. 240. In that case the property which constituted the matrimonial home had been transferred into the name of the Director, Veterans' Land Act for financing reasons. The learned judge referred to s. 45(3)(b)(ii) and said: