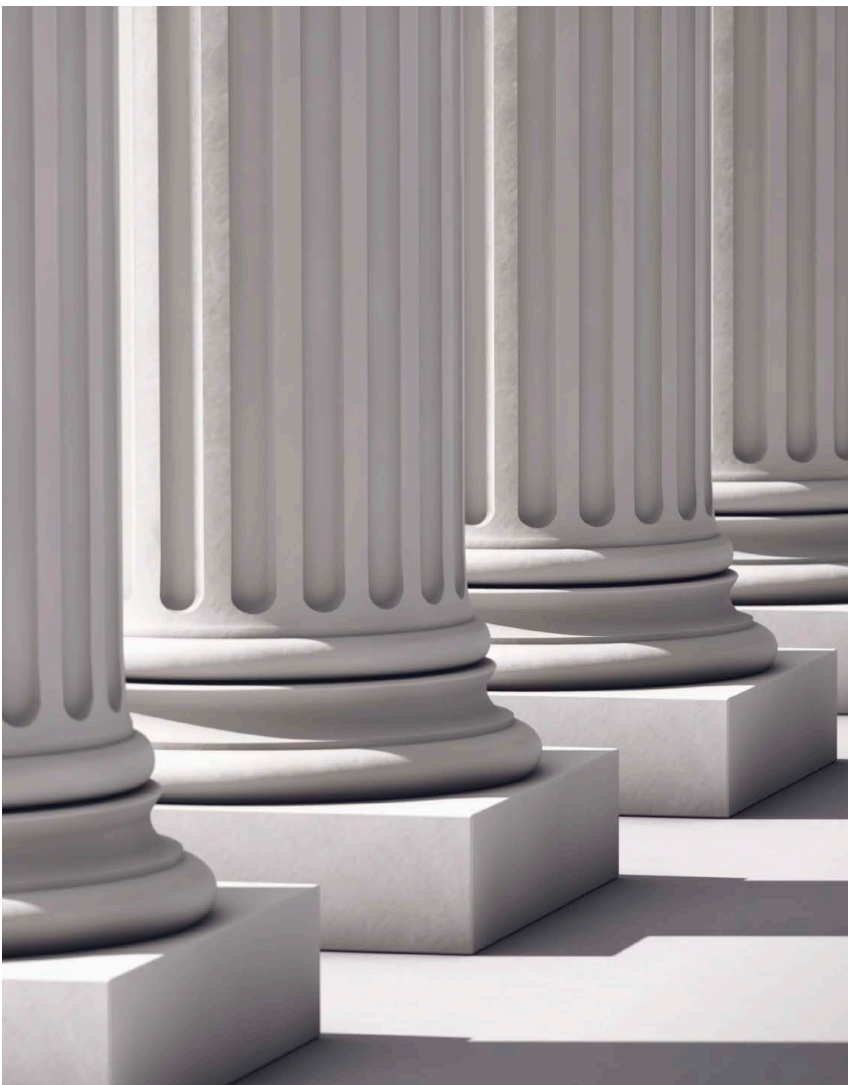




ALBERTA LAW REFORM INSTITUTE
PROPERTY DIVISION: COMMON LAW COUPLES
AND ADULT INTERDEPENDENT PARTNERS

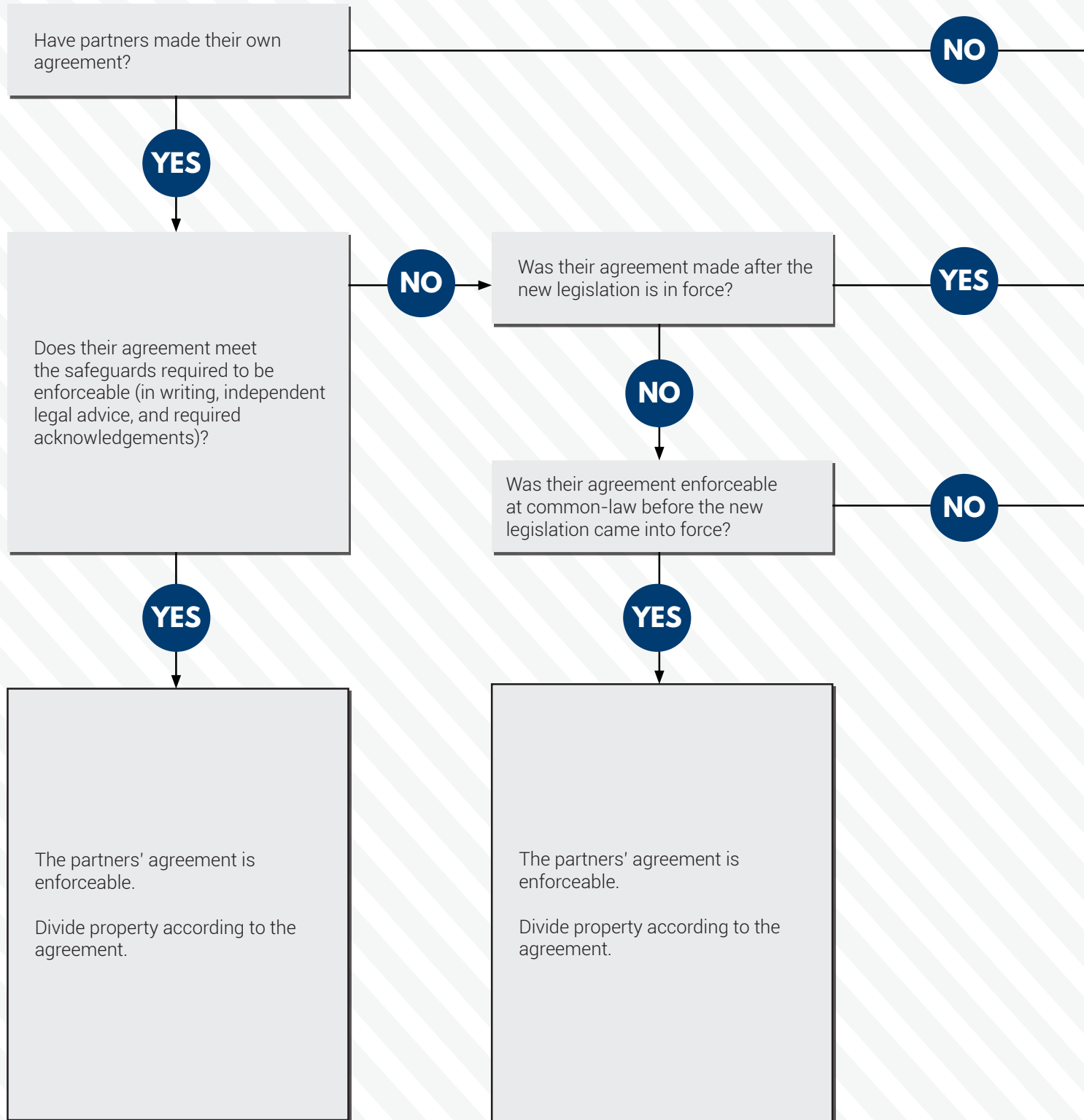


FINAL REPORT
112
JUNE 2018



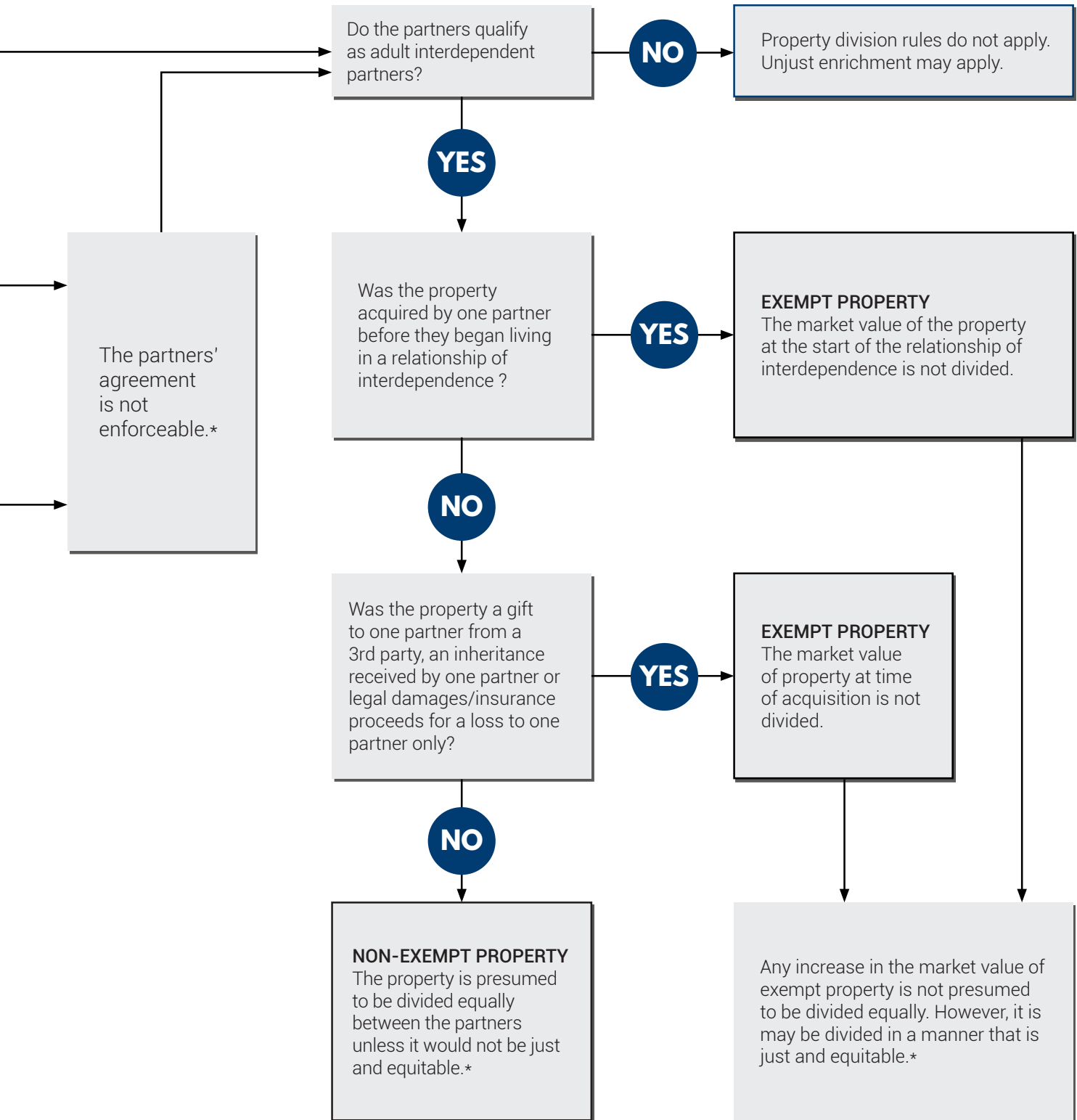
WHAT IS ALRI RECOMMENDING

PARTNERS SHOULD BE ENCOURAGED TO MAKE THEIR OWN AGREEMENTS ABOUT OWNERSHIP AND DIVISION OF PROPERTY



FOR COMMON-LAW PARTNERS?

IF PARTNERS DO NOT MAKE AN ENFORCEABLE AGREEMENT, THE LEGISLATED RULES PROVIDE A FRAMEWORK FOR DIVIDING PROPERTY



*An agreement that is not enforceable may be considered in deciding if the division is just and equitable.



ISSN 834-9037

ISBN 978-1-896078-75-5

ALRI claims copyright © in this work. ALRI encourages the availability, dissemination and exchange of public information. You may copy, distribute, display, download and otherwise freely deal with this work on the following conditions:

- (1) You must acknowledge the source of this work,
- (2) You may not modify this work, and
- (3) You must not make commercial use of this work without the prior written permission of ALRI.

Table of Contents

Alberta Law Reform Institute	i
Acknowledgments	iii
Summary	v
Recommendations	xi
Table of Abbreviations	xv
Common Terms	xvii
CHAPTER 1 Introduction	1
A. Introduction	1
B. Background to the Project	2
C. Scope of the Project	4
D. Framework of the Project	6
1. Early consultation	6
a. Public opinion research	7
b. 2016 roundtable discussions	7
2. Reports for Discussion and general consultation	7
a. Reports for Discussion	7
b. Online surveys	8
c. Presentations and meetings	9
d. 2018 roundtable discussions	9
e. Other responses	9
E. Structure of this Report	10
CHAPTER 2 The Need for Reform	13
A. Introduction	13
B. A Significant Number of People Are Affected	13
C. The Existing Law Is Complex	13
1. The <i>Matrimonial Property Act</i> applies to spouses	14
2. Property division based on legal ownership for partners	15
3. The law of unjust enrichment for partners	15
D. There Are Barriers to Access to Justice for Partners	17
1. The law of unjust enrichment is a barrier to negotiated settlements	17
2. Litigation is disproportionately time-consuming, expensive, and risky	18
a. Litigation is time-consuming	19
b. Litigation is expensive	19
c. Litigation is risky	20
E. Support for Reform	21
CHAPTER 3 Property Division by Agreement	23
A. Agreements Allow Partners to Choose Their Own Rules	23
B. Legislated Rules to Facilitate Agreements	23
C. Safeguards for Agreements	24
1. Safeguards in the <i>Matrimonial Property Act</i>	24
2. Possible exceptions to the safeguards	26

3.	Consultation results	27
a.	Safeguards based on the requirements in the <i>Matrimonial Property Act</i>	27
b.	Possible exceptions to the safeguards.....	27
4.	ALRI's position	30
a.	Agreements about the date a relationship began	31
b.	Agreements to opt-out of legislated rules	31
c.	Other exceptions.....	32
CHAPTER 4 The Need for Legislated Rules		35
A.	Opt-in Approaches Are Not a Complete Solution	35
1.	Barriers to making cohabitation agreements.....	35
2.	Experience shows opt-in approaches are ineffective	36
a.	Registration system	37
b.	Marriage	38
3.	Shortcomings of opt-in approaches	40
a.	Lack of agreement.....	40
b.	Misconceptions.....	41
c.	Other barriers to opting-in	41
B.	The Need to Clarify Obligations.....	42
CHAPTER 5 Eligibility Criteria		45
A.	The Need for Legislated Eligibility Criteria	45
B.	The <i>Adult Interdependent Relationships Act</i>	47
1.	Consistency with other legislation.....	47
2.	Purpose of the <i>Adult Interdependent Relationships Act</i>	48
3.	Definition of adult interdependent partner	49
a.	Relationship of interdependence	49
b.	Becoming adult interdependent partners.....	51
C.	Consultation Results	54
1.	Relationship of interdependence.....	55
2.	Qualifying period	56
3.	Child of the relationship.....	57
4.	Adult interdependent partnership agreement.....	58
D.	ALRI's Position	59
1.	Relationship of interdependence.....	59
2.	Qualifying period	62
3.	Child of the relationship.....	63
4.	Agreement	63
CHAPTER 6 Content of Legislated Rules		65
A.	The <i>Matrimonial Property Act</i>	65
B.	Consultation Results	68
C.	ALRI's Position	69
CHAPTER 7 The Beginning of the Relationship and Premarital Cohabitation		73
A.	Introduction.....	73
B.	Determining When an Adult Interdependent Relationship Begins for the Purpose of Property Division.....	73
1.	Difficulty establishing the beginning of the relationship	74
2.	The qualifying period and the threshold date	76
a.	The Saskatchewan approach: excluding the qualifying period	76
b.	The BC approach: including the qualifying period	76

3.	Consultation results	77
4.	ALRI's position	79
C.	Effect on Premarital Cohabitation	81
1.	The need for reform	83
a.	Consistency for adult interdependent partners and spouses	83
b.	Consistency with other legislation and guidelines.....	84
c.	Many couples live together before marrying.....	85
d.	Differential impact on same sex couples.....	86
2.	Beginning of the relationship for spouses who lived together before marriage.....	87
3.	Consultation results	87
4.	ALRI's position	88
D.	The Presumption of Equal Division and Exemptions.....	89
1.	The presumption of equal division.....	89
a.	Consultation results.....	89
b.	ALRI's position	90
2.	Exempt property	91
a.	Consultation results.....	92
b.	ALRI's position	92
CHAPTER 8 Making and Resolving Claims at the End of the Relationship		95
A.	Introduction.....	95
B.	Time to Make a Claim for Property Division	95
1.	Triggering events and time limits under the <i>Matrimonial Property Act</i>	96
2.	Triggering events for adult interdependent partners.....	97
3.	Consultation results and additional issues	98
4.	ALRI's position	100
a.	Triggering events for adult interdependent partners	100
b.	Time limits for adult interdependent partners.....	101
C.	Addressing Overlapping Claims	102
1.	Changing the default valuation date to the date of separation ..	103
2.	Other options to address overlapping claims.....	104
3.	Consultation results	105
a.	Changing the default valuation date to the date of separation	105
b.	Other options to address overlapping claims	106
4.	ALRI's position	106
D.	Court Jurisdiction and Procedure	107
1.	Consultation results	107
2.	Jurisdiction in family matters	108
3.	Options for jurisdiction.....	109
CHAPTER 9 The Impact of New Legislation on Agreements About Ownership and Division of Property.....		111
A.	Introduction.....	111
B.	Cohabitation Agreements and Marriage	111
1.	Effect of cohabitation agreements during marriage.....	111
2.	Consultation results and additional issue	112
3.	ALRI's position	113
a.	Hybrid agreements and subsection 37(2) of the <i>Matrimonial Property Act</i>	113

b. A default rule about the effect of cohabitation agreements during marriage	115
C. Transition Rules for Agreements About Ownership and Division of Property	117
1. Existing agreements that do not meet the proposed requirements	117
2. Consultation results	118
3. ALRI's position	118
CHAPTER 10 Transition Issues and Consequential Amendments	120
A. Transition Issues	120
1. Application to existing couples	120
2. Application to separated couples	122
3. Transition period	123
B. Consequential and Related Amendments	124
C. Conclusion	127

Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

ALRI Board Members

Hon Judge CD Gardner (Chair)
 MT Duckett QC (Vice Chair)
 DR Cranston QC
 Hon Justice JT Eamon
 Hon Justice AL Kirker
 J Koshan
 DM McKenna
 PD Paton
 S Petersson
 KA Platten QC
 LD Weber
 RJ Wood

Appointment Type

Member at Large
 Member at Large
 Law Society of Alberta
 Member at Large
 Member at Large
 University of Calgary, Faculty of Law
 Member at Large
 University of Alberta, Provost
 Executive Director
 Member at Large
 Member at Large
 University of Alberta, Faculty of Law

ALRI Staff Members

L Buckingham
 C Burgess
 B Chung
 J Koziar
 K MacKenzie
 S Petersson
 G Tremblay-McCaig
 S Varvis

Counsel
 Operations Manager
 Communications Associate
 Executive Assistant
 Counsel
 Executive Director
 Counsel
 Counsel

ALRI reports are available to view or download from our website at:

www.alri.ualberta.ca

The preferred method of contact for the Alberta Law Reform Institute is email at:

lawreform@ualberta.ca

402 Law Centre
 University of Alberta
 Edmonton AB T6G 2H5

Phone: (780) 492-5291
 Fax: (780) 492-1790
 Twitter: @ablawreform

Acknowledgments

This project has benefitted greatly from the involvement of many individuals and organisations.

ALRI has received many suggestions from individuals for a project along these lines over the years. This topic has also featured on the Canadian Bar Association Alberta Branch *Agenda for Justice*. ALRI appreciates the work of the CBA Alberta Branch in raising the profile of this topic and bringing the broader profession into the discussion

In the early stages of the project, ALRI was fortunate to partner with the Population Research Lab at the University of Alberta to carry out a survey of Albertans' attitudes and expectations towards cohabitation and property division. In particular we are thankful for the assistance of Dr Gillian Stevens and Aleena Amjad Hafeez in analysing the survey results and bringing the opinions of 1,200 Albertans prominently into the framework of this report. We also thank Robert Leckey for sharing his draft paper and some observations from his project on cohabitation and law reform.

During the course of this project ALRI, held four round table events with family law and estates practitioners. We are grateful to have had the opportunity to meet with the following groups and hear their opinions:

- Canadian Bar Association Sexual Orientation and Gender Identify (South) section
- Canadian Bar Association Family Law (North) section
- Canadian Bar Association Small, Solo and General Practice (North) section
- Canadian Bar Association Young Lawyers (North) section
- Canadian Bar Association Wills, Estates and Trusts (North) section
- Canadian Bar Association Family Law (South) section
- Central Alberta Bar Society

We ran three online surveys to garner feedback on our initial proposals. We also had a good number of people who wrote to us with extensive comments. We thank everyone who provided feedback on the report as your input brought to light new issues and considerations. This final report is improved through those comments.

This report also reflects the dedication and hard work of the ALRI staff and Board. We thank the Board for their thoughtful discussion of the complicated issues that arose during this project.

Our two legal counsel, Laura Buckingham and Geneviève Tremblay-McCaig, have worked tirelessly to carry out the research, analysis and consultation required to see this project through to completion. Each also took on the writing of one of the two Reports for Discussion that informed our consultation process. Laura Buckingham has been lead counsel for writing the final report and taking all consultation comments into consideration.

Additional support for various aspects of the project has been provided by other ALRI current and former team members: Barry Chung, Debra Hathaway, Jenny Koziar, Katherine MacKenzie, Robyn Mitchell, Sandra Petersson and Stella Varvis. We also appreciate the contributions of our summer students Ashley Hathorn (2017) and Joseph Sellman (2018).

Summary

Who Will be Affected by the Recommendations in this Report?

In this Report, ALRI makes recommendations to change the law for how common law couples divide property if their relationship breaks down. This Report also recommends changes to the law for married couples who lived together before marriage and for adult interdependent partners who are not common law couples.

Why is Change Needed?

2016 Census data indicates that 320,260 Albertans consider themselves to be in common-law relationships. If common-law couples break up and cannot agree how to divide their property, they need to rely on complex judge-made law to divide their property. ALRI considers that the law of unjust enrichment is overly complicated, costly to litigate, and unpredictable. Legislated rules would better guide parties to make their own agreements and settle disputes.

Couples who lived together before marriage and adult interdependent partners may also need to rely on judge-made law for property division and would also benefit from a clearer legislated framework for property division.

Who Was Consulted in Making These Recommendations?

This has been a significant and challenging project. Recognising the impact recommendations in this area would have, ALRI undertook more intensive consultation including the following:

- a public opinion survey to determine how Albertans view common law relationships and their expectations around property division
- early roundtable consultation with lawyers before recommendations were made
- online surveys targeted at the general public and more technical surveys for lawyers and other justice workers
- follow up roundtable consultation with lawyers to fine tune recommendations

How will the Recommendations Affect Common Law Couples?

Priority to agreements

Couples should be free to make their own agreements regarding ownership and division of property. ALRI recommends that legislation should allow common law couples to make their own agreements. ALRI further recommends that agreements should be subject to specific requirements in order to be enforceable. Those requirements, which include independent legal advice, are intended to make sure that each common law partner is aware of their potential claims to property and the nature and effect of the agreement, and that each partner is entering the agreement freely and voluntarily.

An agreement that does not satisfy these safeguards is not enforceable but may be considered by the Court in an application by one or both partners to divide property.

Default rules when needed

If a couple does not make their own agreement or their agreement is not enforceable, ALRI recommends that there should be default rules to govern the division of property.

Legislated default rules for property division should apply to couples who are adult interdependent partners under the Adult Interdependent Relationships Act. The criteria in the Act consider whether the couple are interdependent economically, domestically and socially. Couples also have to live together for a specified qualifying period, although they may shorten or eliminate the qualifying period by making a written agreement. Short term or casual relationships would not trigger the property division rules.

The default property division rules would recognise three categories of property:

1. Exempt property: The value of exempt property is not divided. Property that each partner had at the start of the relationship would be exempt for its market value at that time. Property acquired during the relationship by one partner through inheritance, as a gift from a third party, or as settlement of certain legal or insurance claims would also be exempt for its market value at the time it was acquired.
2. Increase in value on exempt property: The increase in the value of exempt property is not presumed to be divided equally but may be divided in a manner that is just and equitable.

3. Non-exempt property: All other property is presumed to be divided equally unless an equal division would not be just and equitable.

Determining what property is exempt requires determining a date for the start of the relationship. ALRI recognises that determining the start date of a relationship will be complicated for many couples. Once a couple satisfies the *Adult Interdependent Relationships Act's* requirements including the qualifying period, ALRI recommends that, for purposes of property division, the start of the relationship is the date the partners began living together in a relationship of interdependence. This approach of including the qualifying period is used in four other provinces and territories.

ALRI's recommendations mean couples who are adult interdependent partners would have property agreement and division rules that mirror those in the *Matrimonial Property Act*. This result is consistent with other Alberta legislation, where adult interdependent partners already have the same rights and obligations as spouses. Having the same property division rules ensures that all Alberta couples are treated equitably and that fewer couples will have to resort to the complex law of unjust enrichment.

How Might These Recommendations Affect Married Couples?

ALRI's recommendations for property division rules for common law couples also have implications for couples who live together before marriage.

An increasing number of couples live together before getting married. To ensure all couples are treated equitably and to reduce the number of couples having to resort to unjust enrichment for part of their relationship, ALRI recommends that property division rules should also apply to premarital cohabitation.

This is a change from the current law where property division laws only apply from the date that a couple gets married. However, having a single set of rules that applies to the couple's relationship avoids the problem of spouses having to rely on unjust enrichment for the period before marriage and the *Matrimonial Property Act* for the period after marriage. Again, it is relevant to emphasize that couples are able to make their own agreements about the ownership and division of property.

How Will These Recommendations Affect Adult Interdependent Partners Who Are Not Common Law Couples?

The focus of ALRI's project has been on common-law couples. The definition of adult interdependent partners is a standard one that is already used throughout Alberta legislation. This definition will capture a small number of adult interdependent partners who would not consider themselves to be a common-law couple. For example, the *Adult Interdependent Relationships*

Act allows family members to make an agreement to become adult interdependent partners. Two family members with an adult interdependent agreement may have the rights, benefits, and obligations accorded to adult interdependent partners under Alberta law. ALRI has concluded that there is no valid basis to differentiate between adult interdependent partners who are common-law couples and those who are not.

What Other Recommendations Is ALRI Making?

Agreements

In our consultation we heard that some people think that the law is unclear regarding whether partners can make an agreement that covers both their pre-marriage and marriage relationship. So called hybrid agreements allow partners to determine their own affairs and how they want ownership and division of property to be determined in different phases of their relationship. ALRI recommends that the law should be clarified to remove this uncertainty and to allow partners to make hybrid agreements that are enforceable both before and after marriage.

ALRI has also made recommendations that cover the following aspects of agreements:

- a couple's ability to agree on a date to be used for determining exempt property
- the impact on a couple's property agreement if they marry each other
- the status of existing agreements under the new law

Transitional provisions

If implemented, ALRI's recommendations will mean a significant change for some couples. As such, ALRI recommends that there should be a transition period to allow couples to learn about the changes before those changes become the law.

ALRI also recommends that the law should only apply to couples who separate after the changes become law. It would be unfair to impose new requirements on couples who are already in the process of resolving their property disputes through settlement or litigation.

Recommendations

RECOMMENDATION 1

There should be legislated rules describing how partners may make an agreement about ownership and division of property.....24

RECOMMENDATION 2

To be enforceable, an agreement about ownership and division of property should have to meet the same requirements that apply to agreements between spouses. In particular, the agreement should be in writing and each partner should meet separately with different lawyers to make the required acknowledgments. 33

RECOMMENDATION 3

A court should be able to consider any other agreement in a decision about dividing property. 33

RECOMMENDATION 4

There should be legislated rules describing how property should be divided if partners do not have an agreement about ownership and division of property..... 43

RECOMMENDATION 5

Legislated property division rules should apply to adult interdependent partners, as defined in the *Adult Interdependent Relationships Act*. 64

RECOMMENDATION 6

Legislated property division rules for adult interdependent partners should be based on the rules for spouses in the *Matrimonial Property Act*, aside from the specific exceptions recommended in this Report. 71

RECOMMENDATION 7

Unless adult interdependent partners agree otherwise, the date the relationship began for the purpose of property division should be the date that they began living in a relationship of interdependence. 81

RECOMMENDATION 8

Unless spouses agree otherwise, the date the relationship began for the purpose of property division should be the date that they began living in a relationship of interdependence or the date of marriage, whichever is earlier. 89

RECOMMENDATION 9

The presumption of equal division should begin on the date that the partners or spouses began living in a relationship of interdependence or the date of marriage, whichever is earlier. 91

RECOMMENDATION 10

Property that a partner or spouse acquired before the relationship began should be exempt from division. The exemption should apply to the market value of the original property on the date the relationship of interdependence began or the date of the marriage, whichever is earlier. 93

RECOMMENDATION 11

A partner should be able to apply for a property division order if the partners have become former adult interdependent partners as defined in the *Adult Interdependent Relationships Act*, unless the reason they became former adult interdependent partners was that they married each other.101

RECOMMENDATION 12

A partner should be able to apply for a property division order if the partners are living separate and apart and the other partner transfers property to defeat a claim or dissipates property.101

RECOMMENDATION 13

A partner should be able to commence an application for a property division order within two years after the date that the partner first knew, or in the circumstances ought have known, that the partners had become former adult interdependent partners.102

RECOMMENDATION 14

Unless adult interdependent partners or spouses agree otherwise, the valuation date should be the date on which they begin to live separate and apart.107

RECOMMENDATION 15

Partners should be able to make a hybrid agreement about ownership and division of property, intended to apply both during cohabitation and during marriage. A hybrid agreement should continue in effect whether or not the partners marry each other.....114

RECOMMENDATION 16

An agreement about ownership and division of property intended to apply during cohabitation should not continue in effect during marriage, unless the agreement is a hybrid agreement or the partners agree that the agreement will continue in effect during marriage.....116

RECOMMENDATION 17

An agreement about ownership and division of property that was enforceable immediately before new legislation comes into force should remain enforceable after new legislation comes into force.....119

RECOMMENDATION 18

New property division legislation should apply to adult interdependent partners or spouses who separate after the legislation comes into force.....123

RECOMMENDATION 19

There should be a transition period before new legislation comes into force, providing a reasonable amount of time for partners or spouses who do not want legislated property division rules to apply to make an agreement about ownership and division of property.124

RECOMMENDATION 20

Alberta pension legislation should be amended so that unmarried pension partners can divide pension benefits in the same way as spouses.127

Table of Abbreviations

LEGISLATION

AIRA	<i>Adult Interdependent Relationships Act</i> , SA 2002, c A-4.5
MPA	<i>Matrimonial Property Act</i> , RSA 2000, c M-8

LAW REFORM PUBLICATIONS

Case Law Review	Jonnette Watson Hamilton and Annie Voss-Altman, <i>The Matrimonial Property Act: A Case Law Review</i> , Research Paper (2010), online: Alberta Law Reform Institute < https://www.alri.ualberta.ca/docs/OP_MPA_Case_Law.pdf >
Report for Discussion 30	Alberta Law Reform Institute, <i>Property Division: Common Law Couples and Adult Interdependent Partners</i> , Report for Discussion 30 (2017), online: < https://www.alri.ualberta.ca/images/stories/docs/RFD30 >
Report for Discussion 31	Alberta Law Reform Institute, <i>Property Division: Living Together Before Marriage</i> , Report for Discussion 31 (2017), online: < https://www.alri.ualberta.ca/images/stories/docs/RFD31.pdf >
Valuation Date Report	Alberta Law Reform Institute, <i>Matrimonial Property Act: Valuation Date</i> , Final Report 107 (2015), online: < https://www.alri.ualberta.ca/docs/FR107.pdf >

SURVEYS

Alberta Survey Report	Aleena Amjad Hafeez, <i>Albertans' Perceptions and Attitudes Regarding Common-law Property Division Laws: Exploring Evidence from the Alberta Survey 2016</i> , Research Paper (2017), online: Alberta Law Reform Institute < https://www.alri.ualberta.ca/images/stories/docs/AB_cohab_survey_results.pdf >
2002 Consultation Report	Alberta, Department of Justice and Attorney General, <i>Alberta Family Law Reform Stakeholder Consultation Report</i> , by Marcomm Works (May 2002), online: < www.assembly.ab.ca/lao/library/egovdocs/2002/aljag/136616.pdf >

Common Terms

Common Law Partners – Two people who live in a marriage-like relationship without being legally married. Some, but not all, common-law partners are also adult interdependent partners.

Adult Interdependent Partners – Two adults who share a relationship of interdependence and who have satisfied the additional qualifications of the *Adult Interdependent Relationships Act*. Most, but not all adult interdependent partners, will also be common law partners.

Married Spouses – Two people who are legally married to each other. Spouses may have been common-law partners or adult interdependent partners before the date of marriage.

CHAPTER 1

Introduction

A. Introduction

[1] In recent decades, it has become increasingly common for couples to live together without being legally married. Sometimes these relationships are short-lived, but for some couples, living together without being married is a long-lasting arrangement. For other couples, living together is a step towards marriage. They may live together for a time before marrying.

[2] Couples who live in a marriage-like relationship without being legally married are often said to be living in a common-law relationship. In this report, we use “common-law partners” to refer to such couples and “spouses” to refer to couples who are legally married.¹

[3] In Alberta law, many common-law couples are recognized as adult interdependent partners. Adult interdependent partners is a term defined in the *Adult Interdependent Relationships Act* [AIRA].² Adult interdependent partners does not mean exactly the same thing as common-law partners. A common-law relationship is usually understood to be one that is marriage-like, or conjugal. AIRA does not require partners to be in a conjugal relationship to become adult interdependent partners. In this report, we use “adult interdependent partners” and “relationship of interdependence” as they are defined in AIRA. We use “partners” to mean either common-law partners or adult interdependent partners.

[4] Adult interdependent partners have many of the same rights, benefits and obligations as spouses under Alberta legislation.³

¹ The term “common-law” has different definitions in different contexts. Our definition in this report is much like the definition Statistics Canada uses. Statistics Canada defines a common-law couple as two people living together who are not legally married to each other. There is no minimum period of cohabitation to be considered a common-law couple for statistical purposes: Statistics Canada, *Classification of Census Family Status*, (Ottawa: Statistics Canada, 16 September 2016), online: <www23.statcan.gc.ca/imdb/p3VD.pl?Function=getVD&TVD=61912&CVD=61915&CPV=1.1.2&CST=01012004&CLV=3&MLV=3>. For other definitions of “common-law”, see note 96.

² *Adult Interdependent Relationships Act*, SA 2002, c A-4.5 [AIRA].

³ See e.g. *Family Law Act*, SA 2003, c F-4.5, ss 56–63; *Wills and Succession Act*, SA 2010, c W-12.2, ss 60–62, 72(b), 88.

[5] There is a notable exception. There are no legislated rules for property division upon the breakdown of a common-law relationship or adult interdependent relationship. The *Matrimonial Property Act* [MPA] does not apply to common-law partners or adult interdependent partners.⁴ When partners separate, there are no presumptions or formulas about how they should divide property. If they cannot agree, they face litigation that is likely to be long, expensive, and unpredictable.

[6] In this Final Report, ALRI recommends legislated rules for division of property upon the breakdown of a relationship between adult interdependent partners. These recommendations are intended to make the law clearer and more predictable, promote settlement, and improve access to justice.

[7] The recommendations in this report would also affect some spouses. To ensure fair treatment of all couples, ALRI recommends a change affecting spouses who lived together before marriage. Currently, the MPA does not require spouses to divide property acquired before marriage, including property they may have acquired while living in a relationship of interdependence. As discussed in Chapter 7, ALRI recommends that legislated rules for division of property apply to property acquired while living in a relationship of interdependence, whether or not the partners later marry.

B. Background to the Project

[8] In the past 40 years, there have been significant reforms to laws affecting couples and their property. ALRI has studied many of the issues. Our 1975 *Matrimonial Property* report led to the enactment of the MPA in 1978.⁵ Our 1989 report, *Towards Reform of the Law Relating to Cohabitation Outside Marriage* rejected the idea of equating marriage and common-law relationships in all situations, but recommended a number of specific reforms.⁶ At that time, we did not recommend changes to the law relating to property division for common-law

⁴ *Matrimonial Property Act*, RSA 2000, c M-8 [MPA]. The other notable exception is from the rights, benefits, and obligations provided by the *Dower Act*, RSA 2000, c D-15. ALRI reviewed some issues with the *Dower Act* in Alberta Law Reform Institute, *The Matrimonial Home*, Report for Discussion 14 (1995), online: <<https://www.alri.ualberta.ca/docs/rfd014.pdf>>. ALRI has determined that potential reform to the *Dower Act* is outside the scope of this project.

⁵ Institute of Law Research and Reform (Alberta), *Matrimonial Property*, Final Report 18 (1975), online: <<https://www.alri.ualberta.ca/docs/fr018.pdf>>.

⁶ Alberta Law Reform Institute, *Towards Reform of the Law Relating to Cohabitation Outside Marriage*, Final Report 53 (1989), online: <<https://www.alri.ualberta.ca/docs/fr053.pdf>>.

partners. ALRI published a research paper on *Recognition of Rights and Obligations in Same Sex Relationships* in 2002, which identified discrimination in legislation that provided certain rights to spouses but not same sex partners.⁷ Many other projects have touched on laws affecting couples.⁸ To date, ALRI has not recommended legislated rules about division of property for common-law partners or adult interdependent partners upon relationship breakdown.

[9] There are several reasons why ALRI decided to take on this project now.

[10] First, the number of common-law couples is on the rise. Statistics Canada data shows that in recent years, the number of common-law couples has increased faster than the number of married couples.⁹

[11] Second, ALRI's research indicates that property division for partners is a troublesome issue. In a 2010 research paper commissioned by ALRI, Jonnette Watson Hamilton and Annie Voss-Altman identified property division for partners as "the second thorniest issue" arising from a review of the MPA case law, and noted it "causes much uncertainty and inefficiency."¹⁰ Further research conducted for this project supports their conclusions.¹¹

[12] Third, two Supreme Court decisions have made it clear that significant reform will require legislation. In *Nova Scotia (AG) v Walsh* and in *Quebec (AG) v A*, the Court heard arguments that matrimonial property legislation should apply to common-law partners, but each time the majority declined to extend the scope of legislation.¹² The Court has held that it is for legislatures to decide whether to maintain or eliminate distinctions between spouses and partners in division of property.

⁷ Alberta Law Reform Institute, *Recognition of Rights and Obligations in Same Sex Relationships*, Research Paper 21 (2002), online: <<https://www.alri.ualberta.ca/docs/rp021.pdf>>. At the time the research paper was published, same sex partners were not able to marry.

⁸ See e.g. Alberta Law Reform Institute, *Non-Pecuniary Damages in Wrongful Death Actions – A Review of Section 8 of the Fatal Accidents Act*, Final Report 66 (1993) at 40–41, online: <<https://www.alri.ualberta.ca/docs/fr066.pdf>>; Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Final Report 78 (1999) at 98–131, online: <<https://www.alri.ualberta.ca/docs/fr078.pdf>>.

⁹ Statistics Canada, *Portrait of Families and Living Arrangements in Canada*, Catalogue No 98-312-x2011001 (Ottawa: Statistics Canada, 22 December 2015), online: <www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.cfm>.

¹⁰ Jonnette Watson Hamilton & Annie Voss-Altman, *The Matrimonial Property Act: A Case Law Review*, Research Paper (2010) at para 179, online: Alberta Law Reform Institute <https://www.alri.ualberta.ca/docs/OP_MPA_Case_Law.pdf> [Case Law Review].

¹¹ The research is discussed in Chapter 2, below.

¹² *Nova Scotia (AG) v Walsh*, 2002 SCC 83 [Walsh]; *Quebec (AG) v A*, 2013 SCC 5 [Quebec v A].

[13] Finally, members of the legal profession and other justice system participants are calling for reform. Both academics and practitioners have written about the need for legislated rules.¹³ The lack of presumptions or formulas has been specifically identified as an access to justice issue. For example, in its 2013 report, the Action Committee on Access to Justice in Civil and Family Matters called for simpler rules offering “more guidance by way of rules and presumptions” to resolve property claims between common-law partners.¹⁴

[14] The then-President of the Canadian Bar Association, Alberta Branch [CBA Alberta], asked ALRI to take on this project in a December 2014 letter. The letter indicated that “members of the profession have identified this as a pressing legislative issue and one very key access to justice issue.”¹⁵ CBA Alberta included a call for legislation in its “Agenda for Justice”, a document released in advance of the 2015 Alberta provincial election.¹⁶ In a 2018 letter, the current president of CBA Alberta wrote that CBA Alberta supports “establishing some legislative certainty regarding property division among cohabitants, to help decrease conflict and the need for court intervention in disputes”.¹⁷

C. Scope of the Project

[15] This project focuses on issues specific to property division for partners. It also addresses an issue that affects spouses, to the extent that they acquired property while living in a relationship of interdependence before marriage.

¹³ See e.g. Winifred Holland, “Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?” (2000) 17 Can J Fam L 114; Philip M Epstein, “‘Houston, We Have a Problem’: Constructive Trust and Unjust Enrichment” (Paper delivered at Unmarried and Unjust [Enrichment] SuperConference, 29 November 2012) [unpublished]; Doug Moe, “Yours, Mine and Ours: A Family Lawyer’s Guide to Unjust Enrichment in Alberta” (Paper delivered at Unmarried and Unjust [Enrichment] SuperConference, 29 November 2012) [unpublished]; Lonny Balbi and Lily Rabinovitch, “Unequal Justice for Unmarried Couples: The Problem Surrounding Common-Law Property Division in Alberta” (Paper delivered at Unmarried and Unjust [Enrichment] SuperConference, 29 November 2012) [unpublished]; Natasha Bakht, “A v B and Attorney General of Quebec (Eric v Lola): The Implications for Cohabiting Couples Outside Quebec” (2013) 28:2 Can J Fam L 261; Andrew Morrison, “Who Is a Family: Cohabitation, Marriage, and the Redefinition of Family” (2015) 29:2 Can J Fam L 381.

¹⁴ Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words*, Final Report (2013), at 57–59, online: Canadian Forum on Civil Justice <www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf>.

¹⁵ Letter from Steven N Mandziuk, QC to Peter Lown, QC, ALRI Director (17 December 2014).

¹⁶ Canadian Bar Association, *Agenda for Justice Backgrounder: Distribution of Property – Unmarried Couples* (2017), online: <www.cba-alberta.org/getattachment/Publications-Resources/Resources/Agenda-For-Justice/Distribution-of-Property-Unmarried-Couples/agenda-for-justice_unmarried-property_jul27-17.pdf>.

¹⁷ Letter from M Jenny McMordie to Sandra Petersson, ALRI Executive Director (27 February 2018).

[16] Several related issues came up in background research and early consultation for this project. ALRI has determined that these issues are outside the scope of this project, although they may deserve their own review.

[17] The following issues are outside the scope of this project:

- Whether the MPA requires reform. This project considers a few narrow amendments that would be required to harmonize rules for adult interdependent partners and spouses. However, a full review of the MPA is outside the scope of this project. Jonnette Watson Hamilton and Annie Voss-Altman identified a number of issues with the MPA that may require attention.¹⁸ ALRI has already considered valuation date, which was one of the issues they identified, but other issues may deserve review.¹⁹ For example, they identified the division of debt as a problematic area “fraught with uncertainty and inconsistent treatment by the courts.”²⁰
- Whether AIRA requires reform. In consultation for this project, we heard various concerns about AIRA. AIRA affects eligibility for many different rights, benefits, and obligations. A review of AIRA should not be limited to issues relating to property division.
- Whether the *Dower Act* should apply to partners. ALRI has previously questioned whether the *Dower Act* continues to serve a useful purpose.²¹ It would be appropriate to consider the *Dower Act* as a whole before making any recommendations about its application to partners.
- How Alberta law could best address the needs of those in relationships involving more than two partners. There are Albertans living in relationships where more than two partners share their lives at the same time, but these relationships are not recognized by Alberta law.²²

¹⁸ Case Law Review.

¹⁹ Alberta Law Reform Institute, *Matrimonial Property Act: Valuation Date*, Final Report 107 (2015), online: <<https://www.alri.ualberta.ca/docs/FR107.pdf>> [Valuation Date Report].

²⁰ Case Law Review at para 183.

²¹ Alberta Law Reform Institute, *The Matrimonial Home*, Report for Discussion 14 (1995), online: <<https://www.alri.ualberta.ca/docs/rfd014.pdf>>.

²² At our roundtables, a few lawyers mentioned issues related to polyamorous or polygamous relationships. In some cases, these relationships involve individuals who choose to share their lives with more than one partner. In other cases, individuals may be in a non-monogamous relationship that is not of their choice. In either case, the relationship may involve economic interdependence.

Reform may be needed to address the needs of individuals in these relationships, especially those who are vulnerable or unable to negotiate the terms of the relationship. Property division is only one of many potential legal issues. It would be best to review the issues in a comprehensive way. The Canadian Research Institute for Law and the Family recently published findings from a survey of people in polyamorous relationships.²³ The survey provides insight into the demographics of people in such relationships, and identifies some legal issues they face. Future research may offer further insight.

D. Framework of the Project

[18] ALRI sought input at every stage of this project. We asked for and received feedback from lawyers who practise family law, people living in common-law relationships, and the general public. We considered all input when developing the recommendations in this Final Report. We are grateful to everyone who shared their views with us.

1. EARLY CONSULTATION

[19] Background research for this project revealed there was little available data about the attitudes and expectations of common-law partners, especially relating to property. There are many sources for demographic data, but very few sources of information about how common-law partners perceive their relationships or how they plan to deal with property. The most significant source of data on the attitudes and expectations of common-law partners in Alberta was a 1983 survey commissioned by ALRI (then called the Institute of Law Research and Reform).²⁴ Although this survey provided a large amount of detailed data, including data about arrangements and expectations relating to property, the results are now quite dated.

²³ John-Paul E Boyd, *Perceptions of Polyamory in Canada* (2017), online: Canadian Research Institute for Law and the Family <www.crilf.ca/Documents/Perceptions_of_Polyamory_-_Dec_2017.pdf>; see also John-Paul E Boyd, *Polyamorous Relationships and Family Law in Canada* (2017), online: Canadian Research Institute for Law and the Family <www.crilf.ca/Documents/Polyamorous%20Relationships%20and%20Family%20Law%20-%20Apr%202017.pdf>.

²⁴ Institute of Law Research and Reform (Alberta), *Survey of Adult Living Arrangements: A Technical Report*, Research Paper 15 (1984), online: <<https://www.alri.ualberta.ca/docs/rp015.pdf>>.

a. Public opinion research

[20] ALRI decided this project would benefit from public opinion research. We worked with the Population Research Lab at the University of Alberta to conduct this research. ALRI placed a series of questions about attitudes and expectations related to common-law relationships on the Population Research Lab's 2016 Alberta Survey. The Alberta Survey was a random-sample telephone survey of Alberta adults. There were 1208 respondents to the survey. Aleena Amjad Hafeez, a graduate student in the Department of Sociology at the University of Alberta, analyzed the results and prepared a report under the supervision of Dr. Gillian Stevens, Executive Director of the Population Research Lab. ALRI published Ms. Hafeez's report.²⁵

b. 2016 roundtable discussions

[21] ALRI also sought early input from members of the legal profession. In November 2016, ALRI hosted two roundtable discussions with lawyers who practise family law [the 2016 roundtables]. One roundtable discussion was in Edmonton and one was in Calgary. In these discussions, ALRI sought input on specific options for reform and any legal or practical issues associated with those options.

2. REPORTS FOR DISCUSSION AND GENERAL CONSULTATION

a. Reports for Discussion

[22] ALRI published two Reports for Discussion with preliminary recommendations. In September 2017, ALRI published *Property Division: Common Law Couples and Adult Interdependent Partners*, Report for Discussion 30.²⁶ In November 2017, ALRI published *Property Division: Living Together Before Marriage*, Report for Discussion 31.²⁷

²⁵ Aleena Amjad Hafeez, *Albertans' Perceptions and Attitudes Regarding Common-law Property Division Laws: Exploring Evidence from the Alberta Survey 2016*, Research Paper (2017), online: Alberta Law Reform Institute <https://www.alri.ualberta.ca/images/stories/docs/AB_cohab_survey_results.pdf> [Alberta Survey Report].

²⁶ Alberta Law Reform Institute, *Property Division: Common Law Couples and Adult Interdependent Partners*, Report for Discussion 30 (2017), online: <<https://www.alri.ualberta.ca/images/stories/docs/RFD30.pdf>> [Report for Discussion 30].

²⁷ Alberta Law Reform Institute, *Property Division: Living Together Before Marriage*, Report for Discussion 31 (2017), online: <<https://www.alri.ualberta.ca/images/stories/docs/RFD31.pdf>> [Report for Discussion 31].

[23] During a consultation period in late 2017, ALRI sought feedback on the preliminary recommendations in the Reports for Discussion. We sought feedback in several ways.

b. Online surveys

[24] ALRI created three online surveys to gather feedback on the preliminary recommendations:

- a. A general survey about property division for common-law couples [the general survey]. This survey was intended for anyone with an interest in the issue, and was written to be accessible to a general audience.
- b. A technical survey about property division for common-law couples [the technical survey]. This survey was primarily aimed at family law lawyers and other professionals who work in family law.
- c. A survey about division of property acquired during premarital cohabitation [the premarital survey].

[25] Each survey had multiple-choice questions that asked whether respondents agreed or disagreed with specific preliminary recommendations. There were text boxes below each multiple-choice question to allow respondents to provide additional comments. There were also some open-ended questions with text boxes that allowed respondents to add comments about issues not addressed elsewhere in the surveys.

[26] The three surveys were designed to complement each other. Each survey had different questions, covering different preliminary recommendations. ALRI encouraged family law lawyers and other professionals to complete all the surveys.²⁸

[27] There were 181 respondents to the general survey, 48 respondents to the technical survey, and 47 respondents to the premarital survey. Although there were a total of 276 completed surveys, it is likely there was overlap between respondents to the three surveys. We expect some individuals completed all of

²⁸ ALRI offered an incentive to complete the general survey and the premarital survey. At the end of those surveys, respondents had the option to enter their name in a draw for a prepaid credit card.

the surveys. Therefore, we do not assume there were more than 181 unique respondents.

[28] Each survey asked respondents to indicate their interest in the project. Respondents could select more than one answer.

[29] Among the 181 respondents to the general survey, 52 selected the answer that read “I live with a common-law partner or live-in partner.” Fifty-eight respondents selected the answer that read “I work in family justice as a lawyer, judge, law professor, or other legal professional.” Twenty-six respondents selected the answer that read: “I work in family justice in another role (for example, social worker, mental health professional, financial advisor, court staff, etc.)”.

[30] The majority of respondents to the technical survey and the premarital survey were legal professionals. Of the 48 respondents to the technical survey, 39 selected the answer that read “I work in family justice as a lawyer, judge, law professor, or other legal professional.” On the premarital survey, 25 of the 47 respondents selected this answer.

c. Presentations and meetings

[31] ALRI counsel attended meetings with lawyers’ groups to discuss the preliminary recommendations. We made presentations to seven groups in Edmonton, Calgary, and Red Deer. We noted comments received at these meetings.

[32] ALRI counsel also had informal meetings with several other individuals and groups.

d. 2018 roundtable discussions

[33] In February 2018, ALRI hosted two further roundtable discussions with lawyers who practise family law or wills and estates law [the 2018 roundtables]. One roundtable discussion was in Edmonton and one was in Calgary. At these discussions, ALRI sought input on some specific issues identified during consultation.

e. Other responses

[34] ALRI also received more than 30 other comments in writing or by phone. About a third of the comments came from individuals who identified themselves

as lawyers or from law firms. The remaining comments came from other individuals or organizations.

[35] CBA Alberta sought feedback from members of the Family Law (North) section and provided the results to us.²⁹ Approximately 55 members provided feedback, either in writing or at an in-person meeting.

[36] ALRI considered all responses and comments before making the final recommendations in this report.

E. Structure of this Report

[37] Chapter 1 is the general introduction to this report. Chapter 2 outlines the current law and the need for reform.

[38] Chapter 3 discusses agreements about ownership and division of property. Alberta currently has no legislated rules about agreements between partners. This chapter contains ALRI's recommendations for legislated rules that would clarify and reform the law about such agreements.

[39] Chapter 4 explains why effective reform requires legislated rules to replace the law of unjust enrichment.

[40] Legislated rules must answer two basic questions. First, who would the legislated rules apply to? Second, what should the legislated rules be? Chapters 5 and 6 contain ALRI's recommendations answering the two basic questions. In Chapter 5, ALRI recommends that legislated rules should apply to adult interdependent partners. In Chapter 6, ALRI recommends that legislated rules should be based on the MPA.

[41] Chapters 7 and 8 make recommendations for adjustments to specific rules. Chapter 7 addresses an issue related to the beginning of a relationship. It considers what threshold date should be used to determine exemptions for adult interdependent partners. This chapter also recommends a change to the MPA, to harmonize the rules for adult interdependent partners and spouses. Chapter 8 addresses issues that arise at the end of a relationship, when a claim for property division is made. It includes recommendations about when a claim may be made and addressing overlapping claims.

²⁹ Letter from M Jenny McMordie to Sandra Petersson, ALRI Executive Director (27 February 2018).

[42] Chapters 9 and 10 discuss technical issues that would arise from implementation of new legislation. Chapter 9 considers the impact of new legislation on agreements about ownership and division of property. Chapter 10 considers transition rules and consequential amendments.

CHAPTER 2

The Need for Reform

A. Introduction

[43] This chapter briefly summarizes the current law and key reasons for reform of rules about division of property for partners.

B. A Significant Number of People Are Affected

[44] There are many common-law couples in Alberta. Some of these couples will break up. When they do, they need to divide their property.³⁰

[45] With the increasing prevalence of common-law relationships, property division is not a rare or unusual issue. In 2016, Statistics Canada found there were 320,260 persons in Alberta living with a common-law partner.³¹ This number is approximately 17 per cent of all “persons in a couple”, and approximately 10 per cent of the total population aged 15 or more. Between 2006 and 2011, the number of common-law couples in Canada grew faster than the number of legally married couples.³²

C. The Existing Law Is Complex

[46] There is a widespread misconception that the law about division of property treats partners and spouses alike.³³ In fact, the rules for division of

³⁰ Some research shows that unmarried couples are, on average, more likely to separate than married couples. If so, the need for rules may be particularly acute for unmarried couples: see e.g. Statistics Canada, *Navigating Family Transitions: Evidence from the General Social Survey*, by Pascale Beaupré & Elisabeth Cloutier in General Survey Cycle 20, Catalogue No 89-625-XIE (Ottawa: Statistics Canada, 2006) at 19, online: <www.publications.gc.ca/collection_2017/statcan/89-625-x/89-625-XIE2007002.pdf>.

³¹ Statistics Canada, *Families, Households and Marital Status Highlight Tables: Marital status and opposite- and same-sex status by sex for persons aged 15 and over living in private households for both sexes, total, presence and age of children, 2016 counts, Canada, provinces and territories, 2016 Census* (Ottawa: Statistics Canada, 18 July 2017), online: <www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/fam/Table.cfm?Lang=E&T=11&Geo=00>. For an explanation of how Statistics Canada defines common-law for statistical purposes, see note 1.

³² Statistics Canada, *Portrait of Families and Living Arrangements in Canada*, Catalogue No 98-312-x2011001 (Ottawa: Statistics Canada, 22 December 2015), online: <www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.cfm>.

³³ The Alberta Survey showed that a significant number of respondents had misconceptions. Approximately 31 per cent of all respondents said that when common-law partners split up, property acquired by either

property are very different. The legislation that applies to spouses is clear and generally produces predictable results. In contrast, the rules for partners are difficult to find, difficult to describe, and produce inconsistent results.

1. THE MATRIMONIAL PROPERTY ACT APPLIES TO SPOUSES

[47] The MPA applies to spouses who separate or divorce. The MPA uses presumptions and formulas that make outcomes easy to predict. With some help from public legal education materials, separating or divorcing spouses should be able to make a reasonable estimate of how a court would divide their property. This estimate can help spouses to settle disputes without going to court.

[48] The MPA presumes that spouses are economically interdependent and that they intend to share property acquired or improved during the relationship.³⁴ This presumption is not absolute. Spouses may make an agreement that the MPA will not apply to some or all of their property.³⁵ The MPA includes rules for making an enforceable agreement.³⁶

[49] The MPA provides a formula for dividing property when spouses separate or divorce.³⁷ All the property owned by the spouses is divided into categories. Each category has its own rules for division. Property in one category is exempt from division, which means the spouse who owns the property keeps it. Property in a second category is divided in a way that the court considers fair, taking relevant circumstances into account. The third category includes most

partner is equally divided between them: see Alberta Survey Report at 10–15. Anecdotally, Alberta lawyers report meeting with many individuals who believe living in a common-law relationship establishes a legal right to share property with a partner. Surveys in other jurisdictions have also revealed large numbers of people who mistakenly believe living together has the same legal consequences as marriage. For example, a 2013 study in the UK found 47 per cent of respondents aged 18 to 34 believed common-law partners had the same legal rights as married spouses: Helen Jenks, “Common-law marriage myth highlights desperate need for reform”, *The Conversation* (28 April 2014), online: <www.theconversation.com/common-law-marriage-myth-highlights-desperate-need-for-reform-25895>. A 2013 survey in Quebec showed that nearly 50 per cent of respondents believed that common-law partners “are as well protected as married couples” and 62 per cent were unaware that property accumulated while living with a common-law partner would not be equally divided: Chambre des Notaires, “The Myths”, online: Chambre des Notaires – Common Law Spouses <www.uniondefait.ca/en/commonlawspouses-2007survey.php>.

³⁴ See *Jensen v Jensen*, 2009 ABCA 272 at para 1: “In 1978, Alberta enacted matrimonial property legislation to legally recognise marriage as an economic partnership, founded on the presumption that the parties intend to share the fruits of their labour during and as a result of it, on an equal basis”.

³⁵ MPA, s 37.

³⁶ MPA, ss 37–38.

³⁷ The description in this paragraph is a very brief summary. The MPA rules are explained in more detail in Chapter 6. See MPA, s 7.

property acquired during the marriage. There is a presumption that each spouse will receive an equal share of property in the third category.

2. PROPERTY DIVISION BASED ON LEGAL OWNERSHIP FOR PARTNERS

[50] When partners separate, the starting point is to divide property based on legal ownership. For many kinds of property – including land, bank accounts, shares of corporations, and other kinds of investments – there are records that show the legal owner. Each partner keeps the property registered in their own name. If the partners have property registered in both names, they each receive their share. For property without records of legal ownership – like furniture and household goods – each partner normally keeps the items they paid for.

[51] Legal ownership is not always an accurate reflection of each partner contribution to the property. Couples often work together, with each partner making financial or non-financial contributions. For example, one partner may pay for groceries and utilities, allowing the other partner to make mortgage payments. Or one partner may take primary responsibility for childcare and domestic work, freeing up the other partner to focus on earning money.

3. THE LAW OF UNJUST ENRICHMENT FOR PARTNERS

[52] The law of unjust enrichment allows a court to divide property based on contributions, instead of legal ownership. If either partner believes dividing property based on legal ownership would not produce a fair result, that partner may file a lawsuit asking the court to divide property based on unjust enrichment.

[53] The law of unjust enrichment is judge-made law found in court decisions. The most recent decision of the Supreme Court of Canada on unjust enrichment, *Kerr v Baranow*, sets out a framework to be followed in most claims between partners.³⁸

[54] In *Kerr*, the Supreme Court introduced a concept it called the joint family venture. A joint family venture exists when both partners have contributed to the accumulation of property. There is no presumption that partners are in a joint family venture.³⁹ Rather, the partner making the claim must prove that the

³⁸ *Kerr v Baranow*, 2011 SCC 10 [*Kerr*].

³⁹ *Kerr*, note 38 at para 88.

couple was in a joint family venture with evidence about the relationship. In *Kerr*, the Court identified various factors to be considered, grouped under four headings.⁴⁰ The Court was explicit that the list of factors is not closed and it is not a checklist. One writer, attempting to synthesize *Kerr* and the cases that follow it, identified 21 factors that must be considered to determine if there is a joint family venture.⁴¹ In practice, establishing a joint family venture requires a great deal of detailed evidence.

[55] If a joint family venture is established, the partner making the claim (the plaintiff) must still prove that the other partner (the defendant) was unjustly enriched. Unjust enrichment occurs in a joint family venture if, upon separation, one partner “retains a disproportionate share of the assets which are the product of their joint efforts.”⁴² To establish unjust enrichment in a joint family venture, a plaintiff must prove:

- a. The defendant was enriched;
- b. The plaintiff experienced a corresponding deprivation;
- c. There is no juristic reason for the enrichment;
- d. The relationship was a joint family venture;
- e. The plaintiff contributed, directly or indirectly, to assets owned by one or both partners; and
- f. The relative contributions the partners made to the assets.

[56] If there is unjust enrichment in a joint family venture, the remedy will usually be a monetary award. The award “should be calculated on the basis of the share of those assets proportionate to the claimant’s contributions.”⁴³ There is no presumption that the shares will be equal and no formula to calculate the amount of money to be paid.⁴⁴

⁴⁰ *Kerr*, note 38 at paras 89-99.

⁴¹ David Frenkel, “Joint Family Venture: A Synthesis of the Post-Kerr Case Law” (2014), 34 CFLQ 35.

⁴² *Kerr*, note 38 at para 60.

⁴³ *Kerr*, note 38 at para 100.

⁴⁴ *Ernst v Martins*, 2017 ABQB 785 at para 111 [*Ernst*]

D. There Are Barriers to Access to Justice for Partners

[57] The law of unjust enrichment requires a court to consider the facts of each case and exercise discretion to achieve a fair result. While this approach may produce justice in individual cases, it provides little guidance for future cases with different facts.

[58] It is unlikely that court decisions will produce more specific rules, as *Kerr* prescribes a very deferential standard of review for most issues.⁴⁵ Appellate courts are limited in their ability to enforce consistency or develop presumptions or formulas.

[59] For separating partners, access to justice would mean being able to divide their property fairly. Without presumptions or formulas to help them negotiate a fair settlement or the resources to pursue a claim in court, separating partners experience barriers to access to justice.

1. THE LAW OF UNJUST ENRICHMENT IS A BARRIER TO NEGOTIATED SETTLEMENTS

[60] Access to justice does not necessarily mean access to litigation, but it does mean people can resolve disputes fairly. As Justice Cromwell has said:⁴⁶

I think we can agree that, in general terms, members of our society would have appropriate access to civil and family justice if they had the knowledge, resources and services to deal effectively with civil and family legal matters.

[61] The lack of legislated rules makes it difficult for partners to settle disputes about unjust enrichment. There are two main reasons.

[62] First, it is difficult to find and interpret the applicable law, particularly for self-represented individuals. The law of unjust enrichment is found in court decisions, not legislation. Public legal education resources exist, but generally provide little information beyond the fact that a claim for unjust enrichment is possible and it is wise to seek legal advice.⁴⁷

⁴⁵ *Kerr*, note 38 at paras 88, 158.

⁴⁶ The Honourable Thomas A. Cromwell, “Access to Justice: Towards a Collaborative and Strategic Approach” (2012) 63 UNBLJ 38 at 39.

⁴⁷ See e.g. Centre for Public Legal Education Alberta, Property Division for Married and Unmarried Couples (2014) at 18, online: <p.b5z.net/i/u/10086419/f/PropertyDivision.pdf>.

[63] Second, it is difficult to predict the outcome in a particular case, which discourages settlement. When individuals or their lawyers cannot predict how a court would resolve their dispute, they have difficulty evaluating options for settlement. As Kevin Hannah put it, individuals “often have very different perspectives on what is fair and they look to the law as a source of objective standards that can be applied to their case.”⁴⁸ When they cannot identify objective standards, they cannot determine whether a proposed settlement is a “fair” one.

2. LITIGATION IS DISPROPORTIONATELY TIME-CONSUMING, EXPENSIVE, AND RISKY

[64] As it is difficult to settle disputes, partners are pushed towards litigation. Litigation is time-consuming, expensive, and risky, for both plaintiffs and defendants. Potential plaintiffs who do not have the resources to litigate may have to abandon their claim, so they lack access to justice.

[65] The time, cost, and risk of litigation are evident from reported cases. As part of our research for this project, ALRI reviewed all reported Alberta trial decisions of unjust enrichment claims between former partners issued from February 18, 2011 (the date that the Supreme Court issued its decision in *Kerr*) to May 31, 2018. There are nineteen such decisions.⁴⁹ While reported cases may not be representative of all unjust enrichment cases, they provide a snapshot of the issues.⁵⁰

⁴⁸ Kevin E Hannah, “Top 7 Property Issues” in *Issues in Matrimonial Property* (Alberta: Legal Education Society of Alberta, 2012) at 10.

⁴⁹ *Rubin v Gendemann*, 2011 ABQB 71, aff’d 2012 ABCA 38 [*Rubin*]; *Walraven v Tanne*, 2011 ABQB 210; *Thompson v Williams*, 2011 ABQB 311 [*Thompson*]; *Boissoneault v McNutt*, 2011 ABQB 568, aff’d 2012 ABCA 365; *Montgomery v Schlender*, 2012 ABQB 332 [*Montgomery*]; *Macgregor v Hosack*, 2012 ABQB 647 [*Macgregor*]; *Lemoine v Griffith*, 2012 ABQB 685, aff’d 2014 ABCA 46 [*Lemoine*]; *Lotnick v Berezowski*, 2013 ABQB 304; *KGH v SLV*, 2013 ABQB 326 [*KGH*]; *Gauthier v Gauthier*, 2013 ABQB 566; *JLC v RGC*, 2013 ABQB 701 [*JLC*]; *Brick v Cross*, 2014 ABQB 35 [*Brick*]; *Wen v Li*, 2014 ABQB 195 [*Wen*]; *Mailhot v Galbraith*, 2014 ABQB 396 [*Mailhot*]; *Thew v Nichol*, 2015 ABQB 556; *Klein v Wolbeck*, 2016 ABQB 28; *Rockey v Hartwell*, 2016 ABQB 438 [*Rockey*]; *Buchner v Long*, 2016 ABQB 523, aff’d 2017 ABCA 382 [*Buchner*]; *Ernst* note 44.

⁵⁰ The Canadian Research Institute for Law and the Family [CRILF] recently published research that also found litigation is time-consuming and expensive compared to other dispute resolution processes: see Joanne J. Paetsch, Lorne D. Bertrand & John-Paul E. Boyd, *An Evaluation of the Cost of Family Law Disputes: Measuring the Cost Implication of Various Dispute Resolution Methods* (2017), online: Canadian Research Institute for Law and the Family <crilf.ca/Documents/Cost_of_Dispute_Resolution_-_Mar_2018.pdf> [Paetsch, Bertrand & Boyd]. CRILF’s research was based on data gathered from a survey of lawyers in five Canadian jurisdictions, including Alberta. CRILF’s research considered all types of family law disputes, not only unjust enrichment. Among other findings, CRILF found that disputes resolved by litigation took the longest to resolve and cost the most. The reported average time to resolve a high-conflict case by litigation was more than two years (27.7 months): Paetsch, Bertrand & Boyd at 29. The reported average legal fees to resolve a high-conflict case by litigation were \$54,390 (for one party): Paetsch, Bertrand & Boyd at 30. A

a. Litigation is time-consuming

[66] The reported cases show that unjust enrichment cases take a long time, both to get from separation to trial and in trial time.

[67] There was generally a delay of several years from separation to trial. In eight of the nineteen cases, the trial was more than three years after the separation.⁵¹ Delay can produce significant hardship in family litigation. For a partner who has to leave the family home or who lacks money to pay for housing or other basic needs, waiting years for a resolution can be intolerable.

[68] When the cases reached trial, they often took a great deal of trial time. Eleven of the nineteen cases required five or more days of trial.⁵² Further, unjust enrichment trials can be complex, requiring a great deal of detailed evidence. For example, the trial in *Rubin* involved at least 22 witnesses and 3000 pages of documentary evidence.

b. Litigation is expensive

[69] Trials – which are often required for unjust enrichment cases – can be prohibitively expensive. A 2016 survey showed average legal fees for a family law trial up to five days was \$36,577 in the Western provinces and could be up to \$73,737.⁵³ Those fees are for one party; if both parties are represented by lawyers, the total fees for both would be about double. In 2016, the median net worth of Alberta family units was \$290,500.⁵⁴ For a family at or below the median, a trial of up to five days could consume most of their assets.

large majority of lawyers surveyed disagreed or strongly disagreed with the statements “litigation is usually a fast and efficient dispute resolution process” (83.5 per cent disagreed or strongly disagreed) and “litigation is usually a cost-effective dispute resolution process” (87.1 per cent disagreed or strongly disagreed): Paetsch, Bertrand & Boyd at 34-35. CRILF’s findings indicate that the reported cases we reviewed are not outliers, but rather illustrate broader trends.

⁵¹ See *Montgomery, Macgregor, KGH, Wen, and Brick*, note 49; *Ernst*, note 44; *Walraven v Tanne*, 2011 ABQB 210; *Klein v Wolbeck*, 2016 ABQB 28.

⁵² See *Rubin, Thompson, Macgregor, Lemoine, KGH, JLC, Wen, Rockey and Buchner*, note 49; *Ernst*, note 44; *Gauthier v Gauthier*, 2013 ABQB 566.

⁵³ Michael McKiernan, “The Going Rate”, *Canadian Lawyer Magazine* (6 June 2016) 49 at 53, online: <www.canadianlawyermag.com/staticcontent/AttachedDocs/CL_June_16-Going%20Rate.pdf>.

⁵⁴ Median net worth of Alberta family units was \$290,500 in 2016, according to Statistics Canada: Statistics Canada, *Survey of Financial Security, 2016*, (Ottawa: Statistics Canada, 7 December 2017), online: <www.statcan.gc.ca/daily-quotidien/171207/t001b-eng.htm>.

[70] Litigation can be expensive whether or not a case reaches trial. With every step in litigation, legal fees add up. They may add up quickly if there are multiple applications to resolve disputes before trial.

[71] The alternative is self-representation. While self-represented litigants may not pay legal fees, they often spend significant time and resources working on their case. For example, they may have to take time off work to attend court.⁵⁵

[72] Trials also require significant court and judicial resources.

c. Litigation is risky

[73] Unjust enrichment claims are risky. A plaintiff faces the possibility that the claim will be entirely unsuccessful. If so, the plaintiff will receive nothing while having to pay legal fees and usually paying costs to the defendant.⁵⁶ A defendant also faces an unknown outcome.

[74] Even if a plaintiff is successful, it is difficult to predict the share of property or amount the plaintiff will receive. It is difficult to discern any pattern in the share of property awarded in reported cases. We have heard a few lawyers suggest a rule of thumb that a plaintiff will receive about 30 to 35 per cent of assets in question, but the reported decisions did not show any consistent pattern. Awards range from zero to 50 per cent of family assets. As noted, some plaintiffs receive nothing, despite living in a common-law relationship for years.⁵⁷ Some plaintiffs in long-term relationships have received awards in the range of 30 per cent of assets accumulated during the relationship.⁵⁸ Less often, plaintiffs receive awards approximating equal division.⁵⁹ In other cases, courts have made awards that appear to be in the nature of fee-for-services.⁶⁰

⁵⁵ Dr Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*, Final Report (2013) at 109-10, online: National Self-Represented Litigants Project <representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>. There are other costs for self-represented litigants, such as stress and social isolation (at 108-11).

⁵⁶ *Rubin*, note 49 may be a cautionary tale for potential plaintiffs. The plaintiff's claim was dismissed so she received nothing from her former partner. Instead, she was required to pay her former partner more than \$100,000.00 in costs for the trial (not including costs for subsequent applications and an unsuccessful appeal), in addition to her own legal costs: see *Rubin v Gendemann*, 2011 ABQB 466 (decision on costs).

⁵⁷ *Rubin and Montgomery*, note 49.

⁵⁸ See e.g. *Lemoine and Thompson*, note 49.

⁵⁹ See e.g. *Brick and Buchner*, note 49.

⁶⁰ See e.g. *Boissoneault v McNutt*, 2011 ABQB 568, aff'd 2012 ABCA 365; *Mailhot*, note 49. See also *Dahlseide v Gallagher*, 2017 ABQB 505.

[75] The law is unclear as to what property should be included or excluded from division. Courts have taken different approaches. Sometimes, the court divides only a subset of the total property.⁶¹ Sometimes, a court treats property as exempt from division for specific factual reasons.⁶²

[76] Given the time, cost, and risk of litigation, few potential plaintiffs will be willing or able to take an unjust enrichment claim to trial, no matter how worthy the claim. In cases that are litigated, defendants also face time, cost, and risk that is often disproportionate to the amount at stake.

[77] Reform is needed to improve access to justice for separating partners. Regardless of whether separating partners negotiate or litigate, they would benefit from legislated rules with presumptions or formulas. Presumptions or formulas would help partners resolve disputes outside of court and would streamline litigation for those who are unable to settle.

E. Support for Reform

[78] Throughout this project, ALRI has heard views both in favour of and opposed to reform. People on both sides of the issue have well thought out reasons for their position and feel strongly about the issue.

[79] Although consultation results were not unanimous, a large majority of the people we heard from were in favour of reform.

[80] Survey results showed strong support for reform. In both the Alberta Survey and ALRI's online surveys, a large majority of respondents were in favour of applying the same rules for division of property to both partners and spouses. Results for specific questions are discussed in more detail in the following chapters.

[81] We also heard strong support for reform at presentations and roundtables. We conducted informal polls at some of these meetings. Almost every time a large majority of those in attendance were in favour of reform.

⁶¹ For example, in *Lemoine* the trial judge awarded the plaintiff 30 per cent of the increase in the value of the defendant's assets, essentially treating the plaintiff's assets as exempt: *Lemoine*, note 49 at paras 155-61. In some cases, the "exemption" is explained by the plaintiff's claim. Despite the creation of the joint family venture, some plaintiffs still limit their claims to specific property, often the shared home. See e.g. *Macgregor and Wen*, note 49.

⁶² For example, in *Thompson* the court treated one real estate investment as exempt from division because the defendant had offered to put the plaintiff's name on title when he acquired it, but the plaintiff had refused: *Thompson*, note 49 at paras 14, 48.

[82] CBA Alberta found strong support among the members of the Family Law (North) section. Of the 55 members who gave input, 46 were in favour of legislated rules, although there were various views about what the content of the rules should be.

[83] In comments, respondents explained why they supported reform. Recurring themes were that the law of unjust enrichment is unclear, that settlement is difficult, and that partners experience lack of access to justice. Many respondents expressed the view that marriage and common-law relationships are much the same, and the law should treat both alike.

[84] Several comments specifically discussed the impact on vulnerable partners. Some noted that in opposite-sex couples, women often earn less and own less property than their male partners. They have fewer resources to fund litigation and are less able to seek justice through the courts. The law of unjust enrichment therefore contributes to the feminization of poverty. A few comments also discussed the impact on victims of domestic violence. They noted that domestic violence may be linked to financial abuse. They said that there are additional barriers to access to justice for victims of domestic violence, as litigation may increase risks to their safety and can be a re-victimizing experience.

[85] A minority of respondents opposed reform. A common reason they gave was that individuals should have a choice about whether property division rules should apply to their relationship. When couples decide to marry it can be assumed that they intend to share property but it should not be assumed that all partners have the same intention. Many said that individuals or couples choose not to marry to avoid property division rules and should not have legislated rules imposed upon them. Some said that the law of unjust enrichment works well and produces fair results, tailored to the individual circumstances of each relationship.

[86] ALRI considered all responses, both those in favour of reform and those opposed to reform. Consultation helped us to identify additional issues and to work through the details of specific proposals for reform. The following chapters explain how consultation results informed our conclusions on specific issues.

[87] The strong support for reform indicates that many Albertans find the existing law unsatisfactory, which is another reason why reform is needed.

CHAPTER 3

Property Division by Agreement

A. Agreements Allow Partners to Choose Their Own Rules

[88] One way to create clear rules is by agreement. Agreements allow partners to choose rules that suit them and are fair for their specific circumstances. Whenever possible, partners should be encouraged to make their own agreements about division of property.

[89] Partners in Alberta may make agreements about property. They may also make agreements about support and other issues. Partners may make an agreement prospectively at the beginning of the relationship or during the relationship. Such an agreement is often called a cohabitation agreement. Partners may also make an agreement at the end of the relationship. Such an agreement may be called a separation agreement. In a cohabitation or separation agreement, partners may agree to divide property based on legal ownership, to use a formula like the one in the MPA, or to use any other way that they choose.

[90] Currently, some partners make cohabitation agreements about property, but ALRI's research indicates couples with such agreements are the minority. In the Alberta Survey, 23 per cent of respondents living in a common-law relationship said they had a written agreement with their partner about how they would divide property if they split up. A large majority – 77 per cent – said they did not have a written agreement with their partner about how they would divide property if they split up.⁶³ This result accords with anecdotal information we heard from family law lawyers in both our early and general consultation. Many lawyers told us it is rare for partners to make a prospective agreement about how property would be divided if the relationship breaks down.

B. Legislated Rules to Facilitate Agreements

[91] In Alberta, there are no legislated rules about agreements for division of property for partners.⁶⁴

⁶³ Alberta Survey Report at 10.

⁶⁴ The *Family Law Act* has rules about agreements respecting spousal support or adult interdependent partner support: *Family Law Act*, SA 2003, c F-4.5, s 62. The MPA has rules about agreements between

[92] In Report for Discussion 30, ALRI proposed introducing legislated rules about agreements. Our consultation did not reveal any issue with this general proposal.

[93] Legislated rules would be useful for two reasons. First, they would clearly inform partners that they may make agreements about property. Second, they would inform partners of the conditions that must be met for the agreement to be enforceable. Partners could then ensure that their agreements are enforceable, giving them peace of mind and helping them avoid litigation.

[94] The rules should apply to agreements made at the beginning of the relationship, during the relationship, or at the end of the relationship.

[95] Partners should be able to make comprehensive agreements that cover every issue about division of property. By making a comprehensive agreement, they could opt-out of any legislated presumptions or formulas that might be enacted.

[96] Partners should also be able to make more limited agreements, addressing specific issues. For example, they might make an agreement to include or exclude certain property from division.

[97] ALRI therefore recommends that there should be legislated rules about agreements for division of property between partners.

RECOMMENDATION 1

There should be legislated rules describing how partners may make an agreement about ownership and division of property.

C. Safeguards for Agreements

1. SAFEGUARDS IN THE MATRIMONIAL PROPERTY ACT

[98] In Report for Discussion 30, ALRI proposed that legislation for partners should be based on the existing legislation that applies to spouses. The MPA has rules about agreements that could also be applied to agreements between partners.

spouses respecting property, but the provisions do not apply to partners: MPA, ss 37-38. Some other Canadian jurisdictions have legislation that applies to agreements between partners respecting property or other matters: see e.g. *Family Law Act*, SBC 2011, c 25, ss 92-93; *Family Law Act*, RSO 1990, c F.3, ss 53, 55-58.

[99] Sections 37 and 38 of the MPA describe how spouses may make an agreement about division of property and what conditions must be met for the agreement to be enforceable. An agreement is only enforceable if certain requirements are met:

- The agreement must be in writing;
- Both spouses must acknowledge, in writing, that they are:
 - aware of the nature and effect of the agreement;
 - aware of the possible future claims to property they may have under the MPA and that they intend to give up those claims in order to give effect to the agreement; and
 - executing the agreement freely and voluntarily, without any compulsion from the other spouse;
- Each spouse must meet separately with a lawyer to make the acknowledgements; and
- The spouses cannot meet with the same lawyer. The lawyer that meets with one spouse must be different from the lawyer who meets with the other spouse.

[100] Most Canadian jurisdictions only require that agreements about property be in writing and signed before one witness to be enforceable.⁶⁵ In all but one of those jurisdictions, however, legislation allows a court to set aside property agreements at the time property is divided.⁶⁶

⁶⁵ *Family Law Act*, RSO 1990, c F.3, s 55; *Marital Property Act*, SNB 2012, c 107, s 37; *Family Law Act*, RSPEI 1988, c F-2.1, s 54(1); *Family Law Act*, RSNL 1990, c F-2, s 65(1); *Family Property and Support Act*, RSY 2002, c 83, s 60(2); *Family Law Act*, SNWT 1997, c 18, s 7(1); *Family Law Act*, SNWT (Nu) 1997, c 18, s 7(1); *Family Law Act*, SBC 2011, c 25, s 93(1). Manitoba only requires agreements to be in writing: *Family Property Act*, CCSM, c F25, s 5(1).

⁶⁶ *Family Law Act*, RSO 1990, c F.3, s 56(4); *Marital Property Act*, SNB 2012, c 107, s 43; *Family Law Act*, RSPEI 1988, c F-2.1, s 55(4); *Family Law Act*, RSNL 1990, c F-2, s 66(4)(5); *Family Law Act*, SNWT 1997, c 18, s 8(4); *Family Law Act*, SNWT (Nu) 1997, c 18, s 8(4); *Family Law Act*, SBC 2011, c 25, s 93; *The Family Property Act*, SS 1997, c F-6.3, s 24(2). The exception is Yukon. Some legislation sets out grounds for setting aside an agreement. For example, the *Family Law Act*, SBC 2011, c 25, s 93(5) allows a court to set aside an agreement at the time property is divided if it is “significantly unfair”. The section reads:

93 (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

- (a) the length of time that has passed since the agreement was made;
- (b) the intention of the spouses, in making the agreement, to achieve certainty;

Continued

[101] Unlike most Canadian jurisdictions, Alberta does not have a statutory provision that allows a court to review an enforceable agreement for fairness at the time property is divided. If an agreement meets the requirements in sections 37 and 38 of the MPA, a court does not have the power to make an order that departs from the agreement.

[102] An agreement that does not meet all the requirements is not enforceable, but may nonetheless be considered by a court. Section 8(g) of the MPA allows a court to consider “the terms of an oral or written agreement between the spouses” when dividing certain kinds of property. Under this section, a court has discretion about the weight to give to an agreement that does not meet all the requirements.

2. POSSIBLE EXCEPTIONS TO THE SAFEGUARDS

[103] In Report for Discussion 30, ALRI asked whether there should be any exceptions to the requirement that both partners meet separately with different lawyers. We questioned whether the requirement could be a barrier to partial settlements or agreements that narrow the issues in dispute. We discussed one example in particular, proposing a specific exception. Preliminary recommendation 3 was:

An agreement about the date a relationship began should not require that each partner obtain independent legal advice.

[104] The date a relationship began may be an issue in dispute, particularly if it affects exemptions or the presumption of equal division.⁶⁷ We considered that an agreement about the date a relationship began for the purpose of property division might be a convenience, to narrow the issues in dispute. It might also function as an agreement to exempt certain property from division or to establish a presumption of equal division for certain property.

[105] ALRI also asked whether there should be any other exceptions to the requirement that both partners meet separately with different lawyers. We posed the following questions:

(c) the degree to which the spouses relied on the terms of the agreement

⁶⁷ In Chapter 7, below, we make recommendations about establishing a threshold date for classifying property. The date a relationship began will usually be the threshold date. The date the relationship began could have significant consequences for exemptions and the presumption of equal division.

- Could a requirement for independent legal advice be a barrier to partial settlements or agreements that narrow the issues in dispute?
- Should the requirement for independent legal advice apply to every agreement that could affect ownership or division of property?
- If not, what kinds of agreements should be excepted? How could legislation distinguish between those agreements that should always require independent legal advice and those for which it should be optional?

3. CONSULTATION RESULTS

a. Safeguards based on the requirements in the *Matrimonial Property Act*

[106] The majority of consultation responses were in favour of applying requirements like those in sections 37 and 38 of the MPA to agreements between partners. In the general survey, 75 per cent of respondents agreed that agreements between partners should have to meet the same requirements as in the MPA. In the survey and in written comments, many of those who addressed this issue said that these safeguards are important to ensure that the agreement is truly the will of both partners. The formal requirements mean that both partners have an opportunity to receive independent legal advice, so they can make an informed choice about entering the agreement.

[107] Some respondents pointed out that there is power imbalance in some relationships. A few specifically mentioned the possibility of abuse, which might include financial or economic abuse. They said that independent legal advice can be especially important where there is a power imbalance between partners.

[108] We also heard from those who did not support applying requirements like those in the MPA to agreements between partners. A recurring concern was that the cost of independent legal advice would be a barrier to making an agreement.

b. Possible exceptions to the safeguards

[109] There were two considerations that came up repeatedly in feedback about any possible exceptions to the requirements.

[110] The first consideration is the cost and inconvenience of making an enforceable agreement. Many comments said meeting separately with different lawyers is expensive and takes time. Cost and inconvenience can be barriers to

making an agreement. Some comments said that agreements should be inexpensive and easy to make, to help partners avoid disputes or resolve disputes without litigation.

[111] The second consideration is the importance of informed decision-making. Many comments said that both partners should understand the consequences of an agreement. Independent legal advice protects both partners against an unfair or poorly thought out agreement. Independent legal advice reduces the risk that one partner will try to take advantage of the other.

[112] Some comments directly addressed the need to balance the two considerations against each other. Several respondents acknowledged that cost is a barrier to making an agreement, but said that the immediate cost of independent legal advice should be weighed against potential future costs. An unfair agreement may result in one partner making contributions to property, without receiving any benefit at the end of the relationship. An unfair or poorly thought out agreement may also lead to litigation, which is likely to be expensive and difficult for both partners.

i. Agreements about the date a relationship began

[113] In consultation, there was some support for ALRI's proposed exception for agreements about the date a relationship began, but support was not overwhelming. In the technical survey, 56 per cent of respondents agreed with this proposal.

[114] A few of the comments in support of this proposal said that the date a relationship began is different than other issues that might be the subject of an agreement because it is primarily a question of fact.

[115] Some comments from those opposed to the proposal pointed out the important legal consequences of the date the relationship began. ALRI's other proposals would mean the date the relationship began would be the usual threshold date used to determine whether certain property is exempt from division. The legal consequences of this date may not be apparent without legal advice. We received many comments pointing out the risk that, without independent legal advice, an informed partner could take advantage of an uninformed one.

ii. *Agreements to opt-out of legislated rules*

[116] In consultation, we received several suggestions for another exception to the safeguards. Many people were concerned that a significant number of common-law couples may have chosen not to get married partly because they did not want to have legal obligations to divide property with each other. It would be a significant new burden on these couples if they had to make an agreement that meets all the requirements in order to opt-out of legislated property division rules. A number of comments suggested that there should be an easy way for couples to opt-out of property division rules. By an easy way to opt-out, most seemed to mean a way that would not require both partners to meet separately with different lawyers.

[117] We heard some well thought out proposals for easy ways for couples to opt-out of property division rules. There were a few proposals for a standard form agreement. A standard form agreement might be enacted in a regulation, similar to the adult interdependent partner agreement found in the *Adult Interdependent Partner Regulation*.⁶⁸ The standard form might offer some limited options to customize the agreement. For example, there could be checkboxes to allow couples to choose between a few options. A standard form might include some basic information about the legal consequences of the agreement. Basic information in the form would be a kind of safeguard to ensure both partners understand the agreement.

[118] Another proposal envisioned agreements that would apply only for a certain period of time. For example, partners might enter an agreement at the beginning of a relationship without meeting separately with different lawyers, but the agreement would only apply to property acquired before the couple became adult interdependent partners. The agreement might be renewable, but only with the consent of both partners and for another limited period of time. A time limit would be a kind of safeguard to ensure that both partners voluntarily agree to opt-out of legislated property division rules. If circumstances changed, or either partner changed their mind, the agreement could be renegotiated or allowed to end when the time limit expires.

⁶⁸ *Adult Interdependent Partner Agreement Regulation*, Alta Reg 66/2011, Schedule.

iii. Other exceptions

[119] We received a suggestion that an exception might be appropriate when partners agree to divide property equally.

[120] We also received a few suggestions that an exception might be appropriate where the value of the property in question is relatively small. Some comments suggested specific thresholds, like \$25,000 or \$50,000.

4. ALRI'S POSITION

[121] If partners make an agreement, there should be safeguards to ensure that both partners are aware of the consequences of the agreement and are entering it voluntarily. The requirements in section 37 and 38 of the MPA provide appropriate safeguards.

[122] These safeguards are particularly important in the absence of a statutory provision to allow a court to review an agreement at the time property is divided.⁶⁹ In Alberta, an enforceable agreement remains enforceable no matter how a couple's circumstances may change. It is therefore critically important that both partners understand the agreement and carefully consider whether it reflects their intentions. The requirements in section 37 and 38 of the MPA are the best way to ensure both partners have an opportunity to fully consider the agreement.

[123] After considering the consultation results, ALRI has concluded that any exceptions to these requirements are likely to undermine the purpose of safeguards.

[124] In reaching our conclusion, we also considered that there is an existing option under the MPA for spouses to make an agreement without meeting all the requirements in sections 37 and 38. This option comes with a different kind of safeguard. Spouses who wish to avoid cost and inconvenience may make an agreement that does not meet all the requirements. While this agreement would not be enforceable by a court under the MPA, it may still be given some weight. If the spouses later have a dispute and seek a court order about division of property, section 8(g) of the MPA gives a court discretion to take the agreement into account when dividing certain kinds of property. A court will usually

⁶⁹ At this time, ALRI is not making any recommendation to change Alberta law to allow courts to review an agreement for fairness at the time property is divided.

review the circumstances surrounding the making of the agreement. The more the circumstances indicate that both partners understood the agreement and entered it voluntarily, the more weight a court is likely to give to the agreement.

[125] There should be a similar provision in legislation about property division for partners. If partners make an agreement without meeting all the requirements, a court should have discretion about what weight to give to the agreement.

a. Agreements about the date a relationship began

[126] An exception for agreements about the date a relationship began for the purpose of property division has the potential to narrow the issues in dispute. We are not convinced, however, that the benefits outweigh the costs. Upon reflection, we think it is unlikely that such an exception would result in substantial savings for a large number of couples. The exception would come with a real risk of an informed partner taking advantage of an uninformed one.

[127] We have also considered our recommendations in *Matrimonial Property Act: Valuation Date*, Final Report 107 [Valuation Date Report]. In our Valuation Date Report, we discussed allowing spouses to agree on a date that matrimonial property would be valued for the purpose of division. We recommended that spouses should be able to agree on a valuation date, but that there should be safeguards for such agreements. Recommendation 2 in our Valuation Date Report was:

Before executing an agreement regarding valuation date, spouses should be required to obtain independent legal advice as outlined in section 38 of the *Matrimonial Property Act*.

[128] Like an agreement about valuation date, an agreement about the date a relationship began can have consequences that may not be apparent without legal advice. In both cases, it is important that both partners understand the effect of the agreement. ALRI's position is therefore that the same requirements should apply to all agreements.

b. Agreements to opt-out of legislated rules

[129] We were impressed by the quality of the proposals for an easy way for couples to opt-out of legislated property division rules, and we considered them carefully. In the end, however, we have concluded that the same safeguards should apply to all agreements.

[130] Opting-out of legislated property division rules implies another set of rules will apply. Most of the proposals did not specify what rules would apply. Opting-out of legislated property division rules might mean that partners would divide property based only on legal ownership, or that partners would divide property based on contributions under the law of unjust enrichment, or that partners would divide property according to some other formula or approach. An easy way to opt-out requires defining which rules would apply instead. Our research and consultation did not reveal a clear consensus about what rules should apply instead of legislated property division rules.

[131] Many of the proposals included some kind of safeguard to help partners make an informed choice about entering or continuing the agreement. In our view, however, the proposed safeguards are not adequate substitutes for legal advice.

[132] A standard form agreement might offer general information, but could not advise partners about how an agreement would affect their specific circumstances. Meeting separately with a lawyer gives each partner an opportunity to understand the claims they may have and would be giving up. Partners may need advice about specific property that might be at stake, or the best way to arrange their affairs in light of the agreement. A standard form cannot take the full context into account or tailor advice to an individual.

[133] Further, standard forms or time limits are not safeguards against duress or undue influence. One of the requirements in the MPA is that each partner meets separately with a lawyer to acknowledge that they are executing the agreement freely and voluntarily, without any compulsion from the other spouse. This requirement offers some protection against a later claim that a spouse's consent was vitiated and the agreement should be set aside.

[134] For these reasons, ALRI has concluded that we cannot recommend an exception that would allow couples to make an enforceable agreement to opt-out of legislated property division rules, without meeting the requirements in sections 37 and 38 of the MPA.

c. Other exceptions

[135] The same concerns would arise with any other proposed exceptions. Any kind of agreement may come with the risk of an informed partner taking advantage of an uninformed one. Meeting separately with different lawyers is the best way to ensure both partners understand the agreement and enter it

voluntarily. The cost and inconvenience to make an agreement properly should be weighed against the cost and inconvenience of resolving a potential future dispute.

[136] Exceptions for agreements to divide property equally or for property below a certain value would be feasible only in certain circumstances. It would require that the value of the property in question be known. To determine if the exception would apply, partners would have to ensure they both have complete information about the property they each own. They might have to obtain valuations of certain property. Further, the exception could not be relied upon to make agreements prospectively. It might be feasible in the case of a separation agreement, but it would not help partners make agreements at the beginning of a relationship or during a relationship. It would not be possible to anticipate in advance what property partners may have at the end of the relationship or what its value will be. In our view, this kind of exception would not be useful often enough to justify including it in legislation.

[137] ALRI does not recommend any other exceptions to the requirements.

[138] ALRI's conclusion is that the requirements should be the same for partners and spouses. Any agreement made after new property division legislation comes into force should have to meet the same requirements as in sections 37 and 38 of the MPA. An agreement that does not meet these requirements should not be enforceable.

[139] If a couple makes an agreement without meeting all the requirements, it would not be enforceable but could be considered by the court. There should be a provision similar to section 8(g) of the MPA, allowing a court to take an unenforceable agreement into account when dividing certain kinds of property.

RECOMMENDATION 2

To be enforceable, an agreement about ownership and division of property should have to meet the same requirements that apply to agreements between spouses. In particular, the agreement should be in writing and each partner should meet separately with different lawyers to make the required acknowledgments.

RECOMMENDATION 3

A court should be able to consider any other agreement in a decision about dividing property.

CHAPTER 4

The Need for Legislated Rules

A. Opt-in Approaches Are Not a Complete Solution

[140] Agreements are not a complete solution to the lack of legislated rules. A key goal of reform should be to reduce the number of people who must rely on claims for unjust enrichment to divide property.

[141] In consultation, some respondents said that legislated rules should apply only to partners who opt-in by agreement. In ALRI's view, this approach would not have a significant effect on the number of people who must rely on the law of unjust enrichment to divide property. In Alberta and elsewhere, experience has shown that many partners will not make agreements. If the law of unjust enrichment remains the default for partners without an agreement, the problem will not be solved.

[142] To achieve effective reform, ALRI has concluded there must be legislated rules to replace the law of unjust enrichment.

1. BARRIERS TO MAKING COHABITATION AGREEMENTS

[143] As discussed above, partners in Alberta are currently able to make agreements about division of property, but most do not make agreements in advance. In the Alberta Survey, a large majority of respondents living in a common-law relationship – 77 per cent – said they did not have a written agreement with their partner about how they would divide property if they split up.⁷⁰

[144] Legislation may facilitate agreements, but it is unlikely to prompt all partners into making agreements. There are at least three reasons why cohabitation agreements are likely to remain uncommon.

[145] The first reason is that preparing a cohabitation agreement is costly and inconvenient. Many partners need legal help to prepare an enforceable, effective agreement. A 2016 survey found the average fees for a lawyer to prepare a

⁷⁰ Alberta Survey Report at 10.

marriage or cohabitation agreement was \$2,094 in the western provinces.⁷¹ Many partners will be unable or unwilling to pay a lawyer to prepare a cohabitation agreement, even though the immediate cost of the agreement is likely to be significantly less than the cost of resolving a potential claim for unjust enrichment.⁷² Going forward, ALRI's recommendations mean that each partner would need to meet with different lawyers to ensure the agreement would be enforceable. Even if they bought a low-cost standard form agreement or prepared their own agreement, they would still face the cost and inconvenience of meeting with two different lawyers.

[146] The second reason is that it can be difficult to negotiate an agreement. A lawyer at one of our 2016 roundtables reported drafting many cohabitation agreements, but said that few are executed.⁷³ In this lawyer's experience, partners often cannot agree on terms. When they reach an impasse, they either break up or decide to live together without a cohabitation agreement.

[147] The third reason is a tendency to "sliding versus deciding" among partners, which has been identified by some sociologists.⁷⁴ In other words, relationships tend to progress gradually without partners making a clear decision to progress from one stage to the next. Over time, the partners' lives become intertwined without making a formal commitment. They may be in an economic partnership and intend to share property, but they are unlikely to take a formal step to record their intentions.

2. EXPERIENCE SHOWS OPT-IN APPROACHES ARE INEFFECTIVE

[148] Opt-in approaches, which require partners to take a formal step to be bound by property division rules, have also been shown to be ineffective at reducing the number of people who must rely on claims for unjust enrichment to divide property.

⁷¹ Michael McKiernan, "The Going Rate", *Canadian Lawyer Magazine* (6 June 2016) 49 at 53, online: <www.canadianlawyermag.com/staticcontent/AttachedDocs/CL_June_16-Going%20Rate.pdf>.

⁷² The same survey found that the average legal fees for a family law trial of up to five days were \$36,577: Michael McKiernan, "The Going Rate", *Canadian Lawyer Magazine* (6 June 2016) 49 at 53, online: <www.canadianlawyermag.com/staticcontent/AttachedDocs/CL_June_16-Going%20Rate.pdf>.

⁷³ This lawyer is not the only one to make this observation: see Don A Gross, "Some Considerations Regarding Pre-nuptial Agreements, Cohabitation Agreements and Minutes of Settlement" in *Cohabitation and Pre-Nuptial Agreements* (Alberta: Legal Education Society of Alberta, 2012) at 9.

⁷⁴ See Wendy D Manning & Pamela J Smock, "Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data" (2005) 67:4 *Marriage and Family* 989; Scott M. Stanley, Galena Kline Rhoades & Howard J. Markman, "Sliding Versus Deciding: Inertia and the Premarital Cohabitation Effect" (2006) 55:4 *Family Relations* 499 at 505-506.

a. Registration system

[149] Two provinces, Nova Scotia and Manitoba, allow common-law partners to opt-in to certain consequences of marriage, including legislated property division rules, by registering their relationship with a government agency. Following registration, property division legislation applies to the partners as if they were spouses.⁷⁵

[150] In theory, a registration system is an attractive option. It does not require partners to marry, with all that marriage signifies. It also offers a relatively simple way to opt-in to legislated rules without significant cost to the partners.

[151] It is likely that many people would support a registration system. In 2002, Alberta Justice commissioned a public consultation on family law [2002 Consultation Report]. It included a phone survey and roundtable discussions. The phone survey had 800 respondents, randomly selected within quotas for gender, age, and geographic region to ensure the sample was representative of Alberta's population. Results were summarized in a report, which provides insight into public opinion at the time on a number of issues related to family law.⁷⁶ There was strong support for a registration system in the 2002 Consultation Report. In the phone survey, 68 per cent of respondents supported the concept of a government registry for common-law and same sex relationships.⁷⁷

[152] At our 2016 roundtables, several lawyers were strongly in favour of a registration system.

[153] Unfortunately, experience in Nova Scotia and Manitoba shows that a registration system is unlikely to substantially reduce the number of people who have to rely on the law of unjust enrichment. Both provinces have had registration systems in place for more than ten years. They have seen very low numbers of registrations. Out of tens of thousands of common-law couples (42, 630 in Nova Scotia and 45, 100 in Manitoba, according to the 2016 census), only a tiny fraction have registered.⁷⁸ In Manitoba, a total of 416 couples registered

⁷⁵ *Vital Statistics Act*, RSNS 1989, c 494, ss 53-54; *Family Property Act*, CCSM c F25.

⁷⁶ Alberta, Department of Justice and Attorney General, *Alberta Family Law Reform Stakeholder Consultation Report*, by Marcomm Works (May 2002), online: <www.assembly.ab.ca/lao/library/egovdocs/2002/aljag/136616.pdf> [2002 Consultation Report].

⁷⁷ 2002 Consultation Report at 89.

⁷⁸ Statistics Canada, *Families, Households and Marital Status Highlight Tables: Marital status and opposite-and same sex for persons aged 15 and over living in private households for both sexes, total, presence and age of children, 2016*

common-law relationships in the first ten years of the registration system.⁷⁹ There was an average of 59 registrations per year from 2012 to 2016.⁸⁰ Cumulative numbers are not available for Nova Scotia, but the annual number of registrations is similar to Manitoba. There were 68 registrations in Nova Scotia in 2013 (the latest year for which statistics are available), 51 in 2012, and 76 in 2011.⁸¹

b. Marriage

[154] We have sometimes heard the argument that partners who want to benefit from property division rules should marry. In consultation, some respondents said that partners should get married if they want to be treated like spouses.

[155] Many couples do marry. In 2016, approximately 83 per cent of “persons in a couple” in Alberta were married.⁸²

[156] Nonetheless, a significant number of couples do not marry. As noted above, the 2016 census found that 320,360 “persons in a couple in Alberta” – approximately 17 per cent – were common-law partners.⁸³

counts, Canada, provinces and territories, 2016 Census (Ottawa: Statistics Canada, 18 July 2017), online: <www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/fam/Table.cfm?Lang=E&T=11&Geo=00>.

⁷⁹ Manitoba Vital Statistics Agency, *2014/15 Annual Report* (2015) at 13, online: <vitalstats.gov.mb.ca/pdf/2015_vs_annual_report_en.pdf>.

⁸⁰ Manitoba Vital Statistics Agency, *2016/17 Annual Report* (2015) at 16, online: <vitalstats.gov.mb.ca/pdf/2017_vs_annual_report_en.pdf>.

⁸¹ Service Nova Scotia, *Annual Report* (2013) at 89, online: <www.novascotia.ca/sns/pdf/ans-vstat-2013-annual-report.pdf>; Service Nova Scotia, *Annual Report* (2012) at 92, online: <www.novascotia.ca/sns/pdf/ans-vstat-2012-annual-report.pdf>; Service Nova Scotia, *Annual Report* (2011) at 92, online: <www.novascotia.ca/sns/pdf/ans-vstat-2011-annual-report.pdf>. The Nova Scotia Law Reform Commission reported that the number of registrations has remained relatively low in other years: Law Reform Commission of Nova Scotia, *Division of Family Property, Final Report* (2017) at 93, online: <www.lawreform.ns.ca/Downloads/Division%20of%20Family%20Property%20-%20Final%20Report.pdf> [Nova Scotia Final Report]. The Commission wrote:

The option to register a domestic partnership under the *Vital Statistics Act* has not had a strong uptake. Vital Statistics reports for the years 2008 to 2014 indicate that an average of 59 domestic partnerships were registered with Vital Statistics each year.

⁸² Statistics Canada, *Families, Households and Marital Status Highlight Tables: Marital status and opposite- and same-sex status by sex for persons aged 15 and over living in private households for both sexes, total, presence and age of children, 2016 counts, Canada, provinces and territories, 2016 Census* (Ottawa: Statistics Canada, 18 July 2017), online: <www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/fam/Table.cfm?Lang=E&T=11&Geo=00>.

⁸³ Statistics Canada, *Families, Households and Marital Status Highlight Tables: Marital status and opposite- and same-sex status by sex for persons aged 15 and over living in private households for both sexes, total, presence and age of children, 2016 counts, Canada, provinces and territories, 2016 Census* (Ottawa: Statistics Canada, 18 July 2017), online: <www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/fam/Table.cfm?Lang=E&T=11&Geo=00>.

[157] There is evidence that only a small fraction of partners make a deliberate choice not to marry to avoid the financial consequences of marriage. In the 2011 General Social Survey, Statistics Canada asked individuals in a common-law relationship whether they intended to marry their current partner, and if not, why not. Only four per cent of respondents who did not intend to marry said that their main reason for not marrying was “to maintain financial independence.”⁸⁴

[158] For most couples, the decision to marry involves other considerations. To many people, marriage is more than a legal or financial transaction. Marriage may have personal, social, cultural, and religious meaning.⁸⁵ In the 2011 General Social Survey, married respondents were asked their main reason for marrying, and individuals living with a common-law partner who wanted to marry their partner were asked why they would like to marry. The most common reasons for married respondents were “cultural/moral/religious beliefs” (35 per cent) and “proof of love and commitment” (32 per cent). Only one per cent of respondents who were married said their main reason was financial security.⁸⁶

[159] Further, as discussed below, the decision to marry requires both partners to agree. In the 2011 General Social Survey, two per cent of respondents who did not intend to marry their common-law partner said the reason for not marrying was “partner does not want to”.⁸⁷

[160] Whatever their reasons, many couples do not marry. A system that requires couples to marry in order to opt-in to legislated property division rules is not a true choice system and will leave many partners to rely on claims for unjust enrichment. A true choice system should also respect the different reasons why couples choose not to marry. Avoiding the financial consequences of marriage is only one of those reasons.

⁸⁴ The most common reasons not to marry in the 2011 General Social Survey were “current situation is fine as it is” (33 per cent of respondents) and “don’t believe in the institution of marriage” (23 per cent of respondents): Statistics Canada, *Table 3: Main Reason Why People Living in Common-law Do Not Intend to Marry Their Current Partner, Canada, 2011*, (Ottawa: Statistics Canada, 30 November 2015), online: <www.statcan.gc.ca/pub/89-650-x/2012001/tbl/tbl03-eng.htm>.

⁸⁵ Walsh, note 12 at para 43; see also John Eekelaar & Mavis Maclean, “Marriage and the Moral Bases of Personal Relationships” (2004) 31:4 *JL & Soc’y* 510.

⁸⁶ Statistics Canada, *Table 2: Main Reason Why People Have Married or Would Like to Marry Their Current Partner, Canada, 2011*, (Ottawa: Statistics Canada, 30 November 2015), online <www.statcan.gc.ca/pub/89-650-x/2012001/tbl/tbl02-eng.htm>.

⁸⁷ Statistics Canada, *Table 3: Main Reason Why People Living in Common-law Do Not Intend to Marry Their Current Partner, Canada, 2011*, (Ottawa: Statistics Canada, 30 November 2015), online: <www.statcan.gc.ca/pub/89-650-x/2012001/tbl/tbl03-eng.htm>.

3. SHORTCOMINGS OF OPT-IN APPROACHES

[161] Agreements, registration systems, and marriage all require that couples take a formal step to indicate their choice. An opt-in approach has a strong appeal to those who believe that legal obligations should be a matter of choice. Holders of this view are found in the courts, among lawyers, and in the general public. In *Walsh* and *Quebec v A*, some judges of the Supreme Court of Canada said that legal obligations should be freely chosen rather than imposed.⁸⁸ At our 2016 roundtables, many lawyers said they would prefer for partners to assume legal obligations by choice. In the Alberta Survey, 21 per cent of respondents said that the most important value in any new law about division of property was “individuals should not have to divide property with a partner unless they agree to do so.”⁸⁹ Of respondents currently in a common-law relationship, 31 per cent said that this value was the most important.⁹⁰ In our general consultation, we heard from respondents who felt strongly that property division rules should only apply to couples who opted-in.

[162] There are problems with relying only on an opt-in approach, however.

a. Lack of agreement

[163] When partners agree, an opt-in approach respects individual choice for both partners. When partners do not agree, however, an opt-in approach prioritizes one partner’s choice and discounts the other’s. These are distinct scenarios from the perspective of choice but the law treats them as the same under an opt-in approach.

[164] At the 2016 roundtables, some lawyers pointed out that there is often a correlation between the relative economic power of the partners and their preferences. The partner with more assets or higher income is usually the one who prefers not to share property. The partner with fewer assets or lower income has little power to compel the other to share property, and the most to lose if the

⁸⁸ See the majority decision in *Walsh*, note 12 at para 43: “Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount,” Bastarache J; see also the decision of LeBel, Fish, Rothstein, and Moldaver JJ in *Quebec v A*, note 12 at para 257:

In Quebec family law, these rights and obligations are always available to everyone, but imposed on no one. Their application depends on an express mutual will of the spouses to bind themselves. This express, and not deemed, consent is the source of the obligation of support and of that of partition of spouses’ patrimonial interests. As we have seen, this consent is given in Quebec law by contracting marriage or a civil union, or entering into a cohabitation agreement. Participation in the protective regimes provided for by law depends necessarily on mutual consent.

⁸⁹ Alberta Survey Report at 25.

⁹⁰ Email from Aleena Amjad Hafeez to Laura Buckingham, ALRI Counsel (5 February 2017).

relationship breaks down.⁹¹ The burden of an opt-in approach therefore tends to fall on the most vulnerable. As Winifred H. Holland said: “The flip side of one person’s autonomy is often another’s exploitation.”⁹²

[165] Further, a vulnerable partner may not have a free choice about remaining in the relationship. The reasons an individual may not feel able to leave a relationship could include children, financial dependence, personal care needs, or abuse, among others. It should also be noted that leaving the relationship may crystallize a loss. Partners often share resources during a relationship. As long as the relationship is intact, the partner with fewer assets or lower income can expect that sharing will continue. They may hope that someday their partner will agree to marry or opt-in to property division rules. If the individual leaves the relationship, they lose the opportunity to share now and for the future.

b. Misconceptions

[166] An opt-in approach works best if individuals make informed choices. There is reason to believe many partners mistakenly believe they are already subject to legislated property division rules. As discussed in Chapter 2, anecdotal information and survey results indicate many Albertans believe legislated property division rules apply to partners and spouses alike.⁹³ Individuals who have this misconception would not know a formal step is necessary to opt-in, so they would be unlikely to take the necessary step.

c. Other barriers to opting-in

[167] Even if partners agree and are informed, they may fail to take the necessary steps to opt-in. Sometimes there are barriers to opting-in, such as the

⁹¹ In opposite-sex couples, the relative economic power of the partners is often gendered. On average, Canadian women earn less than men: Statistics Canada, *Table 206-0052: Income of individuals by age group, sex and income source, Canada, provinces and selected census metropolitan areas* (Ottawa: Statistics Canada, 12 March 2018), online: <www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2060052&pattern=&csid=>>. The difference is most pronounced in Alberta: see Kathleen A Lahey, *Equal Worth: Designing Effective Pay Equity Laws for Alberta*, Report (2016) at 3, online: Parkland Institute <d3n8a8pro7vhm.cloudfront.net/parklandinstitute/pages/341/attachments/original/1457119686/equal_worth.pdf?1457119686>. Men are less likely than women to take time away from paid work or work part-time to accommodate caregiving responsibilities and other unpaid work. This difference can result in women having lower earnings, less money to save and invest, and lower pension benefits: see Lahey above ch 2; see also Roderic Beaujot & Zenaida R Ravanera, “Family Models for Earning and Caring: Implications for Child Care and for Family Policy” (2009) 36:1-2 *Canadian Studies in Population* 145.

⁹² Winifred H. Holland, “Marriage and Cohabitation – Has the Time Come to Bridge the Gap?” in *Special Lectures of the Law Society of Upper Canada 1993 – Family Law: Roles, Fairness and Equality* (Scarborough, Ont: Thomson, 1994) 369 at 380.

⁹³ See note 33, above.

cost of a cohabitation agreement or a wedding.⁹⁴ The tendency to “sliding versus deciding” may also mean partners are unlikely to take a formal step to opt-in to legislated property division rules. For some partners, such as non-conjugal adult interdependent partners, opting-in to legislated property division rules by marrying may not be an option.

[168] Regardless of the reason, experience shows that an approach that requires couples to opt-in to legislated property division rules will leave many partners to rely on the law of unjust enrichment.

B. The Need to Clarify Obligations

[169] Legislated property division rules should not be seen as creating entirely new legal obligations. Legal obligations already exist under the law of unjust enrichment. As Justice Dickson pointed out in *Pettkus v Becker* nearly 40 years ago, an individual who benefits from a relationship already has an obligation to share the benefit:⁹⁵

[W]here one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it

[170] The law of unjust enrichment is a poor way to define partners’ obligations. It is complex and produces unpredictable results, so it does not help partners predict how they must fulfill their obligations. The time, cost, and risk of litigation means many partners will be unable to pursue a claim for unjust enrichment, leading to injustice. For partners who do not make an agreement, the law of unjust enrichment should not be the default option.

[171] Legislated property division rules would clarify the obligations. There should be clear legislated rules about how partners without an agreement should divide property if their relationship ends. Legislated property division rules with

⁹⁴ In the 2011 General Social Survey, Statistics Canada asked individuals in a common-law relationship whether they intended to marry their current partner, and if not, why not. Eight per cent of those who did not intend to marry gave their main reason as “Wedding (preparations, cost)”: Statistics Canada, *Table 3: Main Reason Why People Living in Common-law Do Not Intend to Marry Their Current Partner, Canada, 2011*, (Ottawa: Statistics Canada, 30 November 2015), online: <www.statcan.gc.ca/pub/89-650-x/2012001/tbl/tbl03-eng.htm>.

⁹⁵ *Pettkus v Becker*, [1980] 2 SCR 834 at 849.

presumptions or formulas would allow partners to predict how they must fulfill their obligations.

[172] The legislated rules should be default rules, which would only apply if partners do not choose other rules. As discussed in Chapter 3, partners could choose other rules by making an agreement about ownership and division of property. An agreement would prevail over the legislated rules.

[173] Default legislated rules would mean that partners who do not make a choice or do not take a formal step to indicate their choice would not be left to rely on the law of unjust enrichment.

RECOMMENDATION 4

There should be legislated rules describing how property should be divided if partners do not have an agreement about ownership and division of property.

CHAPTER 5

Eligibility Criteria

A. The Need for Legislated Eligibility Criteria

[174] Property division legislation for partners requires eligibility criteria to clearly define which relationships are affected by the rules.

[175] The term “common-law” is regularly used to mean a relationship between two individuals who live in a marriage-like relationship without being legally married, but the term has no fixed technical meaning. It is used in different ways, and does not necessarily mean the same thing in all contexts.⁹⁶

[176] If legislation does not include eligibility criteria, it would be difficult for separating partners to determine whether legislated property division rules apply to them. It would be difficult to settle disputes, and partners would be pushed towards litigation about whether or not the rules apply. Courts might eventually fill the gap, developing eligibility criteria through judicial decisions, but it would take time. Legislation should provide clear guidance about which relationships are affected.

[177] There are two reasons commonly given for why property division rules should apply to particular relationships. One reason is that the relationship is an economic partnership. If the partners or spouses both contribute to any gains accumulated during the relationship, it is fair that they share those gains. The other reason is that the partners or spouses intend, or should be presumed to intend, to share any gains accumulated during the relationship.⁹⁷

⁹⁶ For example, most federal legislation uses the term “common-law partners”, usually defined as individuals who have lived together in a conjugal relationship for at least one year: see e.g. *Canada Pension Plan*, RSC 1985, c C-8, s 2(1); *Citizenship Act*, RSC 1985, c C-29, s 2(1). The definition of common-law partner under the *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 248(1) also includes partners who have lived together for less than one year, if they have a child together. Some provincial legislation uses a different definition: see e.g. *Family Property Act*, CCSM c F25, s 1(1), which defines “common-law partner” as a person who has lived with another person in a conjugal relationship for at least three years, or has registered a common-law relationship with another person. Statistics Canada uses a different definition. It considers a common-law couple to be two people living together who are not legally married to each other, regardless of how long they have lived together: Statistics Canada, *Classification of Census Family Status*, (Ottawa: Statistics Canada, 16 September 2016), online: <www23.statcan.gc.ca/imdb/p3VD.pl?Function=getVD&TVD=61912&CVD=61915&CPV=1.1.2&CST=01012004&CLV=3&MLV=3>.

⁹⁷ These justifications can be seen in case law and academic writing. Both justifications are evident in the Supreme Court’s discussion of the joint family venture in *Kerr*. The Court described a joint family venture as

Continued

[178] It is impractical to require plaintiffs to prove the actual degree of economic partnership or the actual intentions of both partners, as is currently required by the law of unjust enrichment. It requires a detailed inquiry into the facts of the particular case and outcomes are unpredictable.⁹⁸ This approach contributes to a lack of access to justice.

[179] Legislated eligibility criteria should instead rely on presumptions. If the relationship between two individuals meets certain observable criteria, it should be presumed that they have formed an economic partnership or that they intend to share property.

[180] In Report for Discussion 30, ALRI proposed that property division rules should apply to adult interdependent partners, as defined in AIRA.

[181] Any criteria relying on presumptions will necessarily be imperfect and somewhat arbitrary. It is likely that some adult interdependent partners are not in an economic partnership and do not intend to share property. It should be remembered, however, that partners have the option to opt-out of legislated property division rules by making an agreement. Similarly, some couples who are in an economic partnership or who intend to share property may not meet the definition of adult interdependent partners. These couples also have the option of making an agreement about property division. By making an agreement, couples may decide to divide property in a way that reflects their actual intentions.

a partnership, involving joint effort and economic integration (although not a presumption of equal sharing): *Kerr*, note 38 at paras 85, 90–93. The Court also identified “actual intent” as one of the four main headings of factors to consider in determining whether a relationship is a joint family venture, stating “the actual intentions of the parties must be given considerable weight”: *Kerr*, note 38 at para 94. See also *Jensen v Jensen*, 2009 ABLA 272 at para 1; Brenda Cossman & Bruce Ryder, “What Is Marriage-like Like? The Irrelevance of Conjugalit” (2001) 18:2 Can J Fam L 269 at 283–91 [Cossman & Ryder].

⁹⁸ Despite the Supreme Court’s admonition that the remedy for unjust enrichment “should not be based on a minute totting up of the give and take of daily domestic life” (*Kerr*, note 38 at para 7), evidence often amounts to exactly that. Alberta cases following *Kerr* (e.g., *Mailhot*, *Rockey*, *Montgomery*, *Rubin* and *Macgregor*, note 49) refer to details such as who paid the mortgage, who paid for utilities (*Mailhot* at paras 59, 65; *Rockey* at paras 77, 153), who purchased furniture (*Mailhot* at para 75; *Montgomery* at para 57), who paid for groceries and who ate the groceries (*Mailhot* at paras 59, 65; *Montgomery* at para 34–35; *Rockey* at paras 71–75), who did the cooking (*Rubin* at para 218–21; *Rockey* at paras 71–75), who did the housework (*Macgregor* at para 88; *Rockey* at paras 71–75), who mowed the lawn (*Rubin* at para 231; see also *Anthony v Berger*, 2010 ABQB 3 at paras 47–49), who performed specific home improvement jobs (*Montgomery* at para 37) and similar details.

B. The Adult Interdependent Relationships Act

[182] AIRA is used to define which partners are eligible for many rights, benefits, and obligations in Alberta legislation. Alberta adopted AIRA in 2002, after certain legislation was found to discriminate against Albertans in same sex relationships or on the basis of sexual orientation.⁹⁹ AIRA extended many of the rights, benefits, and obligations of marriage to adult interdependent partners.

1. CONSISTENCY WITH OTHER LEGISLATION

[183] The term adult interdependent partner, as defined in AIRA, is used throughout Alberta legislation.

[184] Before AIRA was adopted, there were inconsistent definitions of spouse and common-law partner in Alberta legislation. A couple might meet the criteria for some rights, benefits, or obligations but not others. The piecemeal approach to eligibility criteria made it difficult for partners to determine which rights, benefits, or obligations applied to their relationship.

[185] One of the goals of AIRA was the use of consistent criteria throughout Alberta legislation.¹⁰⁰ AIRA defines “adult interdependent partner” and “adult interdependent relationship”. The *Interpretation Act* defines these terms by reference to AIRA.¹⁰¹ A consequential amendment made as a result of AIRA also established a consistent definition of “spouse”. The *Interpretation Act* now states that “‘spouse’ means the spouse of a married person”.¹⁰² These definitions are used throughout Alberta legislation.

[186] More than 130 different Alberta statutes and regulations now include the words “adult interdependent partner”. Generally, legislation extends the same rights, benefits, and obligations to adult interdependent partners and spouses. Adult interdependent partners and spouses have the same rights and obligations

⁹⁹ In *Johnson v Sand*, 2001 ABQB 253, the Alberta Court of Queen’s Bench struck down provisions of the *Intestate Succession Act*, RSA 1980, c I-9. In *A (Re)*, 1999 ABQB 879, the Court considered whether the *Child Welfare Act*, SA 1984, c C-8.1 permitted step-parent adoptions by the same sex partner of a child’s parent. See also *Vriend v Alberta*, [1998] 1 SCR 493, where the Supreme Court of Canada read in sexual orientation as a protected ground under the *Individual’s Rights Protection Act*, RSA 1980, c I-2.

¹⁰⁰ Alberta, Legislative Assembly, *Alberta Hansard*, 25th Leg, 2nd Sess (19 November 2002) at 1388 (Hon David Hancock).

¹⁰¹ *Interpretation Act*, RSA 2000, c I-8, ss 28(1)(b.1)–(b.2).

¹⁰² *Interpretation Act*, RSA 2000, c I-8, s 28(1)(zz.1).

relating to support,¹⁰³ intestate succession, maintenance and support from an estate,¹⁰⁴ and for many other purposes.¹⁰⁵

2. PURPOSE OF THE ADULT INTERDEPENDENT RELATIONSHIPS ACT

[187] At the 2016 roundtable discussions, several lawyers told us that the AIRA criteria were appropriate to determine which relationships give rise to support obligations, but were not appropriate for property division. In their view, AIRA was not designed with property division in mind. This point merited further investigation, so we reviewed the legislative history of AIRA. We found nothing in the history or in AIRA itself to indicate it was designed specifically for support obligations.

[188] AIRA’s preamble states that a purpose of the act is “to define a legal context for the nature of those interdependent relationships and to set out the applicability of Alberta laws to them”.¹⁰⁶

[189] When AIRA was introduced in the legislature, its sponsor said it was intended to address financial and property issues people in committed relationships may face:¹⁰⁷

Over the years courts and lawmakers have recognized the need for laws that allow people in committed personal relationships outside of marriage to deal with the financial and property issues that they face.

...

Committed relationships of all kinds can create financial interdependencies. Government does not create these relationships; people do. But it is our duty to ensure that our laws help Albertans address the emotional and financial responsibilities which are created through those relationships and which then have to be taken care of when those relationships break down.

¹⁰³ *Family Law Act*, SA 2003, c F-4.5, ss 56–63.

¹⁰⁴ *Wills and Succession Act*, SA 2010, c W-12.2, ss 60–62, 72(b), 88.

¹⁰⁵ See e.g. *Conflicts of Interest Act*, RSA 2000, c C-23; *Fatal Accidents Act*, RSA 2000, c F-8; *Protection Against Family Violence Act*, RSA 2000, c P-27. Other legislation extends the same rights, benefits, and obligations to spouses and partners who meet certain criteria, without using the definition of adult interdependent partner. Often, a different definition is used in provincial legislation that must harmonize with federal legislation: see e.g. *Income and Employment Supports Act*, SA 2003, c I-0.5 (“cohabiting partner”); *Employment Pension Plans Act*, SA 2012, c E-8.1 (“pension partner”); *Alberta Personal Income Tax Act*, RSA 2000, c A-30 and *Income Tax Act*, RSC 1985, c 1 (5th Supp) (“common-law partner”).

¹⁰⁶ AIRA, Preamble.

¹⁰⁷ Alberta, Legislative Assembly, *Alberta Hansard*, 25th Leg, 2nd Sess (19 November 2002) at 1388 (Hon David Hancock).

[190] From the beginning, AIRA has applied to certain property issues. In particular, AIRA applies to intestate succession. If an adult interdependent partner dies without a will, the surviving partner receives a preferential share of the deceased's property.¹⁰⁸ Adult interdependent partners and spouses have the same claim to property in the case of intestate succession.

[191] The fact that AIRA does not address property division between separating adult interdependent partners appears to be the result of timing more than policy choice. During debate in the Legislature, the sponsor of AIRA explained that the MPA had been excluded from the statutes amended by AIRA to await the Supreme Court's decision in *Walsh*. He indicated that the issue might be revisited once the Supreme Court issued its decision.¹⁰⁹ Although the Supreme Court issued its decision the following month, the legislature did not revisit property division for adult interdependent partners.

3. DEFINITION OF ADULT INTERDEPENDENT PARTNER

a. Relationship of interdependence

[192] To become adult interdependent partners, two people must live in a "relationship of interdependence". The definition of a relationship of interdependence in AIRA has both emotional and economic aspects. For ease of reference, the definition is:¹¹⁰

1(1) In this Act,

...

- (f) "relationship of interdependence" means a relationship outside marriage in which any 2 persons
 - (i) share one another's lives,
 - (ii) are emotionally committed to one another, and
 - (iii) function as an economic and domestic unit.

(2) In determining whether 2 persons function as an economic and domestic unit for the purposes of subsection (1)(f)(iii), all the

¹⁰⁸ *Wills and Succession Act*, SA 2010, c W-12.2, ss 60–62.

¹⁰⁹ Alberta, Legislative Assembly, *Alberta Hansard*, 25th Leg, 2nd Sess (27 November 2002) at 1608 (Hon David Hancock).

¹¹⁰ AIRA, s 1.

circumstances of the relationship must be taken into account, including such of the following matters as may be relevant:

- (a) whether or not the persons have a conjugal relationship;
- (b) the degree of exclusivity of the relationship;
- (c) the conduct and habits of the persons in respect of household activities and living arrangements;
- (d) the degree to which the persons hold themselves out to others as an economic and domestic unit;
- (e) the degree to which the persons formalize their legal obligations, intentions and responsibilities toward one another;
- (f) the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well-being;
- (g) the degree of financial dependence or interdependence and any arrangements for financial support between the persons;
- (h) the care and support of children;
- (i) the ownership, use and acquisition of property.

[193] AIRA differs from legislation in other jurisdictions, because it does not require partners to have a conjugal relationship to be adult interdependent partners.¹¹¹

[194] In other Canadian jurisdictions with legislated property division rules for common-law partners, the rules apply only to partners in a conjugal, or marriage-like, relationship. There is a tendency to use “conjugal relationship” as a synonym for sexual relationship, but there is more to it. Canadian courts usually refer to the factors in *Molodowich v Penttinen* when considering whether a relationship is a conjugal one.¹¹² The factors are considered holistically.¹¹³ It is not necessary to establish all the factors.

¹¹¹ Whether two individuals have a conjugal relationship is nonetheless one of the factors to be considered in determining whether they live in a relationship of interdependence: AIRA, s 1(2)(a).

¹¹² *Molodowich v Penttinen* (1980), 17 RFL (2d) 376 at para 16 (Ont Dist Ct) [*Molodowich*]. The factors are:

1. SHELTER:

- (a) Did the parties live under the same roof?
- (b) What were the sleeping arrangements?
- (c) Did anyone else occupy or share the available accommodation?

Continued

b. Becoming adult interdependent partners

[195] Under AIRA, two people in a relationship of interdependence may become adult interdependent partners in three ways: by living together for at least three years; by living together and having a child of the relationship; or by entering an agreement to become adult interdependent partners. The ways to become adult interdependent partners are set out in section 3:¹¹⁴

3(1) Subject to subsection (2), a person is the adult interdependent partner of another person if

- (a) the person has lived with the other person in a relationship of interdependence
 - (i) for a continuous period of not less than 3 years, or
 - (ii) of some permanence, if there is a child of the relationship by birth or adoption,

(2) SEXUAL AND PERSONAL BEHAVIOUR:

- (a) Did the parties have sexual relations? If not, why not?
- (b) Did they maintain an attitude of fidelity to each other?
- (c) What were their feelings toward each other?
- (d) Did they communicate on a personal level?
- (e) Did they eat their meals together?
- (f) What, if anything, did they do to assist each other with problems or during illness?
- (g) Did they buy gifts for each other on special occasions?

(3) SERVICES:

What was the conduct and habit of the parties in relation to:

- (a) Preparation of meals,
- (b) Washing and mending clothes,
- (c) Shopping,
- (d) Household maintenance,
- (e) Any other domestic services?

(4) SOCIAL:

- (a) Did they participate together or separately in neighbourhood and community activities?
- (b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

(5) SOCIETAL:

What was the attitude and conduct of the community towards each of them and as a couple?

(6) SUPPORT (ECONOMIC):

- (a) What were the financial arrangements between the parties regarding the provision of or contribution towards the necessities of life (food, clothing, shelter, recreation, etc.)?
- (b) What were the arrangements concerning the acquisition and ownership of property?
- (c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

(7) CHILDREN:

What was the attitude and conduct of the parties concerning children?

¹¹³ See generally Cossman & Ryder, note 97 at 291–300.

¹¹⁴ AIRA, s 3.

or

(b) the person has entered into an adult interdependent partner agreement with the other person under section 7.

(2) Persons who are related to each other by blood or adoption may only become adult interdependent partners of each other by entering into an adult interdependent partner agreement under section 7.

[196] There is an additional condition that should be noted. Relationships in which one person is being remunerated to provide domestic support or personal care to another are expressly excluded from the definition of adult interdependent partners.¹¹⁵

i. Qualifying period

[197] One way to become adult interdependent partners is to live in a relationship of interdependence for three years.

[198] Compared to legislation in other Canadian jurisdictions, AIRA has a relatively long qualifying period before partners become eligible for statutory rights, benefits, and obligations.

[199] Of the Canadian jurisdictions that have legislated property division rules for partners, the qualifying period varies from one year to three years. The following table summarizes the minimum period partners must cohabit before property division rules apply in those jurisdictions:

British Columbia	2 years of cohabitation
Saskatchewan	2 years of cohabitation
Manitoba	3 years of cohabitation or registered a common-law relationship under the <i>Vital Statistics Act</i>
Northwest Territories	2 years of cohabitation or lived together in a relationship of some permanence if there is a child
Nunavut	2 years of cohabitation or lived together in a relationship of some permanence if there is a child

¹¹⁵ AIRA, s 4(2).

Nova Scotia ¹¹⁶	Made a domestic partnership declaration under the <i>Vital Statistics Act</i>
Federal (<i>Family Homes on Reserves and Matrimonial Interests or Rights Act</i>) ¹¹⁷	1 year of cohabitation

ii. Child of the relationship

[200] The second way for two individuals to become adult interdependent partners is by living in a relationship of some permanence if there is a child of the relationship. In effect, the qualifying period is shortened for partners with a child or children.

[201] Only two other Canadian jurisdictions have a similar rule. In the Northwest Territories and Nunavut, legislated property division rules apply to partners who live in a relationship of some permanence if they have a child together. In the other Canadian jurisdictions that have legislated property division rules for partners, having a child does not reduce the qualifying period.

iii. Adult interdependent partner agreement

[202] The third way to become adult interdependent partners is to enter an adult interdependent partner agreement. Two individuals can enter an adult interdependent partner agreement if they live in a relationship of interdependence or if they intend to live in a relationship of interdependence.¹¹⁸ There is a prescribed form of agreement.¹¹⁹ In effect, two individuals can agree to shorten or eliminate the qualifying period to become adult interdependent partners.

[203] Two individuals who are related by blood or adoption can only become adult interdependent partners by entering an adult interdependent partner agreement.¹²⁰ This provision means that close relatives who live together – such

¹¹⁶ The Nova Scotia Law Reform Commission recently recommended that property division rules should be extended to common-law partners who have cohabited for at least two years: Nova Scotia Final Report, note _ at 115.

¹¹⁷ This table refers to the provisional rules under the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20. Under the act, a First Nation may enact its own laws for division of homes or land on reserve. The provisional rules apply if a First Nation does not enact its own laws.

¹¹⁸ AIRA, s 7.

¹¹⁹ *Adult Interdependent Partner Agreement Regulation*, Alta Reg 66/2011, Schedule.

¹²⁰ AIRA, s 3(2).

as siblings or a parent and adult child – cannot become adult interdependent partners unintentionally. They must both consent in writing to acquire the status of adult interdependent partners.

[204] Manitoba and Nova Scotia have legislation allowing partners to acquire statutory rights, benefits, and obligations by agreement, without a minimum period of cohabitation. In Manitoba, registration allows partners to shorten or eliminate the qualifying period to become eligible for legislated property division rules.¹²¹ In Nova Scotia, registration is the only way partners may become eligible for legislated property division rules.¹²²

C. Consultation Results

[205] Survey results showed strong support for ALRI’s preliminary recommendation. In the general survey, 77 per cent of all respondents agreed that property division rules should apply to adult interdependent partners.¹²³ Of respondents currently living with a common-law partner or live-in partner, 67 per cent agreed that property division rules should apply to adult interdependent partners.

[206] Although most respondents agreed that property division rules should apply to adult interdependent partners, few explained the reason for their support. A few comments said that the criteria in AIRA were appropriate. Only one respondent specifically mentioned consistency with other legislation, saying that the same criteria should apply to support and property division.

[207] Some of those who did not agree with this recommendation were opposed to any opt-out approach to legislated property division rules. They would prefer rules that apply only to those who opt-in, either by marriage or agreement.

[208] A few respondents opposed this recommendation because they consider AIRA as a whole to be flawed. In their view, AIRA was designed to avoid explicitly recognizing same sex relationships for political reasons. They believe AIRA is not based on sound policy.

¹²¹ *Family Property Act*, CCSM c F25, ss 1(1), 13.

¹²² *Vital Statistics Act*, RSNS 1989, c 494, ss 53–54.

¹²³ The survey included a brief summary of the criteria for becoming adult interdependent partners under AIRA, and then asked respondents “Do you agree that a new property division law should apply to couples who are adult interdependent partners?”

[209] We heard many specific concerns about elements of AIRA. Most concerns were about the criteria to become adult interdependent partners under AIRA. Even some respondents who agreed that property division rules should apply to adult interdependent partners added comments suggesting changes to AIRA. The concerns fell into common groups.

1. RELATIONSHIP OF INTERDEPENDENCE

[210] We heard concerns that the criteria for relationships of interdependence are too vague or difficult to measure. A few respondents said the criteria would contribute to lengthy and costly litigation. At a presentation, one lawyer pointed out that every factor in section 1(2) of AIRA is arguable, as none of them rely on facts that are easy to measure. This lawyer had experience with parties disputing all or nearly all of the factors, spending substantial time and resources in doing so. One respondent suggested alternative criteria that would be easier to determine from documents, like whether two people declared themselves to be living common-law on tax returns or named each other as dependents to receive benefits. Another suggested criteria should focus on finances, like whether two people pooled money or shared expenses.

[211] Throughout this project, ALRI has heard concerns about extending property division rules to those in non-conjugal interdependent relationships (in other words, to two individuals who would not be considered to be in a common-law relationship).

[212] Public opinion research conducted fifteen years ago found Albertans were divided on extending rights, benefits, and obligations to those in non-conjugal relationships. As discussed in Chapter 4, Alberta Justice commissioned a public consultation on family law in 2002, before the introduction of AIRA.¹²⁴ One of the questions in the phone survey was, “Do you agree or disagree that the same benefits and obligations that would be applied to married, common law and same-sex relationships should be applied to ... committed platonic relationships?” Fifty percent of all respondents disagreed. The other half either agreed that the same benefits and obligations should be applied to committed platonic relationships (43 per cent) or had no opinion (7 per cent).¹²⁵

¹²⁴ 2002 Consultation Report.

¹²⁵ 2002 Consultation Report at 90.

[213] In consultation, we received several comments expressing opposition to property division rules applying to non-conjugal partners. We heard similar comments at some of our presentations and roundtables.

[214] CBA Alberta asked the members of the Family Law (North) section for their views on this issue. Of the 55 members who gave input, 33 were opposed to property division rules applying to non-conjugal adult interdependent partners. Nine members were in favour, and the rest were unsure.

[215] At many of our presentations and roundtables, we asked lawyers about their experience with non-conjugal adult interdependent partners. We asked whether anyone had encountered a case where a non-conjugal relationship was alleged or found to be an adult interdependent relationship. Many lawyers with years of experience in family law or wills and estates attended our presentations and roundtables, but almost no one indicated they had encountered such a case.

2. QUALIFYING PERIOD

[216] Several respondents said that the three-year qualifying period to become adult interdependent partners is too long. At least ten respondents suggested property division rules should apply to partners who live together for a shorter period. The most common suggestion was that the period should be two years.

[217] Public opinion research shows that many Albertans would support a shorter qualifying period.

[218] In the 2002 Consultation Report, phone survey respondents were “asked to consider which time period of living together would be long enough to establish that a common law or same-sex relationship is a committed one.”¹²⁶ They were asked to select one option from a list. The options included one year, two years, and three years. Forty-two per cent of respondents selected either one year or two years (20 per cent selected one year and 22 per cent selected two

¹²⁶ 2002 Consultation Report at 88. It should be noted that the question did not directly ask about the appropriate qualifying period to become eligible for legal rights, benefits, or obligations. There might be a difference between a committed relationship and one that should have legal consequences. For example, some individuals may consider themselves to be in a committed relationship when they are engaged to be married, but would not expect the relationship to have legal consequences before they marry. Some individuals may consider their common-law relationship to be a committed one when they begin living with a partner, but would not necessarily expect the relationship to have legal consequences immediately.

years). Three years was the most common answer, with 35 per cent of respondents selecting it.¹²⁷

[219] In the Alberta Survey, a large majority of respondents (68 per cent) agreed that property division rules should apply to common-law partners who have lived together for a certain number of years.¹²⁸ The answers to another question, about when respondents considered themselves to be in a common-law relationship, suggested most people who had lived in a common-law relationship used a lower threshold to establish their commitment. A large majority of those who had been in a common-law relationship considered it to be a common-law relationship by the end of the first year.¹²⁹

[220] We did not receive any comments suggesting that the qualifying period should be longer than three years.

3. CHILD OF THE RELATIONSHIP

[221] In the Alberta Survey, a majority of respondents (approximately 59 per cent) agreed that property division rules should apply to partners who have a child together.¹³⁰

[222] At our 2016 roundtables, we heard different views about whether having a child of the relationship should affect eligibility for property division rules. Some lawyers said that children are a “game-changer”. They felt that raising children requires economic interdependence and partners with children should be presumed to be in a joint family venture. In contrast, they said that each partner in a couple without children should usually be capable of economic self-sufficiency. Other lawyers said that the presence of children may be relevant to support, but should not affect property division.

[223] We received very few comments about this factor in our general consultation. A few respondents said that property division rules should apply to couples who have a child together. A few others thought that having a child should not shorten the qualifying period. At least one respondent doubted whether having a child together was a reliable indicator of economic interdependence.

¹²⁷ 2002 Consultation Report at 88. A small number of respondents selected a period longer than three years.

¹²⁸ Alberta Survey Report at 18–21. The number of years was not specified in this question.

¹²⁹ Alberta Survey Report at 7.

¹³⁰ Alberta Survey Report at 18–21.

4. ADULT INTERDEPENDENT PARTNERSHIP AGREEMENT

[224] There is strong support for the idea that partners should have choice about property division rules. Partners should be able to opt-out, but they should also be able to opt-in. Some partners who have not completed the qualifying period may want to opt-in to property division rules. Entering an adult interdependent partnership agreement would offer an easy way to do so.

[225] In the Alberta Survey, a large majority of respondents (68 per cent) agreed that property division rules should apply to common-law partners who opt-in to property division rules by written agreement.¹³¹ A similar percentage of respondents currently in a common-law relationship (66 per cent) agreed with this statement.¹³²

[226] We heard almost no opposition to the idea that property division rules should apply to partners who opt-in by agreement. A few respondents said that property division rules should apply only to those who have entered an agreement.

[227] We received few comments specifically about adult interdependent partnership agreements. We heard some anecdotal information that adult interdependent partnership agreements are rarely used. In a written comment, a group of lawyers from one firm told us they had encountered only three such agreements, and the partners in those cases entered the agreement primarily to obtain pension or health benefits.

[228] At least one respondent noted that this option is not available to some partners. A married person who is separated from their spouse may live with a new partner. The new relationship may eventually become an adult interdependent relationship, but the partners cannot shorten or eliminate the required period of cohabitation by entering an adult interdependent partnership agreement.¹³³

¹³¹ Alberta Survey Report at 19.

¹³² Alberta Survey Report at 20.

¹³³ AIRA, s 7(2)(b).

D. ALRI's Position

[229] ALRI has concluded that property division rules should apply to adult interdependent partners for the same reasons discussed in Report for Discussion 30. Our conclusion is reinforced by the consultation results, which show that most respondents to our survey support this proposal.

[230] Consistency across Alberta legislation is a key reason for our recommendation.¹³⁴ Many separating couples have disputes about both property and support. If eligibility criteria for property division and support were different, separating partners would have to consider two lists of factors. If there was a dispute about eligibility, they might have to separately establish whether the relationship met two different sets of criteria. The process is likely to be confusing, inefficient, and would add complexity to the dispute, contributing to lack of access to justice.

[231] Although many comments raised specific concerns about elements of AIRA, there was no clear consensus on what the flaws were or how they should be addressed. Many of the concerns were about AIRA in general, not specifically about its application to property division. In ALRI's view, the best way to address the perceived shortcomings of AIRA would be to review, and potentially reform, AIRA itself. Such a review is beyond the scope of this project.

[232] After considering the AIRA criteria, we have concluded they are appropriate eligibility criteria for property division rules. While this project is not a review of AIRA, it is worthwhile to explain why we find the AIRA criteria to be appropriate in this context.

1. RELATIONSHIP OF INTERDEPENDENCE

[233] The definition of a relationship of interdependence seems to work as intended in most cases. There is a body of case law interpreting and applying AIRA, which illustrates how AIRA applies in practice.

¹³⁴ It should be noted that there are differences between the AIRA criteria and the definition of "common-law partner" used in most federal legislation. The differences are usually not problematic as federal and provincial legislation address different matters. There is one particular area of concern that would affect couples with interests in homes or land on reserve, however. The recently-enacted *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20 applies to division of interests in homes or land on reserves, while provincial laws apply to division of off-reserve real property or personal property. Couples who have an interest in a home or land on reserve, and also have other property, will have to determine whether they meet the criteria under both federal and provincial legislation. Lawyers who advise couples who have real property on reserves should be aware of the differences.

[234] It is difficult to define the characteristics of a relationship where partners have formed an economic partnership or intend to share property, because relationships are not all the same.¹³⁵ Easily measured criteria may not accurately reflect the spectrum of relationships. For example, some but not all couples have a joint bank account.

[235] The criteria used elsewhere are not obviously less vague or easier to measure than the criteria for a relationship of interdependence in AIRA. Rules applying to partners in a conjugal or marriage-like relationship would require courts to consider the many factors listed in *Molodowich*.¹³⁶ Rules applying to partners in a joint family venture would require courts to consider the many factors identified in *Kerr* and the cases that follow it.

[236] The feature of AIRA that seems to raise the most concern is the potential for property division rules to apply to non-conjugal adult interdependent partners.

[237] ALRI has considered whether property division rules should apply only to partners in conjugal relationships. It is difficult, however, to identify a principled reason to exclude partners in non-conjugal adult interdependent relationships.

[238] It is not easy to distinguish a conjugal relationship from a relationship of interdependence. There is significant overlap between the *Molodowich* factors and the factors in section 1 of AIRA. It is often thought that sexual relations are a necessary part of a conjugal relationship but are not essential to a relationship of interdependence. On closer examination, however, that distinction is unclear. Although sexual relations are one of the *Molodowich* factors, Canadian courts have held that it is possible for two individuals to have a conjugal relationship

¹³⁵ This statement could be said of both marriages and common-law relationships: see e.g. Winifred Holland, "Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?" (2000) 17:1 Can J Fam L 114 at 151-52 ("Marriage encompasses a range of relationships, some characterized by various forms of dependency, while others involve spouses who are quite independent, financially and otherwise. Marriage may or may not involve procreation. Cohabitation relationships are found along a similar spectrum."). A survey conducted in 2007 found that Canadians believe there is "no such thing as a typical family": Vanier Institute of the Family, *Families Count: Profiling Canada's Families IV* (2010) at 26, online: <www.vanierinstitute.ca/resources/families-count>.

¹³⁶ *Molodowich*, note 112. The factors are listed in note 110. As the factors are a list of questions without any "right" answers, judges may have to rely on their own ideas about what marriage is or should be. A study of decisions in Saskatchewan and British Columbia found that judges often measure unmarried couples against "gendered and class-specific notions ... [of] a good marriage" Robert Leckey, "Judging in Marriage's Shadow" (2018) 26:1 Fem Leg Stud 25 at 26 [emphasis in original].

without having sexual relations.¹³⁷ Further, one of the factors in determining whether two individuals are in a relationship of interdependence is whether they have a conjugal relationship.¹³⁸

[239] Even if sexual relations are a necessary part of a conjugal relationship, it is not clear why sexual relations should affect eligibility for legislated property division rules. As discussed by Brenda Cossman and Bruce Ryder, sexual relations are a poor proxy for economic partnership:¹³⁹

The presence or absence of a sexual relationship is a poor indicator of whether cohabitants should be entitled to legal rights and responsibilities. It is both over- and under-inclusive. Many persons who have a sexual relationship do not have a close economic relationship. And conversely, many persons who do not have a sexual relationship may have an economically and emotionally interdependent relationship. It is not clear how the details of cohabitants' sexual lives are relevant in any way to the attainment of legitimate state objectives.

[240] We occasionally heard concerns that roommates or adult siblings might be considered adult interdependent partners, despite having no intention to accept legal obligations towards each other.

[241] ALRI's research indicates that the potential for roommates to unintentionally become adult interdependent partners is mostly a theoretical concern. There are no reported cases where unrelated roommates who did not have sexual relations were found to be adult interdependent partners. When we asked lawyers at our meetings and roundtables whether they were aware of non-conjugal adult interdependent partners, they did not identify any cases involving unrelated roommates. AIRA sets a high bar for becoming adult interdependent partners. A relationship of interdependence requires much more than sharing accommodations and household chores. Very few unrelated roommates would have the degree of emotional commitment and economic integration required for a relationship of interdependence.

[242] In the case of siblings or other close relatives, there is an additional requirement. Under AIRA, persons related by blood or adoption can only become adult interdependent partners by entering an adult interdependent

¹³⁷ See generally Cossman & Ryder, note 97 at 291–300.

¹³⁸ AIRA, s 1(2)(a).

¹³⁹ Cossman & Ryder, note 97 at 297.

partner agreement. If two siblings, or a parent and adult child, or other relatives enter such an agreement, they have clearly indicated their intention to accept legal obligations to each other.

[243] The anecdotal information we heard during consultation suggests that non-conjugal adult interdependent relationships are rare. Whether or not sexual relations are a necessary part of a conjugal relationship, it is likely that the vast majority of adult interdependent relationships are between partners who have or had sexual relations.

[244] Any non-conjugal adult interdependent partners in Alberta would currently have all the rights, benefits, and obligations of adult interdependent partners, including support, intestate succession, maintenance and support from an estate, and social benefits. There is no obvious reason for an exception that would only affect property division. Although some respondents were concerned that non-conjugal adult interdependent partners would not intend to share property, we do not have data about the attitudes and expectations of non-conjugal adult interdependent partners. Without data, we do not know if or how their intentions may differ from other adult interdependent partners.

[245] It should be remembered that partners who do not intend to share property could opt-out. Partners in a non-conjugal adult interdependent relationship, like any other partners, could make an agreement about ownership and division of property. An agreement would reflect their specific circumstances and their actual intentions.

2. QUALIFYING PERIOD

[246] Living together for a period of time is relevant to economic partnership or the intention to share property. Some sociologists have noted that partners may begin living together to “try out” a relationship, but a trial period does not last forever.¹⁴⁰ As Heather Conway and Philip Girard said, “at some necessarily arbitrary point, one can infer that the ‘trial’ period of a relationship has passed, such that it is reasonable to consider a commitment to exist.”¹⁴¹

¹⁴⁰ See e.g. Larry L Bumpass, James A Sweet & Andrew Cherlin, “The Role of Cohabitation in Declining Rates of Marriage” (1991) 53:4 J Marriage and the Family 913 at 920–21.

¹⁴¹ Heather Conway and Philip Girard, “‘No Place Like Home’: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain” (2005) 30:2 Queen’s LJ 715 at 730.

[247] Setting the length of a qualifying period to become eligible for legislated property division rules is a somewhat arbitrary exercise. Economic partnership and the intention to share property often develop gradually, with no bright line marking the end of the trial period. Further, every couple is different.

[248] There are reasonable arguments to draw the line at one year or two years, instead of three years. ALRI's research and consultation indicates that many Albertans would support a shorter qualifying period.

[249] Nonetheless, our research and consultation did not reveal serious problems with the three-year period in AIRA. It is within a reasonable range of possible choices.

3. CHILD OF THE RELATIONSHIP

[250] It is reasonable to presume that partners raising a child or children are in an economic partnership, even if the relationship lasts less than three years. Usually, both partners contribute to meeting the needs of the family. The contributions may include money, caregiving, or other domestic work.

[251] Our research and consultation did not reveal significant problems with shortening the qualifying period for partners with a child or children.

4. AGREEMENT

[252] An adult interdependent partnership agreement maximizes choice, by allowing partners to opt-in to property division rules before completing the qualifying period. There is widespread support for the idea that partners should be able to opt-in. In principle, the option to enter an adult interdependent partnership agreement is a good feature of AIRA.

[253] In practice, there appear to be some issues with adult interdependent partnership agreements. A review of AIRA could consider these issues.

[254] Our consultation suggests that adult interdependent partnership agreements are rarely used. If so, the reasons are not clear. It may be lack of awareness, it may be that few couples want to shorten the qualifying period, or it may be for other reasons.

[255] Despite the significant consequences of entering an adult interdependent partnership agreement, there are few safeguards to ensure that both partners are aware of the consequences of the agreement and are entering it voluntarily. The

prescribed form states only that if the agreement also deals with property “the parties are advised to seek legal advice as to their rights and obligations in respect of that property.”¹⁴² It might be appropriate to include information about the rights, benefits, and obligations of adult interdependent partners on the prescribed form or to require other safeguards to ensure individuals are fully aware of the effects of the agreement.

[256] Although these issues may deserve a separate review, they do not raise problems specific to property division.

[257] There is an issue that could affect adult interdependent partners who have already entered an agreement. Going forward, if legislated property division rules apply to adult interdependent partners, it can be assumed that partners entering a new adult interdependent partner agreement intend for those rules to apply. It is not clear that partners who entered an adult interdependent partner agreement before new rules come into effect would want legislated property division rules to apply. We heard of partners who entered an agreement primarily to obtain pension or health benefits. It is unlikely that they would have anticipated the agreement could affect property. As discussed in Chapter 10, a transition period would allow adult interdependent partners to revisit existing agreements to ensure the agreements reflect their actual intentions.

[258] The AIRA criteria may not be perfect, but they are reasonable. There is no single right answer about which partners should be presumed to be in an economic partnership or have the intention to share property. Rather, there is a range of reasonable answers. The criteria in AIRA fall within the range of reasonable answers.

[259] ALRI therefore recommends maintaining the use of consistent criteria in Alberta legislation by using AIRA to determine eligibility for legislated property division rules.

RECOMMENDATION 5

Legislated property division rules should apply to adult interdependent partners, as defined in the *Adult Interdependent Relationships Act*.

¹⁴² *Adult Interdependent Partner Agreement Regulation, Alta Reg 66/2011, Schedule.*

CHAPTER 6

Content of Legislated Rules

A. *The Matrimonial Property Act*

[260] Alberta has legislation about property division for spouses. The MPA provides clear rules that address most issues about division of property.

[261] In Report for Discussion 30, ALRI proposed that legislated property division rules for adult interdependent partners should be based on the MPA.

[262] Unlike the law of unjust enrichment, Part 1 of the MPA clearly defines the property to be divided and provides a formula for dividing property.

[263] The MPA applies to “all the property owned by both spouses and by each of them”.¹⁴³ All property owned by each spouse is classified into one of three categories. Each category has its own rules for division.

[264] The first category is sometimes called exempt property because the market value of the property at the time of acquisition or marriage (whichever is later) is exempt from division. It includes property acquired by gift or inheritance, or owned by the spouse before marriage. Subsection 7(2) addresses exempt property:¹⁴⁴

7(2) If the property is

- (a) property acquired by a spouse by gift from a third party,
- (b) property acquired by a spouse by inheritance,
- (c) property acquired by a spouse before the marriage,
- (d) an award or settlement for damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses, or
- (e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses,

¹⁴³ MPA, s 7(1).

¹⁴⁴ MPA, s 7(2).

the market value of that property at the time of marriage or on the date on which the property was acquired by the spouse, whichever is later, is exempted from a distribution under this section.

[265] The second category includes the increase in value of exempt property, property acquired after separation, and property that one spouse acquired as a gift from the other spouse. Property in the second category is to be divided in a way that is “just and equitable.” Subsection 7(3) addresses this category:¹⁴⁵

7(3) The Court shall, after taking the matters in section 8 into consideration, distribute the following in a manner that it considers just and equitable:

- (a) the difference between the exempted value of property described in subsection (2), referred to in this subsection as the “original property”, and the market value at the time of the trial of the original property or property acquired
 - (i) as a result of an exchange for the original property, or
 - (ii) from the proceeds, whether direct or indirect, of a disposition of the original property;
- (b) property acquired by a spouse with income received during the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii);
- (c) property acquired by a spouse after a decree nisi of divorce, a declaration of nullity of marriage, a judgment of judicial separation or a declaration of irreconcilability under the *Family Law Act* is made in respect of the spouses;
- (d) property acquired by a spouse by gift from the other spouse.

[266] The third category is a residual category, consisting of all other property acquired during the marriage. This property is to be divided equally between the spouses, unless a court decides “that it would not be just and equitable to do so”. Subsection 7(4) states:¹⁴⁶

7(4) If the property being distributed is property acquired by a spouse during the marriage and is not property referred to in subsections (2) and (3), the Court shall distribute that property equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8.

¹⁴⁵ MPA, s 7(3).

¹⁴⁶ MPA, s 7(4).

[267] The MPA also includes a number of factors to consider in determining what would be just and equitable under subsections 7(3) or 7(4).¹⁴⁷ The factors include “any fact or circumstance that is relevant.”

[268] The MPA also anticipates and addresses many of the ancillary issues that are likely to arise in applying property division rules. For example, section 9 of the MPA allows a court to make orders about how property is to be transferred or equalization payments are to be made. Sections 11 to 16 and 18 describe how a claim may be made or continued if one of the spouses dies and how a matrimonial property claim interacts with other claims against an estate. Part 2 of the MPA allows a court to make orders about possession of the matrimonial home and household goods. Part 3 has rules addressing various ancillary issues, including rules that require spouses to disclose all their property, rules to prevent spouses from disposing of property before it is divided, and rules about agreements.

[269] The MPA rules are clear and generally produce predictable outcomes. They have been further clarified by judicial interpretation over nearly 40 years. With legal advice or using public legal education materials, separating spouses

¹⁴⁷ MPA, s 8. For ease of reference, section 8 states:

- 8 The matters to be taken into consideration in making a distribution under section 7 are the following:
- (a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
 - (b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;
 - (c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;
 - (d) the income, earning capacity, liabilities, obligations, property and other financial resources
 - (i) that each spouse had at the time of marriage, and
 - (ii) that each spouse has at the time of the trial;
 - (e) the duration of the marriage;
 - (f) whether the property was acquired when the spouses were living separate and apart;
 - (g) the terms of an oral or written agreement between the spouses;
 - (h) that a spouse has made
 - (i) a substantial gift of property to a third party, or
 - (ii) a transfer of property to a third party other than a bona fide purchaser for value;
 - (i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order;
 - (j) a prior order made by a court;
 - (k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;
 - (l) that a spouse has dissipated property to the detriment of the other spouse;
 - (m) any fact or circumstance that is relevant.

should usually be able to make a reasonable prediction about how a court would divide their property.¹⁴⁸

[270] The MPA has mostly been successful in helping spouses divide their property fairly. In a review of MPA case law commissioned by ALRI, Jonnette Watson Hamilton and Annie Voss-Altman noted that “much of the MPA appears to work as intended and without any significant or persistent problems.”¹⁴⁹

B. Consultation Results

[271] Both early consultation and general consultation revealed strong support for rules based on the MPA.

[272] We heard widespread agreement that the MPA rules work well for spouses. Comments praised the MPA as clear, easy to explain, predictable, and fair.

[273] A majority of survey respondents favoured applying the same rules to common-law or adult interdependent partners. In the Alberta Survey, 67 per cent of respondents said that the MPA rules about dividing property would be appropriate for common-law couples.¹⁵⁰ Support was even stronger among those currently in a common-law relationship. Of respondents currently in a common-law relationship, 76 per cent said that the MPA rules would be appropriate for common-law partners.¹⁵¹ We saw similar results in the online survey during general consultation. In the general survey, 79 per cent of all respondents and 77

¹⁴⁸ See Centre for Public Legal Education Alberta, *Property Division for Married and Unmarried Couples* (2014) at 7–14 online: <p.b5z.net/i/u/10086419/f/PropertyDivision.pdf>.

¹⁴⁹ Case Law Review at 93. They identified certain specific issues that may call for reform. ALRI addressed one of the identified issues in a recent project: Valuation Date Report.

¹⁵⁰ Interviewers read a brief summary of the rules for dividing property from section 7 of the MPA and then asked respondents “Do you think that the rules about dividing property that apply to married couples would also be appropriate for common-law couples?”: Alberta Survey Report at 4, 16–17. A recent Angus-Reid survey found majority support for a similar statement. In the online survey, which was conducted in January 2018, 59 per cent of respondents in Alberta agreed with the statement “Common-law relationships should be treated the same as marriage when it comes to assets”: Angus Reid Institute, *I don’t: Four-in-ten Canadian adults have never married, and aren’t sure they want to*, (Vancouver: Angus Reid Institute, 7 May 2018), online: <angusreid.org/wp-content/uploads/2018/04/2018.04.16-Marriage-ReleaseTables.pdf>.

¹⁵¹ Alberta Survey Report at 16.

per cent of respondents currently living in a common-law relationship agreed that property division rules should be based on the MPA.¹⁵²

[274] Many of the comments we received said that partners should have the same rights and obligations as spouses. This view was also evident in results from the Alberta Survey. One question asked respondents to choose from several options the most important value to be considered in any new law about division of property for common-law partners. The most common choice was “all couples should be treated the same, whether they are married or not.” Forty-four per cent of all respondents said this value was the most important and 50 per cent of respondents currently in a common-law relationship said that this value was the most important.¹⁵³

[275] A minority of respondents were opposed to common-law or adult interdependent partners having the same rights and obligations as spouses. There were two ideas that came up repeatedly. The first idea is that common-law or adult interdependent relationships are different from marriage. The second idea is that partners who wish to have rights and obligations under the MPA should marry.

[276] We received a few suggestions that there should be rules for partners, but they should not be based on the MPA. Some comments suggested there should not be a presumption of equal division for property acquired during a common-law relationship or relationship of interdependence. There were various alternatives proposed, like dividing property on a sliding scale based on the length of the relationship, dividing property based on the partners’ level of commitment, dividing property based on who paid for it, or dividing property based on each partner’s contributions.

C. ALRI’s Position

[277] ALRI has concluded that legislated property division rules should be based on the MPA.

¹⁵² The survey included a brief summary of the rules for dividing property from section 7 of the MPA, and then asked respondents “Do you agree that a new law about property division for common-law partners should be based on the *Matrimonial Property Act*?”

¹⁵³ Alberta Survey Report at 25-27, 33; email from Aleena Amjad Hafeez to Laura Buckingham, ALRI Counsel (5 February 2017).

[278] ALRI's recommendation is based on the data we collected about the attitudes and expectations of common-law partners. Our surveys showed that most partners want legislated property division rules to mirror the rules for spouses.

[279] The rules in the MPA work well for most spouses. There is every reason to expect they would also work well for most adult interdependent partners.

[280] We considered the suggestion that legislated rules for adult interdependent partners should be different from those for spouses, but we do not see any principled reason for different rules. We did not find data that clearly shows adult interdependent partners as a group are less economically interdependent than spouses, or that adult interdependent partners as a group do not intend to share property with each other. Without such data, there is a risk that different rules would perpetuate stereotyping. A presumption that property acquired during the relationship is to be divided unequally might perpetuate stereotypes that adult interdependent relationships involve less commitment or less cooperation than marriages. Legislation that perpetuates stereotyping may violate section 15 of the *Canadian Charter of Rights and Freedoms*, which guarantees each individual equal protection and equal benefit of the law.¹⁵⁴

[281] Similarly, we cannot recommend legislated rules that do not include presumptions about division of property. The law of unjust enrichment is unsatisfactory partly because it requires a court to determine each partner's share of property considering facts like the length of the relationship, the partners' level of commitment, who paid for property, and each partner's contributions. Legislation that relies on factors like these would perpetuate the difficulty in settling disputes.

[282] Of course, some adult interdependent partners would prefer different rules. Relationships are not all the same. There is enormous variation in the living arrangements, attitudes, and expectations of adult interdependent

¹⁵⁴ *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11. In *Walsh and Quebec v A*, note 12, the Supreme Court of Canada upheld legislation that applied to spouses only. Those cases do not resolve the question of whether legislatures may enact legislated rules for partners that are different from those for spouses. Courts have not had to resolve the question, as so far, all the Canadian jurisdictions that have legislated rules about property division for partners have enacted rules that mirror those for spouses.

partners.¹⁵⁵ In our view, the best way to accommodate these differences is for partners to make agreements. In an agreement, partners can choose rules that suit them and are fair for their specific circumstances.

[283] ALRI's recommendation is therefore that legislated property division rules for adult interdependent partners should be the same as the rules under the MPA to the extent possible.

RECOMMENDATION 6

Legislated property division rules for adult interdependent partners should be based on the rules for spouses in the *Matrimonial Property Act*, aside from the specific exceptions recommended in this Report.

[284] To be clear, ALRI recommends that legislated property division rules for adult interdependent partners should mirror all the rules in the MPA, aside from the specific exceptions discussed in the following chapters. Legislated rules should include a formula for dividing property based on sections 7 and 8 of the MPA, and should also include provisions to address ancillary issues. Legislation for adult interdependent partners should include rules about dividing property based on Part 1 of the MPA, rules about possession of the family home and household goods based on Part 2 of the MPA, and general rules based on Part 3 of the MPA.

[285] There is a body of case law interpreting the MPA and clarifying its application. We expect that case law would inform the interpretation of legislation based on the MPA, helping to produce predictable results for adult interdependent partners.

[286] There are a few rules in the MPA that would require adjustments to apply to adult interdependent partners. The following chapters consider specific adjustments.

¹⁵⁵ There is also, of course, enormous variation in the living arrangements, attitudes, and expectations of spouses: see note 135.

CHAPTER 7

The Beginning of the Relationship and Premarital Cohabitation

A. Introduction

[287] The rules for division of property in section 7 of the MPA assume there is a “time of marriage”. In the MPA, the date of marriage is a threshold date for classifying and valuing property. Exemptions depend on whether property was acquired before the time of marriage or during the marriage. The amount exempted from division is the value at the time of marriage. The presumption of equal division also requires a threshold date. Section 7(4) establishes a presumption of equal division for non-exempt property acquired “during the marriage”, or in other words, after the time of marriage.

[288] Property division rules based on the MPA will require a threshold date. The threshold date should be the beginning of the relationship, but it can be challenging to pinpoint the beginning of a common-law relationship or an adult interdependent relationship. Property division legislation for adult interdependent partners requires an approach suited to the nature of these relationships.

[289] Resolving this issue also requires us to consider an issue that affects spouses who lived in a relationship of interdependence before marriage. ALRI has concluded that fairness requires using the same threshold date for all couples who live in a relationship of interdependence, whether or not they later marry.

B. Determining When an Adult Interdependent Relationship Begins for the Purpose of Property Division

[290] In Report for Discussion 30, ALRI identified two ways to establish a threshold date for adult interdependent partners.

[291] The first way would be for partners to make an agreement about the threshold date.¹⁵⁶ An agreement about the threshold date might be a convenience

¹⁵⁶ As discussed in Chapter 3, ALRI recommends that such an agreement, like any other agreement about ownership and division of property, should meet the same requirements as in sections 37 and 38 of the MPA. An agreement that does not meet these requirements should not be enforceable.

to avoid or resolve a dispute. For example, partners who moved in together over a period of time might pick a specific date from a range of possible dates.

[292] An agreement about the threshold date might also function as an agreement to exempt certain property from division or to establish a presumption of equal division for certain property. Partners might agree on a threshold date that is not the actual date they began living in a relationship of interdependence. For example, a couple who bought a house before moving in together might want to use a threshold date immediately before the purchase to ensure the presumption of equal division would apply to the house. Another couple might want to use a threshold date a year or two after they began living together, to exclude property acquired during a “trial period”. Partners might agree on a calendar date they wish to use as the threshold date or agree how to determine the threshold date. For example, a couple who contemplates having children in the future might agree that the threshold date will be their first child’s date of birth.

[293] The second way would apply to partners who do not make an agreement about the threshold date. A default rule would be required for those partners. Such a rule would provide guidance to partners who have difficulty reaching agreement and to courts when they are required to resolve the question.

[294] In Report for Discussion 30, ALRI proposed that the default rule should be that the threshold date is the date that the partners began living in a relationship of interdependence, as defined by AIRA. This proposal would only affect couples who become adult interdependent partners.

1. DIFFICULTY ESTABLISHING THE BEGINNING OF THE RELATIONSHIP

[295] The difficulty in establishing the beginning of a common-law relationship or adult interdependent relationship relates both to the nature of these relationships and the definitions in AIRA.

[296] It is common for partners to experience a gradual progression in the relationship. It may be difficult to identify a specific date when partners began living together, for example, as moving in together may be something that occurs over a period of time.¹⁵⁷

¹⁵⁷ See Wendy D Manning & Pamela J. Smock, “Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data” (2005) 67:4 J Marriage and Family 989 at 994. They observed that few of the

[297] AIRA does not require adult interdependent partners to identify the beginning of the relationship with precision. Further, the criteria to establish an adult interdependent relationship under AIRA do not necessarily refer to events that occur on a specific date. Some of the factors for determining a relationship of interdependence, such as “the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well-being”, could only be established over a period of time.¹⁵⁸

[298] Even if partners enter an adult interdependent partner agreement, there may be some uncertainty about when the relationship began. Two individuals may enter an adult interdependent partner agreement before they live together (although they must intend to live in a relationship of interdependence), or while they are living in a relationship of interdependence.¹⁵⁹ If the partners live in a relationship of interdependence before entering the agreement, they may become adult interdependent partners immediately upon entering the agreement. If they have lived in a relationship of interdependence for more than three years or have a child together, however, they may already be adult interdependent partners before entering the agreement.

[299] There is little case law about the date an adult interdependent relationship begins. When a court is required to determine whether two people are adult interdependent partners for support, succession, or social benefits, it is not always necessary to determine exactly when the relationship began. The length of the relationship matters, but a court may be able to decide that the relationship of interdependence lasted at least three years without being precise about when the qualifying period began or ended. It is rare that litigation about support, succession, or social benefits focuses on determining the exact date the relationship began.

cohabitants they interviewed were able to quickly state a specific date that they started living with their partner. One woman’s description is a good example:

Within that next year, he basically moved in, there wasn’t a definite date, he would stay one night a week, and then two nights, then . . . it got to a point where he just never left.

See also *Rubin*, note 49 at paras 26–27, where each party described the process of moving in as occurring gradually.

¹⁵⁸ AIRA, s 1(2)(f).

¹⁵⁹ AIRA, s 7(1).

2. THE QUALIFYING PERIOD AND THE THRESHOLD DATE

[300] When partners begin living together, there will be a qualifying period between the time they begin living in a relationship of interdependence and the time they become adult interdependent partners. The qualifying period may be as much as three years. It may be shorter for those who have a child or who enter an adult interdependent partner agreement. Some will marry before the end of the qualifying period, so they will never become adult interdependent partners.

[301] In Report for Discussion 30, ALRI posed the question: should property acquired during the qualifying period be exempt from division? Another way to pose the question would be, should the threshold date be at the beginning or the end of the qualifying period?

[302] There are two different approaches to this issue in other Canadian jurisdictions.

a. The Saskatchewan approach: excluding the qualifying period

[303] In Saskatchewan, property acquired during the qualifying period is exempt from division. This approach is unique in Canada. (For the following discussion, we call it the “Saskatchewan approach”). Saskatchewan’s *Family Property Act* states that property is exempt from division if it was owned by one of the partners before the “spousal relationship” began.¹⁶⁰ Saskatchewan courts have interpreted the legislation to mean that, for partners, the spousal relationship begins once the qualifying period is over.¹⁶¹ The qualifying period is two years in Saskatchewan, so partners do not have to divide property acquired in the first two years they lived together.

b. The BC approach: including the qualifying period

[304] The remaining jurisdictions with legislation about property division for partners – the Northwest Territories, Nunavut, Manitoba, and British Columbia – have taken the opposite approach.¹⁶² The Law Reform Commission of Nova Scotia has recommended that Nova Scotia also adopt this approach.¹⁶³ In

¹⁶⁰ *Family Property Act*, SS 1997, c F-6.3, s 23(1)(c).

¹⁶¹ See e.g. *Ruskin v Dewar*, 2005 SKCA 89 at 30–33; *Swystun v Janzen*, 2016 SKCA 117 at paras 3–4.

¹⁶² See *Family Law Act*, SBC 2011, c 25, ss 3(3), 81, 84, 85(1)(a); *Family Property Act*, CCSM, c F25, s 4; *Family Law Act*, SNWT 1997, c 18, ss 33, 35; *Family Law Act*, SNWT (Nu) 1997, c 18, ss 33, 35.

¹⁶³ Nova Scotia Final Report, note 116 at 127.

this approach, the threshold date is at the beginning of the qualifying period. (For the following discussion, we call it the “BC approach”). Legislation in each jurisdiction clearly requires partners to divide property acquired from the time they began living together. In each jurisdiction there is a qualifying period to become eligible for property division rules. If a relationship does not survive the qualifying period, property division rules will not apply. Once the qualifying period is over, however, the rules apply to all property acquired from the time the partners began living together.

[305] For example, under British Columbia’s *Family Law Act*, the qualifying period is two years.¹⁶⁴ The act defines the beginning of the relationship as the earlier of “the date on which they began to live together in a marriage-like relationship ... or the date of their marriage.”¹⁶⁵ The exemptions include “property acquired by a spouse before the relationship between the spouses began.”¹⁶⁶ Non-exempt property is equally divided between the spouses.¹⁶⁷ If partners split up after living together two years or more, they will equally divide property that either partner acquired from the time they began living together.

[306] ALRI’s preliminary recommendation was that Alberta legislation should follow the BC approach: the default threshold date would be the date that the partners began living in a relationship of interdependence.

3. CONSULTATION RESULTS

[307] Responses to ALRI’s preliminary recommendation were mixed.

[308] At our 2016 roundtables, there was strong support for the Saskatchewan approach. Some lawyers said that economic interdependence develops over time. They thought partners would usually not begin their lives together expecting to share property and it would be unusual for them to make significant contributions to each other’s property in the first few years of the relationship. Some lawyers noted that, under the Saskatchewan approach, a partner could

¹⁶⁴ See *Family Law Act*, SBC 2011, c 25, s 3(1):

- 3(1) A person is a spouse for the purposes of this Act if the person
- (a) is married to another person, or
 - (b) has lived with another person in a marriage-like relationship, and
 - (i) has done so for a continuous period of at least 2 years, ...

¹⁶⁵ *Family Law Act*, SBC 2011, c 25, s 3(3)

¹⁶⁶ *Family Law Act*, SBC 2011, c 25, s 85(1)

¹⁶⁷ *Family Law Act*, SBC 2011, c 25, s 81.

make an unjust enrichment claim for contributions to property acquired during the qualifying period. They said that having two claims – one for unjust enrichment in the early part of the relationship and one for property division under the MPA – would not be problematic because it is just like the current procedure for couples who live in a relationship of interdependence before marriage.

[309] There was also some support for the BC approach at our 2016 roundtables. The lawyers who preferred this approach said it would be better to have a single set of rules for the whole relationship. They thought it was undesirable for a partner to make two claims under different rules, especially because of the problems with the law of unjust enrichment. They would prefer to see legislated rules replace the law of unjust enrichment as much as possible.

[310] In general consultation, 56 per cent of respondents to the technical survey agreed with ALRI's preliminary recommendation. A little over one third of respondents (37 per cent) preferred the Saskatchewan approach. The rest supported neither approach. Only two written comments addressed this proposal. Both were in favour of ALRI's preliminary recommendation.

[311] A recurring concern was that there would be more litigation about the beginning of relationships. It may be difficult to determine the date a couple began to live in a relationship of interdependence, as the AIRA criteria are not easily measured. Many lawyers thought that many couples would be unable to resolve the issue, and would end up litigating.

[312] Several other considerations were mentioned. Some respondents favoured the BC approach because it would be consistent with legislation in most other jurisdictions. Some said they preferred the BC approach because the Saskatchewan approach uses a date that seems arbitrary. They said the Saskatchewan approach may produce perverse results if partners acquire property shortly before becoming adult interdependent partners.

[313] Some respondents favoured the Saskatchewan approach because they thought individuals would not expect to have to share property acquired during the qualifying period. Some couples begin living together to try out a relationship. They may be aware that they will have legal obligations after living together for a certain period of time, but would not expect obligations to date to the beginning of the relationship.

4. ALRI'S POSITION

[314] ALRI has concluded that Alberta should follow the BC approach for substantially the same reasons we gave in Report for Discussion 30.

[315] We heard some well-founded concerns about the difficulty of applying the criteria for a relationship of interdependence. We recognize that there is likely to be more litigation to establish threshold date if it determines whether certain property is exempt. If valuable property is potentially exempt, separating partners may be motivated to litigate.

[316] In our view, the difficulty arises mostly from the nature of common-law or adult interdependent relationships. These relationships often develop over time, so it can be difficult to pinpoint the date the relationship began. Regardless of whether the threshold date is the beginning or the end of the qualifying period, the precise date will sometimes be arguable.

[317] Consultation did not reveal new options to resolve the difficulty, and we have not found any other viable options. We must therefore choose between the Saskatchewan approach and the BC approach.

[318] Litigation about the threshold date would be similar under either approach, and is therefore a neutral factor. Our recommendations are intended to minimize litigation, but it is impossible to eliminate it. Whether Alberta follows the Saskatchewan approach or the BC approach, some partners will not be able to agree about the date the relationship began. With either approach, courts would be able to hear and weigh the evidence to make a decision. Courts would also be able to interpret the legislation to develop general guidelines or clarify legal issues as necessary.

[319] One factor in favour of the BC approach is that, in our view, it is more likely to reflect the expectations of common-law partners or adult interdependent partners. No matter which way partners become adult interdependent partners under AIRA, the criteria require that they live in a relationship of interdependence. The date that the partners began living in a relationship of interdependence is a natural starting point.

[320] A relationship of interdependence is one with significant economic and domestic cooperation. It is likely partners would expect some change in their obligations once they begin sharing some expenses, chores, domestic work, or other contributions to the family unit. The Alberta Survey showed that many respondents considered themselves to be in a common-law relationship before

the qualifying period was over. Of respondents who had lived in a common-law relationship, nearly a quarter considered themselves to be in a common-law relationship as soon as they moved in with their partner, and a majority considered themselves to be in a common-law relationship by the end of the first year.¹⁶⁸ By treating all property acquired while living in a relationship of interdependence as non-exempt, the BC approach avoids arbitrary results that might surprise partners.

[321] In contrast, the Saskatchewan approach may lead to seemingly arbitrary results. For most partners, their relationship will be much the same on the day before the qualifying period ends as it is the next day. They may not even know when the qualifying period ends. But under the Saskatchewan approach, that date would be all-important for identifying exempt and non-exempt property. For example, if the threshold date were at the end of the qualifying period, there would be significantly different consequences to buying a house on the day before the qualifying period ends compared to buying it the day after, even though the partners had been in a relationship for some time and may have made the decision to buy the house together.

[322] The Saskatchewan approach may be particularly difficult to apply in the Alberta context. Under Saskatchewan's *Family Property Act*, there is a single standard qualifying period. In contrast, AIRA establishes different qualifying periods depending on how a couple becomes adult interdependent partners. In particular, for those couples that become adult interdependent partners by having a child of the relationship, it may be hard to know when the qualifying period ends. While the date the child was born or adopted will be known, the parents only become adult interdependent partners by living in a relationship of interdependence "of some permanence". This phrase leaves room for uncertainty.

[323] Uniformity between jurisdictions is another factor in favour of the BC approach. Where possible, it is desirable to have rules that are consistent across jurisdictions. As one respondent pointed out, couples may move between jurisdictions. They would not necessarily expect or want their obligations to change because of a move. The BC approach is used in several provinces and territories, while the Saskatchewan approach is unique to Saskatchewan.

¹⁶⁸ Alberta Survey Report at 7.

[324] The most important reason for our recommendation is that the BC approach would minimize the need to rely on the law of unjust enrichment. Reform is needed because the law of unjust enrichment is unsatisfactory. The Saskatchewan approach would leave adult interdependent partners to rely on the law of unjust enrichment, with all its problems, to divide part of their property. It is better to eliminate the need to have recourse to unjust enrichment by enacting legislated rules that apply to the whole relationship.

[325] ALRI's recommendation is therefore that, for property division legislation, the default threshold date should be the date that the adult interdependent partners began living in a relationship of interdependence as defined by AIRA.

[326] As stated above, partners could make an agreement about the threshold date for the purpose of property division. If their agreement complied with the formal requirements, the agreement would prevail over the default rule.

[327] This recommendation would not affect couples who never become adult interdependent partners. Property division legislation would apply only to couples who become adult interdependent partners, either by living together for at least three years, having a child together, or entering an adult interdependent partner agreement. Couples who do not meet these conditions would not have legislated obligations to divide property.

RECOMMENDATION 7

Unless adult interdependent partners agree otherwise, the date the relationship began for the purpose of property division should be the date that they began living in a relationship of interdependence.

C. Effect on Premarital Cohabitation

[328] The main focus of this Report is recommending legislated property division rules for partners who live together without being legally married. However, our conclusion about the threshold date for adult interdependent partners raises the question of whether the same rule should apply to couples who live in a relationship of interdependence before getting married. For the following discussion, we use "premarital cohabitation" to mean the period that spouses lived in a relationship of interdependence before marriage.

[329] Partners may live together and acquire property before marrying. In some cases, they will live together long enough to qualify as adult interdependent

partners. Others will marry before becoming adult interdependent partners. Any gaps or inconsistencies should be addressed so all couples are treated similarly, whether they later marry or not.

[330] Under the MPA, the threshold date is the date of marriage, even if the spouses were in an economic partnership before they married. Property that either spouse acquired before the date of marriage is exempt from division. The market value of that property at the time of the marriage is never divided under the MPA.¹⁶⁹ A court has no discretion to divide the value that exempt property had at the time of marriage.

[331] There are two kinds of claims that spouses may make about property acquired during premarital cohabitation.

[332] First, a spouse may claim a portion of the increase in value of exempt property. Under the MPA, the difference between the value of exempt property at the time of marriage and its value at the time of division is to be divided in a just and equitable manner.¹⁷⁰ There is no presumption of equal division.¹⁷¹

[333] Section 8 sets out the factors to be considered in dividing the increase in value.¹⁷² Subsection 8(e) provides that a court may consider “the duration of the marriage” and subsection 8(m) provides that a court may consider “any fact or circumstance that is relevant”. Courts may use these factors to consider premarital cohabitation when dividing the increase in value of exempt property.¹⁷³

¹⁶⁹ MPA, s 7(2)(c).

¹⁷⁰ MPA, s 7(3).

¹⁷¹ There is no presumption of equal division of the increase in value of exempt property: *KS v TLS*, 2015 ABQB 568 at para 155. Any increase in value during marriage is divided in a just and equitable manner under sections 7(3) and 8. After considering the different factors in section 8, it is possible for the court to conclude that it is just and equitable to divide the increase in value equally: *Klinck v Klinck*, 2010 ABCA 5, aff'g 2008 ABQB 526, leave to appeal to SCC refused, 33546 (April 22, 2010); *Hughes v Hughes*, 2006 ABQB 468; *Bzdziuch v Bzdziuch*, 2001 ABQB 306. In other cases, however, the court may order the increase in value to be divided unequally: *Gauthier v Gauthier*, 2013 ABQB 566; *Wright-Watts v Watts*, 2005 ABQB 708, *KEW v CRM*, 2005 ABQB 426.

¹⁷² MPA, s 8. The factors are listed in note 147.

¹⁷³ Courts have sometimes included premarital cohabitation when considering the length of the relationship. For example, in *Verburg v Verburg*, 2010 ABQB 201 the court counted both premarital cohabitation and marriage to determine the relationship was not short. Taking into account the length of the relationship, the court concluded the increase in value of exempt property should be divided equally. In contrast, in *Behiels v McCarthy*, 2010 ABQB 281 at para 87 the court did not include premarital cohabitation and concluded that the marriage was a short one. The length of the relationship was a factor in the court's decision to divide the increase in value of certain property unequally.

[334] Using section 8 factors to divide the increase in value of property acquired during premarital cohabitation is not the same as a statutory presumption of equal division. Results remain uncertain under section 8, and depend on the ability of the plaintiff to prove that division of the increase in value is just and equitable in the circumstances.

[335] Second, a spouse may make a claim for unjust enrichment.¹⁷⁴ If property was acquired during premarital cohabitation, it is possible that a court will find the partners were in a joint family venture. A court may divide this property based on the law of unjust enrichment. As discussed in Chapter 2, it is difficult, expensive, and time-consuming for a plaintiff to prove a claim for unjust enrichment and the results are uncertain.

[336] The exemption for property acquired during premarital cohabitation often leaves spouses with limited options. They can give up any claim for property acquired during premarital cohabitation. Otherwise, they have to show to the court that there are factors supporting a division of the increase in value of exempt property, bring an unjust enrichment claim along with their matrimonial property application, or both. These options put the onus on the plaintiff to present evidence that they should receive some share of any property their spouse acquired during premarital cohabitation.

1. THE NEED FOR REFORM

a. Consistency for adult interdependent partners and spouses

[337] Property division rules should treat couples consistently, so couples who go on to marry are not worse off than those who continue to live as adult interdependent partners.¹⁷⁵ It would be unfair to spouses if adult interdependent partners divided property acquired from the beginning of their relationship, but spouses did not.

¹⁷⁴ See e.g. *Panara v Di Ancenzo*, 2005 ABCA 47; *Boissoneault v McNutt*, 2011 ABQB 568, *aff'd* 2012 ABCA 365.

¹⁷⁵ For example, consider two couples who began and ended their relationships at the same time. The first couple has lived for seven years in a relationship of interdependence. After three years, they would be adult interdependent partners. If ALRI's recommendations are implemented, there would be a presumption that they will equally divide all property they acquired during that seven-year period. The second couple has also lived together for seven years. For the first two years, they lived in relationship of interdependence. Then they married and lived together for five more years. In their case, the presumption of equal division would not apply to the entire seven-year relationship. Under the current legislation, the presumption would only apply to non-exempt property, that is, property acquired during the five years of their marriage.

[338] Inconsistency in property division rules could also be problematic for couples who become adult interdependent partners before getting married. If all property acquired during premarital cohabitation remained exempt property under the MPA, adult interdependent partners who later marry might lose the benefit of legislated property division rules that would have applied if they had not married. They might have to make different claims for each period of their relationship. In some cases, spouses may find themselves with two types of claims to resolve: a claim for property acquired during the marriage, to be resolved under the MPA, and another claim for property acquired during premarital cohabitation, to be resolved under the law of unjust enrichment.¹⁷⁶

[339] Having to rely on different rules for different stages of the same relationship would not only be confusing and inefficient, but potentially unfair for couples who live together before marriage. To force those individuals to bring separate claims would also add to the costs of litigation and would increase uncertainty.

b. Consistency with other legislation and guidelines

[340] Other family law legislation does not distinguish between premarital cohabitation and marriage. Family law legislation usually refers to the length of cohabitation, not only the length of marriage. For instance, *Alberta's Family Law Act* expressly provides that courts must take into consideration, among other things, "the length of time the spouses or adult interdependent partners lived together" for determining spousal or adult interdependent partner support.¹⁷⁷ The federal *Divorce Act* contains a similar provision.¹⁷⁸ The *Pension Benefits Division Act* and the *Canada Pension Plan* also take into account credits accumulated during a common-law relationship before marriage.¹⁷⁹

¹⁷⁶ See e.g. *Panara v Di Ascenzo*, 2005 ABCA 47.

¹⁷⁷ *Family Law Act*, SA 2003, c F-4.5, s 58(a)(i).

¹⁷⁸ *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 15.2(4)(a).

¹⁷⁹ *Pension Benefits Division Act*, SC 1992, c 46, Schedule II; *Canada Pension Plan*, RSC 1985, c C-8.

[341] The federal *Spousal Support Advisory Guidelines*, which are not law but provide a formula for calculating typical amounts of support, also include the entire time the spouses lived together. The relevant section reads:¹⁸⁰

3.3.5 Length of marriage

...

Given the relevance of length of marriage under the Advisory Guidelines, it is important to clarify its meaning. **While we use the convenient term length of marriage, the more accurate description is the length of the cohabitation, which includes periods of pre-marital cohabitation, and ends with separation.**

[342] Property division legislation in many other Canadian jurisdictions applies to property acquired during premarital cohabitation. For example, legislation in British Columbia and Manitoba includes property acquired from the time when a couple began living in a “conjugal” or “marriage-like” relationship.¹⁸¹ In some jurisdictions, property division does not apply to common-law relationships but matrimonial property legislation nonetheless affects division of property acquired during premarital cohabitation.¹⁸²

[343] Retaining the status quo in Alberta means that the MPA’s property division scheme will remain inconsistent with other areas of family law, which may lead to even more misunderstanding of separating or divorcing couples’ rights and obligations.

c. Many couples live together before marrying

[344] When the MPA was enacted, it was uncommon for couples to live together before marriage. Nowadays, however, many couples begin their life together in a common-law relationship. Statistics Canada found that the majority of people aged 20 to 29 expect to live in a common-law relationship before

¹⁸⁰ Canada, Department of Justice, *Spousal Support Advisory Guidelines July 2008*, by Carol Rogerson & Rollie Thompson (2008) at 3.3.5 [emphasis in original], online: <www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/index.html>.

¹⁸¹ *Family Law Act*, SBC 2011, c 25, ss 3, 85; *The Family Property Act*, CCSM c F25, s 4(2)(a).

¹⁸² See e.g. *Marital Property Act*, SNB 2012, c 107, which does not apply to common-law relationships (s 1), but does include assets acquired during cohabitation in the pool of matrimonial property (ss 3-4, 6-7). Nova Scotia’s *Matrimonial Property Act*, RSNS 1989, c 275 excludes common-law partners by its definition of spouse (s 2(g)), but provides for the presumptive equal division of assets acquired before marriage (s 4(1)). The Law Reform Commission of Nova Scotia recently recommended: “Family property legislation should define the exclusion of cohabitation date values according to the earlier of the date when the spouses, common law partners or registered domestic partners began to live together in a conjugal relationship, or their marriage”: Nova Scotia Final Report, note 116 at 126-27.

marriage.¹⁸³ Demographic research shows the first union of most Canadians born in the 1970s or later is a common-law relationship.¹⁸⁴

d. Differential impact on same sex couples

[345] The exemption of property acquired during premarital cohabitation may have a differential impact on same sex couples who lived together before the recognition of same sex marriage. Unlike an opposite sex couple, a same sex couple would have had no option but to live in a common-law relationship as they could not legally marry before 2005.¹⁸⁵

[346] In *Walsh*, the Supreme Court ruled that the exclusion of common-law relationships from the operation of Nova Scotia's *Matrimonial Property Act* was not discriminatory because common-law partners have freely chosen to avoid the institution of marriage and the legal consequences that flow from it.¹⁸⁶ The principle of freedom to choose between different marital statuses later played a significant role in *Quebec v A*.¹⁸⁷ These decisions did not consider the situation of same sex couples who lived together before the recognition of same sex marriage. Those couples did not have the freedom to choose their marital status and could not opt-in to the MPA by marrying.

[347] Married same sex couples who lived together before 2005 may have acquired property during that period. It would be unfair if the presumption of equal division did not apply to property they acquired before they could legally

¹⁸³ Statistics Canada, *Figure 2: Percentage of young adults aged 20 to 40 and 25 to 29 in couples by conjugal status, Canada, 1981 to 2011*, (Ottawa, Statistics Canada, 22 December 2015), online: <www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/2011003/fig/fig3_3-2-eng.cfm>.

¹⁸⁴ See e.g. Laura Wright, "Type and Timing of First Union Formation in Quebec and the Rest of Canada: Continuity and Change Across the 1930-79 Birth Cohorts" (2016) 43:3-4 *Canadian Studies in Population* 234; Don Kerr, Melissa Moyser & Roderic Beaujot, "Marriage and Cohabitation: Demographic and Socioeconomic Differences in Quebec and Canada" (2006) 33:1 *Canadian Studies in Population* 83.

¹⁸⁵ All same sex couples across Canada gained the right to marry on July 20, 2005 when the Federal Parliament officially proclaimed the *Civil Marriage Act*: see *Civil Marriage Act*, SC 2005, c 33.

¹⁸⁶ *Walsh*, note 12.

¹⁸⁷ *Quebec v A*, note 12. While the majority concluded that *Walsh* did not bind the Court, four of the five majority judges still focused on the freedom of choice to find the breach of the right to equality was justified under section 1 of the *Charter* (*Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11): see *Quebec v A*, note 12 at paras 382-85, 400-409 (Deschamps, Cromwell and Karakatsanis JJ) and paras 410-15 (McLachlin CJ). The minority did not proceed to the justification stage of the analysis after determining that the conclusion reached in *Walsh* was valid in the circumstances of *Quebec v A*: paras 207-82 (LeBel, Fish, Rothstein and Moldaver JJ).

marry. The MPA could be vulnerable to a constitutional challenge for adverse effects discrimination.¹⁸⁸

2. BEGINNING OF THE RELATIONSHIP FOR SPOUSES WHO LIVED TOGETHER BEFORE MARRIAGE

[348] In Report for Discussion 31, ALRI proposed that rules about the beginning of the relationship should be the same for adult interdependent partners and spouses who lived in a relationship of interdependence before marriage.

[349] ALRI's proposed default rule was that the relationship between spouses who lived together before marriage should be presumed to have begun on the date that they began living in a relationship of interdependence. Our preliminary recommendation was:

Unless the spouses agree otherwise, the presumption of equal division should apply to any property acquired while the spouses were living together in a relationship of interdependence before marriage.

[350] The default rules would apply if the spouses did not have an agreement about the threshold date.

3. CONSULTATION RESULTS

[351] In the premarital survey, 76 per cent of the respondents agreed that for the purpose of property division premarital cohabitation should only include the time when a couple lived in a relationship of interdependence, as defined in AIRA. Another 12 per cent would include periods when a couple lives together in a committed relationship, but thought that the criteria in AIRA were not the right ones. The remaining 12 per cent would include the entire time when a couple lived together.

[352] Some respondents pointed out that couples sometimes live together for convenience or financial reasons, with no intention to share property accumulated during that period. They argued that merely moving in with someone with whom you have a casual relationship should not create unintended legal obligations.

¹⁸⁸ Looking at the larger social, political, and legal context is particularly important when the legislation appears neutral on its face. The MPA may not be discriminatory in purpose but still be discriminatory in effect. See e.g. *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 66; *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 at para 193; *R v Turpin*, [1989] 1 SCR 1296 at 1331.

4. ALRI'S POSITION

[353] ALRI has concluded that the approach to establishing the threshold date should be the same for adult interdependent partners and for spouses who lived in a relationship of interdependence before marriage. In either case, the date the relationship began for the purpose of property division should be the date that the partners began living in a relationship of interdependence. This recommendation means the threshold date would be the same for adult interdependent partners and spouses.

[354] As discussed in Chapter 5, a relationship of interdependence requires a high degree of emotional commitment and economic integration. Interdependence is based on observable factors which focus on both the emotional and economic aspects of a relationship. These factors are similar to the factors used by Canadian courts to determine whether a relationship is conjugal or marriage-like.

[355] Not every instance of living together before marriage will have an impact on property division. To be considered in a relationship of interdependence, two people need to be much more than roommates or in a casual relationship. Merely living in the same dwelling would not trigger the application of property division rules. Not all couples who live together will have an economic partnership or have the intention to share property from the start, even if they later marry. A relationship may evolve and change character over time. If a relationship evolves from a casual relationship or a roommate arrangement to an interdependent relationship, only the period when the spouses lived in a relationship of interdependence should be considered for the purpose of property division.

[356] Of course, some spouses do not live in a relationship of interdependence before marriage. For those spouses, the relationship should begin on the date of marriage.

[357] Spouses who prefer to use a different threshold date would have the option to make an agreement. They could agree to a threshold date that would make all property acquired during premarital cohabitation exempt from division, make specific property exempt from division, or agree how to divide all or specific property. As long as the agreement met the formal requirements, it would prevail over the default rule.

RECOMMENDATION 8

Unless spouses agree otherwise, the date the relationship began for the purpose of property division should be the date that they began living in a relationship of interdependence or the date of marriage, whichever is earlier.

D. The Presumption of Equal Division and Exemptions

1. THE PRESUMPTION OF EQUAL DIVISION

[358] Subsection 7(4) of the MPA establishes a presumption of equal division for non-exempt property acquired during the marriage.

[359] The preliminary recommendations in Report for Discussion 30 assumed that there would be a presumption of equal division for adult interdependent partners. The presumption would apply to property acquired from the date that they began to live in a relationship of interdependence.

[360] Report for Discussion 31 considered how property acquired during premarital cohabitation should be divided. It identified different options, including extending the presumption of equal division to property acquired during premarital cohabitation or giving courts discretion to divide not only the increase in value of property, but also the original value of property acquired during premarital cohabitation. ALRI's preliminary recommendation was that the presumption of equal division should apply to property acquired during premarital cohabitation.

a. Consultation results

[361] In the general survey, 79 per cent of respondents agreed that new rules about property division for adult interdependent partners should be based on the MPA. The MPA includes the presumption of equal division in subsection 7(4).

[362] In the premarital survey, 52 per cent of the respondents agreed that the presumption of equal division should apply to property acquired by spouses during premarital cohabitation. A little more than 20 per cent believed that courts should instead have the discretion to divide the entire value of that property (both the original value and any increase in value) in an equitable manner. Another 27 per cent of the respondents thought that the property

acquired during premarital cohabitation should not be included in equal division.

[363] Comments in support of extending the presumption of equal division to property acquired during premarital cohabitation pointed out that there should not be different set of rules for dealing with property owned by one couple. Others in favour of giving courts more flexibility pointed out that some couples live together expecting to get married and to share their property equally, while others start living together with entirely different expectations which changed over time. A presumption of equal division would not reflect these different expectations. Respondents opposed to extending the presumption of equal division to property acquired during premarital cohabitation said that attaching the presumption to cohabitation, as opposed to the deliberate act of marriage, would be unfair for unsuspecting spouses.

b. ALRI's position

[364] ALRI's recommendations about the threshold date are intended to make the rules consistent for all couples who live in a relationship of interdependence, whether or not they eventually marry. It would defeat the purpose if the presumption of equal division did not apply consistently. It would be unfair to spouses if adult interdependent partners equally divided property acquired from the beginning of their relationship of interdependence, but spouses did not.

[365] Fairness requires that the presumption of equal division apply to property acquired during a relationship of interdependence, including any periods of premarital cohabitation. While marriage may mark a change in the relationship, it would create inequalities between adult interdependent partners and spouses if property acquired by spouses during premarital cohabitation was treated differently than property acquired by adult interdependent partners during the qualifying period.

[366] It should be presumed that a relationship of interdependence is an economic partnership. Adult interdependent partners or spouses should share any gains accumulated throughout the entire relationship. Once partners or spouses are eligible for legislated property division rules, the presumption of equal division should extend back to the threshold date.

[367] The presumption of equal division is not absolute. The presumption of equal division can be rebutted when, having regard to the section 8 factors, it

would not be just and equitable to equally divide the property.¹⁸⁹ A court would have discretion to divide property differently if there are good reasons to do so.

RECOMMENDATION 9

The presumption of equal division should begin on the date that the partners or spouses began living in a relationship of interdependence or the date of marriage, whichever is earlier.

2. EXEMPT PROPERTY

[368] Although ALRI's recommendations would extend the presumption of equal division to include property acquired during premarital cohabitation, we do not intend to interfere with the general principle that there should be an exemption for property acquired before the relationship began. Many people marry or enter relationships of interdependence already having acquired assets, particularly if the relationship begins late in life. Partners should not have to divide all property they own, regardless of when it was acquired.

[369] Under subsection 7(2) of the MPA, the market value of property at the time of marriage is exempt from division. If a spouse owned property before marriage, the court must determine the market value of that property at the time of marriage. That original value is not divided. The spouse who owns the property keeps its original value. If the property increases in value during the marriage, subsection 7(3) allows a court to divide the increase in value in a way that is "just and equitable". There is no presumption that the increase in value will be divided equally.

[370] Other Canadian jurisdictions exempt property acquired by partners or spouses before their "marriage-like" or "conjugal" relationship started.¹⁹⁰ While

¹⁸⁹ MPA, s 7(4). In *Mazurenko v Mazurenko* (1980), 30 AR 34 at para 20 (CA), leave to appeal to SCC refused, Stevenson JA said:

The court must, in my view, look at the relevant facts under s. 8 and then ask itself if it would be unjust or inequitable to divide the property equally. That conclusion would not be lightly reached. There must be some real imbalance in the contribution having regard to what was expected of each or attributable to the other factors in s. 8. In establishing the presumption I take the Legislature to have decided that in ordinary cases equality is the rule. ... The legislation introduces a discretionary system with the presumption of equal sharing, which is similar to a deferred sharing scheme with a power of adjustment. The important point is that both of these schemes recognize '... the principle that a husband and wife carry on their married life, including their economic functions, for their mutual benefit and account and according to arrangements accepted by both for that purpose. That principle, if accepted, requires that the law provide in some way for the sharing of their economic gains between the husband and wife.' That is done by the legislation and done with the presumption of equality.

¹⁹⁰ See *The Family Property Act*, SS 1997, c F-6.3, s 23(1); *Family Law Act*, SBC 2011, c 25, s 85; *The Family Property Act*, CCSM c F25, s 4(2); *Family Law Act*, SNWT 1997, c 18, s 35(1)(b); *Family Law Act*, SNWT (Nu) 1997, c 18, s 35(1)(b). In its report on division of matrimonial property, the Law Reform Commission of Nova

Continued

the wording varies slightly, the objective is the same: to exempt property that is not a result of the couple's economic partnership from division.¹⁹¹

a. Consultation results

[371] In the premarital survey, 88 per cent of the respondents agreed that property acquired before the relationship of interdependence began should remain exempt property. Another 9 per cent suggested that the entire value of that property, including any increase in value of that property during the relationship of interdependence and marriage should be exempt from division. Only 2 per cent of the respondents thought that property acquired before the relationship of interdependence began should be included in the presumption of equal division.

[372] At our presentations and roundtables, we heard concerns about couples who begin their relationship late in life. Some respondents said partners should not have to divide all the property accumulated over a lifetime because they entered a new relationship in their retirement years.

b. ALRI's position

[373] Partners or spouses should divide property acquired during the relationship of interdependence or marriage, but not before that. Property acquired before the threshold date should be exempt from division. Partners or spouses should not have to divide property either one acquired while single, in a relationship with another person, or while their relationship did not meet the criteria for a relationship of interdependence (such as while they were casually dating each other).

[374] The exemption should apply to the market value of the original property on the threshold date. In other words, a partner or spouse who owned property before the threshold date should keep the value of the original property. Under the new legislation, the default threshold date would be the date that the partners or spouses began living in a relationship of interdependence or the date of marriage, whichever is earlier.

Scotia recommended: "Cohabitation date net values of family assets owned by a spouse, registered domestic partner, or common law partner prior to cohabitation should be presumptively excluded from an equal division of family assets": Nova Scotia Final Report, note 116 at 120-25.

¹⁹¹ See *Peregrym v Peregrym*, 2015 ABQB 176 at paras 67-70.

[375] Mirroring the MPA, any increase in value after the threshold date should be divided in a way that is just and equitable in the circumstances. There should be no presumption that the increase in value will be divided equally.

[376] We expect that case law applying the MPA would help to resolve issues about exempt property and dividing the increase in value of exempt property. Over the years, courts have considered these issues under the MPA. There are now well-accepted rules about tracing exempt property and the treatment of exempt property transferred to joint ownership, among others. These rules generally produce predictable results. When the same issues arise for adult interdependent partners, existing case law can provide guidance.

RECOMMENDATION 10

Property that a partner or spouse acquired before the relationship began should be exempt from division. The exemption should apply to the market value of the original property on the date the relationship of interdependence began or the date of the marriage, whichever is earlier.

CHAPTER 8

Making and Resolving Claims at the End of the Relationship

A. Introduction

[377] There are a few other rules in the MPA that could not easily be applied as-is to adult interdependent partners. The MPA was drafted for spouses, and some rules rely on facts that are unique to marriage.

[378] In Report for Discussion 30, ALRI identified three areas where the MPA rules would create difficulty when applied to adult interdependent partners. One area was establishing the beginning of the relationship, which was discussed in the previous chapter.

[379] The two other areas relate to the end of the relationship. They were clarifying the time to make a claim and addressing overlapping claims. An additional area emerged from consultation, about which court should have jurisdiction to make decisions about property division for adult interdependent partners. This chapter discusses specific adjustments that would be required in these areas.

B. Time to Make a Claim for Property Division

[380] The MPA includes rules about when a spouse may make a claim for property division. In general, ALRI recommends that triggering events and time limits for adult interdependent partners should be based on those for spouses.

[381] Some rules in the MPA are specific to spouses. For example, only spouses can divorce. Times calculated from the date of divorce could only apply to spouses. Property division legislation for adult interdependent partners requires rules that recognize how adult interdependent relationships end.

1. TRIGGERING EVENTS AND TIME LIMITS UNDER THE *MATRIMONIAL PROPERTY ACT*

[382] Section 5 of the MPA, “Conditions precedent to application”, sets out the events that may trigger a claim for property division.¹⁹² Property division rules apply only if the relationship has broken down. Section 5 lists the scenarios when the relationship has broken down, allowing a court to make an order about property division. In general, a court may make a property division order if spouses are separated or divorced.

[383] Section 6 of the MPA, “Time for application”, sets out time limits to make a claim.¹⁹³ A spouse must apply for property division within a certain time after the triggering event. If they wait too long to apply, the court will not make an order. In most circumstances, the time limit is two years after separation or divorce.

¹⁹² For ease of reference, MPA, s 5(1) states:

- 5(1) A matrimonial property order may only be made
- (a) if
 - (i) a judgment of divorce has been granted, or
 - (ii) a declaration of nullity of marriage has been made with respect to the marriage,
 - (b) if one of the spouses has been granted a judgment of judicial separation,
 - (b.1) if one or both of the spouses have obtained a declaration of irreconcilability under the *Family Law Act*,
 - (c) if the Court is satisfied that the spouses have been living separate and apart for a continuous period of at least one year immediately prior to the commencement of the application,
 - (d) if the Court is satisfied that the spouses are living separate and apart at the time the application is commenced and the defendant spouse
 - (i) has transferred or intends to transfer substantial property to a third party who is not a bona fide purchaser for value, or
 - (ii) has made or intends to make a substantial gift of property to a third party, with the intention of defeating a claim to property a spouse may have under this Part, or
 - (e) if the Court is satisfied that the spouses are living separate and apart and one spouse is dissipating property to the detriment of the other spouse.

¹⁹³ For ease of reference, the relevant parts of MPA, s 6 state:

- 6(1) An application for a matrimonial property order to which section 5(1)(a) or (b) applies
- (a) may, notwithstanding subsection (2), be commenced at or after the date proceedings are commenced for a decree of divorce, a declaration of nullity, a judgment of judicial separation or a declaration of irreconcilability under the *Family Law Act*, but
 - (b) may be commenced not later than 2 years after the date of the decree nisi, declaration or judgment.
- (2) An application for a matrimonial property order to which section 5(1)(c) or (e) applies may be commenced within 2 years after the date the spouses separated.
- (3) An application for a matrimonial property order to which section 5(1)(d) applies may be commenced within
- (a) two years after the date the spouses separated, or
 - (b) one year after the date the property is transferred or given,
- whichever occurs first.

[384] Spouses usually have at least two opportunities to make a claim. The first opportunity is after spouses separate, when there is a one-year window to make a claim. In most circumstances, a spouse cannot make a claim until at least a year after the date of separation, but the claim must be made within two years after the date of separation.¹⁹⁴ The second opportunity is when spouses divorce. A spouse may make a claim for property division any time between the initial application for divorce and the second anniversary of the divorce judgment. In effect, a spouse can restart the clock by applying for divorce. No matter how long spouses have been separated, a claim for property division is not out of time until they have been divorced for two years.¹⁹⁵

2. TRIGGERING EVENTS FOR ADULT INTERDEPENDENT PARTNERS

[385] In Report for Discussion 30, ALRI proposed that the triggering events for property division should be based on section 10 of AIRA. Section 10 of AIRA sets out the events that cause adult interdependent partners to become former adult interdependent partners. AIRA clearly states that they become former adult interdependent partners when the earliest event occurs. Section 10 of AIRA states:¹⁹⁶

10(1) Unless another enactment provides otherwise, an adult interdependent partner becomes the former adult interdependent partner of another person when the earliest of the following occurs:

- (a) the adult interdependent partners enter into a written agreement that provides evidence that the adult interdependent partners intend to live separate and apart without the possibility of reconciliation;
- (b) the adult interdependent partners live separate and apart for more than one year and one or both of the adult interdependent partners intend that the adult interdependent relationship not continue;
- (c) the adult interdependent partners marry each other or one of the adult interdependent partners marries a third party;

¹⁹⁴ MPA, ss 5(1)(c), 6(2). Spouses may make a claim in the first year after separation if there is reason to believe the other spouse is transferring property to a third party to defeat a claim for property division, or if there is reason to believe the other spouse is dissipating property: MPA, ss 5(1)(d), 5(1)(e).

¹⁹⁵ This issue arose in a Alberta Court of Appeal decision issued during the consultation period for this project: The Court confirmed that there are two limitation periods for spouses: *Baker v Ramsdell*, 2017 ABCA 427.

¹⁹⁶ AIRA, s 10.

- (d) in the case of an adult interdependent partner referred to in section 3(1)(a), the adult interdependent partner enters into an adult interdependent partner agreement with a third party;
- (e) one or both of the adult interdependent partners have obtained a declaration of irreconcilability under section 83 of the *Family Law Act*.

[386] Two of these events – living separate and apart for more than a year or obtaining a declaration of irreconcilability – are equivalent to triggering events in sections 5 and 6 of the MPA.

[387] Most of the other events indicate that the relationship has broken down and would be appropriate triggering events for property division. If partners make a written agreement about separation or if one of them enters a new relationship, the earlier relationship ends and the partners will need to divide their property. If they cannot agree, they should have recourse to the courts.

[388] One of the events is different. If the partners become former adult interdependent partners by marrying each other, the relationship has not broken down. It would not be appropriate for a court to make a property division order just because the partners married each other.

[389] Preliminary recommendation 9 in Report for Discussion 30 was:

Property division legislation should state that a property division order may be made if adult interdependent partners have become former adult interdependent partners in accordance with the Adult Interdependent Relationships Act, unless the reason they became former adult interdependent partners was that they married each other.

3. CONSULTATION RESULTS AND ADDITIONAL ISSUES

[390] There was strong support for ALRI's preliminary recommendation. In the technical survey, 86 per cent of respondents agreed that property division should be available if two people have become former adult interdependent partners, unless they became former adult interdependent partners because they married each other. We received very few comments about this proposal.

[391] Four additional issues came to our attention during the consultation period.

[392] First, we became aware that there could be uncertainty about when the limitation period begins for adult interdependent partners who become former adult interdependent partners by living separate and apart for one year. During the consultation period for this project, the Court of Queen's Bench released a decision considering the limitation period for unjust enrichment.¹⁹⁷ In that case and at least one other, the court raised an issue about whether a claim for unjust enrichment arises on the date that adult interdependent partners separate or a year after separation when they become former adult interdependent partners.¹⁹⁸ Neither of the decisions resolves the issue. In *Briggs* the court found it was unnecessary to resolve the issue, as the claim was made more than five years after the parties separated. *Johansson* was an unsuccessful application for summary judgment where the court found the limitations issue should be decided at trial. There are no subsequent reported decisions in *Johansson*, so it appears that the issue was not decided by a court.

[393] Second, we realized that Report for Discussion 30 did not specifically discuss transfers of property or dissipation as potential triggering events. Although Report for Discussion 30 said that triggering events for adult interdependent partners should be based on those in the MPA, it did not specifically address these scenarios.

[394] Third, one respondent pointed out that ALRI's proposal would mean that adult interdependent partners and spouses would have different opportunities to make a claim for property division. There is no equivalent to divorce for adult interdependent partners, so there is no second triggering event that could restart the clock. Adult interdependent partners would have one limitation period, while spouses would have two.

[395] Fourth, we realized that Report for Discussion 30 did not specifically discuss the time limits to make a property division claim.

¹⁹⁷ *Briggs v Orlowski*, 2017 ABQB 724.

¹⁹⁸ *Johansson v Fevang*, 2009 ABQB 573; see also *Perehudoff v Christiano*, 2013 ABQB 390.

4. ALRI'S POSITION

a. Triggering events for adult interdependent partners

[396] Triggering events for adult interdependent partners should mirror those for spouses as closely as possible. The rules about triggering events should be tailored to recognize some specific differences.

[397] Some of the triggering events in the MPA are specific to spouses and would not apply to adult interdependent partners. In particular, the provisions that permit a matrimonial property order to be made if there is a judgment of divorce, a declaration of nullity of marriage, or a judgment of judicial separation would not apply to adult interdependent partners.¹⁹⁹

[398] In general, an adult interdependent partner should be able to make a claim when the partners become former adult interdependent partners. Property division legislation should include the events in section 10 of AIRA as triggering events.

[399] In the case of those who become former adult interdependent partners by living separate and apart, a partner should be able to make a claim for property division after one year of separation. Partners become former adult interdependent partners under section 10(1)(b) of AIRA only once the separation has lasted more than a year. This approach would parallel the rules for spouses.²⁰⁰ It also has a common-sense appeal, as some couples may be unsure of their intentions at the beginning of a separation. Starting the limitation period on the date of separation might push couples toward litigation instead of reconciliation.

[400] For those who become former adult interdependent partners in any other way, a partner would be able to make a claim for property division as soon as the event occurs. The other ways to become former adult interdependent partners are to make a written agreement about separation, for one partner to marry another person, for one partner to enter an adult interdependent partner agreement with another person, or for a court to make a declaration of irreconcilability. Each of these triggering events requires an intentional act that indicates the relationship will not continue. It is logical to make a property division claim at that time.

¹⁹⁹ MPA, ss 5(1)(a), 5(1)(b).

²⁰⁰ MPA, s 5(1)(b)

[401] Adult interdependent partners should not be able to make a claim for property division when they marry each other. A property division order should be available only if the relationship has ended.

[402] An adult interdependent partner should be able to make a claim for property division in the first year after separation if there is reason to believe the other partner is transferring or giving property to a third party to defeat a claim, or is dissipating property.

RECOMMENDATION 11

A partner should be able to apply for a property division order if the partners have become former adult interdependent partners as defined in the *Adult Interdependent Relationships Act*, unless the reason they became former adult interdependent partners was that they married each other.

RECOMMENDATION 12

A partner should be able to apply for a property division order if the partners are living separate and apart and the other partner transfers property to defeat a claim or dissipates property.

b. Time limits for adult interdependent partners

[403] ALRI recommends adult interdependent partners should have two years to make a claim for property division after they become former adult interdependent partners. The time limit should be the same regardless of how they became adult interdependent partners.

[404] This recommendation would mean there would be a difference between the limitation periods for spouses and for adult interdependent partners. As noted above, spouses usually have a one-year window to make a claim after separation, starting a year after the date of separation and ending two years after the date of separation. However, unlike adult interdependent partners, spouses can restart the limitation period by applying for divorce. Spouses have two years after the date of divorce to make a claim. Adult interdependent partners have only one opportunity to make a claim for property division, so it is appropriate that they should have at least two years to make the claim. A two-year time limit would mean both adult interdependent partners and spouses would have two years after the formal end of the relationship (by divorce or becoming former adult interdependent partners) to make a claim.

[405] For those who become former partners in any other way, a two-year limitation period would mirror the rules for spouses.

[406] There is one other issue that came to our attention. It is possible that one partner may not immediately realize that the triggering event has occurred. The situation will be rare, as in most cases the triggering event would be readily known to both partners. It is possible, however, for one adult interdependent partner to immediately end an adult interdependent relationship by marrying or entering into an adult interdependent agreement with a third party, without the knowledge of the other partner. If a partner does not immediately know of the triggering event, it would not be fair for the limitation period to run against them.

[407] To avoid injustice, the limitation period should be subject to discoverability. The limitation period should end two years after the claimant knew, or in the circumstances ought to have known, that the triggering event had occurred.

RECOMMENDATION 13

A partner should be able to commence an application for a property division order within two years after the date that the partner first knew, or in the circumstances ought have known, that the partners had become former adult interdependent partners.

C. Addressing Overlapping Claims

[408] Under AIRA, it is possible for an individual to have both a spouse and an adult interdependent partner. A married person who is separated from their spouse may form an adult interdependent relationship with a new partner.²⁰¹

[409] If a person has both a spouse and an adult interdependent partner, there is a possibility of overlapping claims to property.

[410] The problem of overlapping claims arises because Alberta law requires matrimonial property to be valued and divided at the time of trial. By the time of trial, one or both spouses may have adult interdependent partners. A new adult interdependent partner may have made contributions to maintaining,

²⁰¹ It should be noted that a married person cannot form a new adult interdependent relationship while living with their spouse: AIRA, s 5(2).

improving, or acquiring property. If the property is non-exempt matrimonial property, valuation at the time of trial means the value of those contributions would be shared with the legal spouse.

[411] Under the MPA, a court has some flexibility to address overlapping claims. In particular, subsection 8(f) allows a court to use discretion in dividing property “acquired while the spouses were living separate and apart”.²⁰² Subsection 8(m) also allows a court to consider “any fact or circumstance that is relevant”, which could include a new relationship.²⁰³ Although these provisions are useful, they do not provide predictable rules. They rely on a court’s discretion and so may encourage litigation instead of settlement.

[412] In both Report for Discussion 30 and Report for Discussion 31, ALRI suggested there was a need for a more predictable, legislated approach to address overlapping claims. We made two preliminary recommendations, in the alternative.

1. CHANGING THE DEFAULT VALUATION DATE TO THE DATE OF SEPARATION

[413] Our preferred solution was to change the default valuation date for both adult interdependent partners and spouses. Our preliminary recommendation was that the default valuation date should be the date on which the parties began to live separate and apart.

[414] This preliminary recommendation was aligned with our recommendations in another report. ALRI recently recommended reforming the MPA to change the default valuation date in our Valuation Date Report.²⁰⁴ We concluded this change would benefit spouses. Recommendation 4 in our Valuation Date Report was:

If spouses do not agree on a valuation date, the *Matrimonial Property Act* should expressly provide that the default valuation date will be the date on which the parties begin to live separate and apart.

[415] The recommendations in our Valuation Date Report would have the additional benefit of resolving the problem of overlapping claims. This change would mean that the spouses would divide the property as it was at the time of separation, before the new adult interdependent relationship was formed. The

²⁰² MPA, s 8(f).

²⁰³ MPA, s 8(m).

²⁰⁴ Valuation Date Report at 29.

adult interdependent partner's contributions would not be included in the property to be divided between the spouses.

[416] The preliminary recommendation would require that the approach to valuation date be the same for adult interdependent partners and spouses.

2. OTHER OPTIONS TO ADDRESS OVERLAPPING CLAIMS

[417] As ALRI's preferred solution would affect spouses and involve considerations outside the scope of this project, we also considered narrower solutions to the problem of overlapping claims.

[418] We concluded that a restriction on forming a new adult interdependent relationship while married would not solve the problem. It would be possible to amend AIRA to state that a married person could not become an adult interdependent partner of a third person until the marriage was ended, either by divorce or by the death of their spouse. Property division rules could then apply to only one relationship at a time. This option would be a superficial solution, failing to address the underlying problem. Separated people would still begin new relationships. Those new relationships would often involve economic interdependence, and the partners might accumulate property through joint efforts. If the new relationship eventually broke down, the partners would still need to divide their property. If they were not recognized as adult interdependent partners, they would have to rely on the law of unjust enrichment. There would still be overlapping claims, but they would be especially difficult to resolve.

[419] We determined the viable options were adding a new factor to section 8 of the MPA or a rule about priority of claims.

[420] A new section 8 factor would allow a court to take into consideration any contribution to property by a third party. This factor would allow a court to consider a new partner's contributions when dividing property at the time of trial.

[421] There are at least two possible versions of a rule about priority of claims. One version would give a spouse's claim priority over an adult interdependent partner's claim. Another version would give priority to a claim from the earlier relationship over a claim from the later relationship. In either version, the partners or spouses in the higher-priority relationship would divide their property first. The partners or spouses in the lower-priority relationship would

then value and divide only the remaining property. A partner or spouse in the lower-priority relationship would have no claim to property retained by their partner's former adult interdependent partner or spouse.

[422] If our preferred solution to change the valuation date were not adopted, then a priority rule would be the best alternative. If the default valuation date remains the date of trial, the parties to the relationship that is first in time should value and divide property first.

3. CONSULTATION RESULTS

a. Changing the default valuation date to the date of separation

[423] ALRI previously consulted about reforming the default valuation date for married couples. In late 2014 and early 2015, ALRI conducted an online survey and received comments about our proposal to make the date of separation the default valuation date under the MPA. That consultation informed the recommendations in our Valuation Date Report. In that consultation, about two-thirds of respondents were in favour of making the date of separation the default valuation date, and about one-third were opposed.

[424] We had similar results in consultation for this project. There was majority support for ALRI's preferred option, but responses were not unanimous. In the technical survey, 70 per cent of respondents agreed that property should be valued at the time of separation for both adult interdependent partners and spouses and 30 per cent were opposed. We also received seven written comments addressing this issue. Three comments were generally in favour of ALRI's preferred option, two were generally opposed, and two pointed out some factors to consider without taking a clear position.

[425] In consultation for this project, respondents raised many of the considerations ALRI reviewed in the Valuation Date Report. Those in favour of valuing property at the time of separation said that it would reduce costs, promote early settlement, and reflect common expectations. Some were concerned that partners or spouses should not have to share losses incurred after separation. Those opposed were mostly concerned that partners or spouses should share increases in the value of property after separation.

b. Other options to address overlapping claims

[426] Consultation did not yield a clear reason to prefer any of the alternative approaches to resolving overlapping claims. In the technical survey, we asked respondents to rank three options: a priority rule giving a claim from the earlier relationship priority over a claim from the later relationship; a priority rule giving a spouse's claim priority over an adult interdependent partner's claim; and a new section 8 factor allowing a court to take into consideration contributions by a third party. No answer received clear majority support. The answer that received the most support was ALRI's alternative preliminary recommendation: a priority rule giving a claim from the earlier relationship priority over a claim from the later relationship, with 50 per cent of respondents ranking it first and 37 per cent of respondents ranking it second. We received very few comments about alternative approaches to resolving overlapping claims.

[427] We did not receive suggestions for other ways to resolve the issue of overlapping claims.

4. ALRI'S POSITION

[428] ALRI has concluded that the best way to address the problem of overlapping claims is to change the default valuation date for both adult interdependent partners and spouses. The default valuation date for all couples should be the date on which the parties began to live separate and apart. This reform makes sense for all the reasons discussed in the Valuation Date Report. It would also resolve the problem of overlapping claims.

[429] As discussed in the Valuation Date Report, post-separation gains or losses could be addressed by applying the factors in section 8 of the MPA. The factors include "whether the property was acquired when the spouses were living separate and apart" and "any fact or circumstance that is relevant".²⁰⁵ A court may refer to these factors in adjusting the division of certain property to achieve a "just and equitable" result.²⁰⁶

²⁰⁵ MPA, ss 8(f), 8(m).

²⁰⁶ MPA, ss 7(3), 7(4).

[430] We do not have strong reasons to recommend any of the alternative approaches considered in Report for Discussion 30, and therefore we do not make any recommendation in the alternative.

RECOMMENDATION 14

Unless adult interdependent partners or spouses agree otherwise, the valuation date should be the date on which they begin to live separate and apart.

D. Court Jurisdiction and Procedure

[431] Under the MPA, only the Court of Queen’s Bench can make decisions about property division between spouses.²⁰⁷

[432] Report for Discussion 30 did not consider which court should have jurisdiction to make decisions about property division between adult interdependent partners.

[433] There are a number of factors to be considered in any decision about which court should have jurisdiction. There are legal constraints, including the inherent jurisdiction of superior courts, the judicature provisions of the *Constitution Act, 1867*, and legislation establishing the courts.²⁰⁸ There are also issues about allocation of resources and administration. The latter factors are outside ALRI’s expertise, so we do not make a specific recommendation. We do, however, suggest some issues to consider.

1. CONSULTATION RESULTS

[434] In consultation, two respondents brought issues about jurisdiction to ALRI’s attention.

[435] One respondent pointed out that having different courts with jurisdiction in family law matters can cause confusion and inefficiency. Even within the same court, there may be different systems and procedures to navigate. For example, the respondent told us that in the Court of Queen’s Bench in Edmonton

²⁰⁷ MPA, s 1(a).

²⁰⁸ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 96-101, reprinted in RSC 1985, Appendix II, No 5; *Judicature Act*, RSA 2000, c J-2; *Court of Queen’s Bench Act*, RSA 2000, c C-31; *Provincial Court Act*, RSA 2000, c P-31.

applications in proceedings under the MPA are heard in family law chambers, while applications in unjust enrichment proceedings are heard in regular civil chambers.

[436] Another respondent suggested that Provincial Court should have jurisdiction, to relieve pressure on the Court of Queen's Bench.

2. JURISDICTION IN FAMILY MATTERS

[437] Many separating couples have more than one issue to resolve. In addition to dividing property, they may have issues about parenting and support. If they have to go to court, it is often easier and most efficient to address all issues before the same court.

[438] In Alberta, some family law matters may be decided by Provincial Court and some can only be decided by the Court of Queen's Bench.

[439] For property division, jurisdiction depends on the marital status of the couple, the amount of money at stake, and whether the claim affects title to land.

[440] Some unjust enrichment matters between partners may be decided by Provincial Court, if the amount at stake is \$50,000 or less.²⁰⁹

[441] The Court of Queen's Bench has exclusive jurisdiction to make decisions in any proceedings under the MPA. It also has exclusive jurisdiction in any unjust enrichment matters where the amount at stake is more than \$50,000 or where the claim affects a title to land.

[442] For parenting and support, jurisdiction depends on the marital status of the couple and whether the claim is part of divorce proceedings. The Court of Queen's Bench has exclusive jurisdiction in any proceedings under the *Divorce Act*. When parenting or support issues arise in divorce proceedings between spouses, only the Court of Queen's Bench may decide the issues. If the parties are unmarried, or are spouses who are separated but not seeking a divorce, jurisdiction is shared between Provincial Court and the Court of Queen's Bench. In these cases, either court may make decisions about parenting and support.

[443] Even within the same court, there are different procedures for different types of matters. In the Court of Queen's Bench, the requirements and deadlines for applications in family law chambers are different than the requirements and

²⁰⁹ *Provincial Court Act*, RSA 2000, c P-31, s 9.6(1)(a)(i)(A.1).

deadlines for applications in regular civil chambers.²¹⁰ Similarly in Provincial Court, there are differences in procedures between the Family Division and the Civil Division.²¹¹ The differences are likely to cause confusion for individuals with matters in more than one place, especially for self-represented litigants.

[444] The partially overlapping jurisdiction in family law matters has been criticized as confusing and inefficient.²¹²

3. OPTIONS FOR JURISDICTION

[445] A unified family court is a possible solution to the problems caused by partially overlapping jurisdiction in family law matters. In 1978, ALRI recommended that Alberta establish a unified family court.²¹³ Others have made the same recommendation.²¹⁴ Recommendations about establishing a unified family court are, however, beyond the scope of the current project.

[446] Within the existing system, there are two options.

[447] One option would be to mirror the MPA, so that the Court of Queen's Bench would have exclusive jurisdiction to make decisions about property division for adult interdependent partners. This option would promote consistency between the rules for adult interdependent partners and those for

²¹⁰ Compare Court of Queen's Bench of Alberta, *Family Law Practice Note 2: Family Law Regular and Special Chambers* (3 April 2018), online: <[albertacourts.ca/docs/default-source/qb/family-law-practice-note-2---family-law-regular-and-special-chambers-\(effective-april-1-2018\).pdf?sfvrsn=2015af80_4](http://albertacourts.ca/docs/default-source/qb/family-law-practice-note-2---family-law-regular-and-special-chambers-(effective-april-1-2018).pdf?sfvrsn=2015af80_4)>; Court of Queen's Bench of Alberta, *Civil Practice Note 2: Special Applications* (20 January 2017), online: <[www.albertacourts.ca/docs/default-source/qb/civil-practice-note-2---special-applications-\(effective-jan-20th-2017\).pdf?sfvrsn=bb4fad80_2](http://www.albertacourts.ca/docs/default-source/qb/civil-practice-note-2---special-applications-(effective-jan-20th-2017).pdf?sfvrsn=bb4fad80_2)>.

²¹¹ Compare *Provincial Court Procedures (Family Law) Regulation*, Alta Reg 149/2005; *Provincial Court Act*, RSA 2000, c P-31, ss 22-68.

²¹² See e.g. Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words*, Final Report (2013), at 46-49, online: Canadian Forum on Civil Justice <www.cfcj-fcj.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf>; John-Paul Boyd, "The Unified Family Court: A Road-tested Justice Strategy for Alberta" *LawNow* 39:2 (November 2014) 19, online: <www.lawnow.org/unified-family-court-justice-strategy-alberta/>.

²¹³ Institute of Law Research and Reform (Alberta), *Family Law Administration: The Unified Family Court*, Final Report 25 (1978), online: <<https://www.alri.ualberta.ca/docs/fr025.pdf>>.

²¹⁴ See e.g. Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words*, Final Report (2013), at 48, online: Canadian Forum on Civil Justice <www.cfcj-fcj.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf>; John-Paul Boyd, "The Unified Family Court: A Road-tested Justice Strategy for Alberta" *LawNow* 39:2 (November 2014) 19, online: <www.lawnow.org/unified-family-court-justice-strategy-alberta/>.

spouses. All property division matters would be heard in the same court, which might reduce confusion.

[448] The other option would be to preserve a role for Provincial Court. There are some advantages to this option. Provincial Court has streamlined procedures. It is often faster and less expensive for parties to address issues in Provincial Court. For couples with relatively small amounts of personal property (like money, vehicles, furniture, and household goods worth \$50,000 or less all together), the time and cost of litigating in the Court of Queen's Bench may be disproportionate to the amount at stake. Provincial Court may provide better access to justice, especially if such couples could resolve parenting, support, and property issues in the same proceedings.

[449] Regardless of which option is selected, it would be desirable to consider whether procedures can be harmonized and simplified. Where possible, separating couples should be able to address all their issues in the same proceeding. If not, there should at least be efforts to avoid unnecessary differences in the systems and procedures they must navigate.

[450] There are financial and administrative factors that may affect which court should have jurisdiction, and how procedures could be harmonized or simplified. The decisions are best left to government, which can weigh all the factors. ALRI therefore does not make any recommendation about which court should have jurisdiction.

CHAPTER 9

The Impact of New Legislation on Agreements About Ownership and Division of Property

A. Introduction

[451] In Chapter 3, ALRI recommended legislated rules to clarify how partners may make agreements about ownership and division of property. There are some implementation issues that may arise from our recommendations. This chapter discusses the impact of new legislation on agreements and our recommendations to resolve specific technical issues.

B. Cohabitation Agreements and Marriage

1. EFFECT OF COHABITATION AGREEMENTS DURING MARRIAGE

[452] Whenever possible, partners or spouses should be encouraged to make their own agreements about division of property. Couples may make an agreement before, during, or after marriage.

[453] There are three kinds of agreements a couple might make before marriage. The first is a cohabitation agreement, which is intended to apply while the couple lives in a common-law relationship or a relationship of interdependence. In other words, it is intended to apply during cohabitation. The second is a prenuptial agreement, which is made before marriage but is intended to apply only during marriage. The third is sometimes called a hybrid agreement. A hybrid agreement is intended to apply during both cohabitation and marriage. In other words, it is both a cohabitation agreement and a prenuptial agreement. A hybrid agreement might have the same rules for cohabitation and marriage or might have one set of rules for cohabitation and another set of rules for marriage.

[454] There are two issues that may arise with cohabitation and hybrid agreements. ALRI identified one issue in our Reports for Discussion. The second came to our attention during consultation.

[455] The first issue affects couples who make a cohabitation agreement without stating what will happen if they marry. If they marry, what should happen to the

agreement? In both Report for Discussion 30 and Report for Discussion 31, ALRI proposed a default rule that would apply if a cohabitation agreement does not address what is to happen if the partners marry each other. Our proposed default rule was that a cohabitation agreement would continue in effect if the partners marry. Our preliminary recommendation was:

An agreement about ownership and division of property should continue in effect if the partners marry, unless the partners agree otherwise.

[456] Our preliminary recommendation was intended to be consistent with legislation in other Canadian jurisdictions. Most Canadian jurisdictions have legislation stating that a cohabitation agreement is considered to be a marriage agreement if the partners later marry.²¹⁵

[457] The second issue affects hybrid agreements. During consultation, we learned that some lawyers consider hybrid agreements to be potentially unenforceable before marriage, due to a provision of the MPA. This second issue affects the first. If hybrid agreements are unenforceable before marriage, a rule that a cohabitation agreement should continue in effect during marriage would be inconsistent with the MPA.

2. CONSULTATION RESULTS AND ADDITIONAL ISSUE

[458] The responses to multiple choice questions in our surveys showed support for ALRI's proposed default rule that a cohabitation agreement should continue in effect during marriage. We asked about this proposal in both the general survey and the premarital survey.²¹⁶ In the general survey, 76 per cent of respondents agreed with this proposal. In the premarital survey, 66 per cent of respondents agreed with it.

²¹⁵ Seven Canadian jurisdictions have legislation stating that a cohabitation agreement is considered to be a marriage agreement if the partners marry. The seven jurisdictions are Ontario, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Yukon, the Northwest Territories, and Nunavut: see *Family Law Act*, RSO 1990, c F.3, s 53(2); *Marital Property Act*, SNB 2012, c 107, s 35(3); *Family Law Act*, RSPEI 1988, c F-2.1, s 52(2); *Family Law Act*, RSNL 1990, c F-2, s 63(2); *Family Property and Support Act*, RSY 2002, c 83, s 60(2); *Family Law Act*, SNWT 1997, c 18, s 4(2); *Family Law Act*, SNWT (Nu) 1997, c 18, s 4(2). In two other jurisdictions – British Columbia and Saskatchewan – common-law partners who have cohabited for at least two years are defined as spouses in family property legislation, so an agreement would continue in effect as long as the parties cohabit: *Family Law Act*, SBC 2011, c 25, ss 3, 92; *The Family Property Act*, SS 1997, c F-6.3, ss 2(1), 38, 41.

²¹⁶ Although we avoided asking the same question on different surveys, we made an exception for this question to seek views from both partners and spouses.

[459] A more complicated picture was revealed in comments and at our 2018 roundtables. There was strong support for the principle that partners should deal with transition by agreement. There also seemed to be agreement that whatever the rule is, partners should not be taken by surprise. There were varying views, however, on what most people would expect and what the default rule should be. Some respondents thought that partners would expect to have the same rules throughout the relationship. Others thought that partners would consider marriage to be different from cohabitation, and would have different expectations after marriage.

[460] One comment pointed out that the preliminary recommendation may be inconsistent with subsection 37(2) of the MPA. The subsection reads:

37(2) An agreement under subsection 1 [about ownership and division of property] may be entered into by 2 persons in contemplation of their marriage to each other but is unenforceable until after the marriage.

[461] Part of the discussion at our 2018 roundtables also touched on subsection 37(2). That discussion helped us understand the different views about the meaning and purpose of this provision.

3. ALRI'S POSITION

a. Hybrid agreements and subsection 37(2) of the *Matrimonial Property Act*

[462] With some further research, we learned that there are different views about interpreting this provision. Some lawyers interpret subsection 37(2) to mean that an agreement can be a cohabitation agreement or a prenuptial agreement, but not both. In their view, an agreement that would continue in effect if the partners marry is one made in contemplation of marriage. Subsection 37(2) says that an agreement made in contemplation of marriage is unenforceable before marriage, implying that the entire agreement cannot be enforced unless and until the partners marry. Other lawyers do not interpret subsection 37(2) to prohibit hybrid agreements. In their view, a hybrid agreement is enforceable both before and during marriage if it is clear that the partners intended the agreement to apply to both. A hybrid agreement requires careful drafting to outline the parties' obligations during cohabitation and during marriage.

[463] We also considered what the purpose of subsection 37(2) might be. We have reviewed the legislative history of this provision and case law considering it, but have not found any source explaining its purpose. Most other Canadian

jurisdictions do not have a provision equivalent to subsection 37(2).²¹⁷ Its intended purpose can only be inferred from the historical context and the text of the provision itself.

[464] The MPA does not contemplate common-law relationships, relationships of interdependence, or cohabitation agreements. It seems likely that subsection 37(2) was intended to apply only to prenuptial agreements. If a couple made an agreement intended to apply during marriage but the marriage did not occur, it would be unfair to enforce the agreement. Assuming this is the purpose of subsection 37(2), we are not convinced that it is necessary. A prenuptial agreement is by definition conditional on marriage. The condition and the parties' intentions should be clear from the agreement. If the condition is not met, the agreement would not be enforceable.

[465] There is no policy reason why partners should not be able to make a hybrid agreement. Some partners may want to have the same rules throughout the relationship. If they have negotiated rules that they consider fair in their specific circumstances and they clearly intend for the rules to apply whether or not they marry, it should not be necessary to make two separate agreements. The safeguards recommended in Chapter 3 should ensure that both partners are aware of the consequences of the agreement – including whether or not it will continue during marriage – and enter it voluntarily.

[466] To clarify that hybrid agreements are enforceable whether or not the partners marry, it may be necessary to repeal or amend subsection 37(2). We do not see any reason to retain subsection 37(2), but if it has any ongoing relevance it could be amended to state that an agreement or any part of an agreement that is conditional on the parties marrying each other is not enforceable until the marriage occurs.

RECOMMENDATION 15

Partners should be able to make a hybrid agreement about ownership and division of property, intended to apply both during cohabitation and during marriage. A hybrid agreement should continue in effect whether or not the partners marry each other.

²¹⁷ Only Saskatchewan has an equivalent provision: *The Family Property Act*, SS 1997, c F-6.3, s 38(4)(c).

b. A default rule about the effect of cohabitation agreements during marriage

[467] For partners who do not make a hybrid agreement, ALRI sees value in a default rule. If a cohabitation agreement does not consider the possibility of marriage, it is currently unclear what effect it has if the partners marry each other. A default rule would clarify the law, so partners would know the effect of their agreement.

[468] It is important that partners are not taken by surprise. Based on what we heard in consultation, we have reason to believe many couples do not expect their cohabitation agreements to continue after marriage. At our 2018 roundtables, one lawyer told us that many couples enter a cohabitation agreement to keep their property separate during the “trial period” of their relationship, but do not make a marriage agreement as they expect to share property acquired during the marriage. Another told us of seeing hybrid agreements with one set of rules to apply during cohabitation and another set of rules for marriage. Some lawyers told us that they currently advise clients that their cohabitation agreement will not continue during marriage, so if they intend to marry they should consider a new agreement in contemplation of marriage. Although this information is anecdotal, we are persuaded that many couples would be surprised if their cohabitation agreement continued to apply during marriage.

[469] After considering the consultation responses, however, we have concluded that the default rule should be that a cohabitation agreement applies only to the time the partners cohabited. If partners wish the same rules to apply to both cohabitation and marriage, they should have to make an agreement that is clearly a hybrid agreement. Of course, the hybrid agreement would have to meet all the formal requirements to be enforceable.

[470] Going forward, ALRI’s other recommendations should help avoid surprise. Both partners would have to meet with a lawyer when entering a cohabitation agreement, so they would have an opportunity to receive legal advice. We expect that most lawyers would consider whether an agreement is to continue during marriage and would discuss the issue with their client. Both partners could therefore make an informed decision about whether to make a cohabitation agreement, a prenuptial agreement, or a hybrid agreement.

[471] ALRI therefore recommends that the default rule should be that a cohabitation agreement does not continue in effect after the partners marry. In other words, a cohabitation agreement would not affect division of property

acquired during marriage unless the partners explicitly agreed so. To be clear, the cohabitation agreement would remain valid and enforceable, but would only apply up to the date of marriage. From the date of marriage onwards, the MPA would apply.

[472] ALRI acknowledges that this recommendation would mean Alberta legislation would not be uniform with other Canadian jurisdictions. Most Canadian jurisdictions have a default rule that a cohabitation agreement continues in effect if the partners marry. Although uniformity is desirable, it is not the key consideration in this case. Family property legislation is different in each jurisdiction. All but one of the jurisdictions which provides that cohabitation agreements continue in effect during marriage also include provisions allowing courts to set aside such agreements at the time property is divided in certain circumstances.²¹⁸ As previously mentioned, the MPA does not allow courts to review enforceable agreements at the time the property is divided.

[473] Many agreements will include a choice of law provision, stating which jurisdiction's laws will apply to interpretation of the agreement. Partners who make an agreement governed by Alberta law should be aware that Alberta legislation will apply. Lack of uniformity is therefore not a major concern.

RECOMMENDATION 16

An agreement about ownership and division of property intended to apply during cohabitation should not continue in effect during marriage, unless the agreement is a hybrid agreement or the partners agree that the agreement will continue in effect during marriage.

²¹⁸ All of the jurisdictions listed above in note 215, except Yukon, include a provision allowing a court to review enforceable agreement for fairness at the time property is divided. *Family Law Act*, RSO 1990, c F.3, s 56(4); *Marital Property Act*, SNB 2012, c 107, s 43; *Family Law Act*, RSPEI 1988, c F-2.1, s 55(4); *Family Law Act*, RSNL 1990, c F-2, s 66(4)(5); *Family Law Act*, SNWT 1997, c 18, s 8(4); *Family Law Act*, SNWT (Nu) 1997, c 18, s 8(4); *Family Law Act*, SBC 2011, c 25, s 93; *The Family Property Act*, SS 1997, c F-6.3, s 24(2).

C. Transition Rules for Agreements About Ownership and Division of Property

1. EXISTING AGREEMENTS THAT DO NOT MEET THE PROPOSED REQUIREMENTS

[474] In Chapter 3, ALRI concluded that the requirements in the MPA would be appropriate for agreements between partners and that an agreement that does not meet the requirements should not be enforceable. This recommendation would affect new cohabitation agreements made after legislation comes into force.

[475] In consultation, we realized that there was a gap in our preliminary recommendations relating to existing cohabitation agreements. If partners have already made a cohabitation agreement, it is likely that their existing agreement does not meet all the requirements in sections 37 and 38 of the MPA. In particular, it would be impossible for partners to have acknowledged they were aware of future claims to property they may have under legislation that does not yet exist.²¹⁹

[476] Currently, there are no specific formal requirements for cohabitation agreements. The common law of contract applies to cohabitation agreements. A cohabitation agreement requires offer, acceptance, and consideration. It may be set aside for reasons including fraud, mistake, duress, undue influence, or unconscionability.²²⁰ If a cohabitation agreement is enforceable at common law, it does not need to meet any other requirements. In particular, it does not matter if the partners met separately with different lawyers or had any legal assistance at all.²²¹ Courts have enforced cohabitation agreements about ownership and division of property that were made without any help from a lawyer.²²²

²¹⁹ It is likely that some existing cohabitation or hybrid agreements include an acknowledgement that the partners are aware of future claims they may have under the law of unjust enrichment, or future claims they may have under the MPA in the event that the partners marry.

²²⁰ In the context of domestic agreements, unconscionability has a broad meaning. For example, a failure to disclose assets, misleading a partner, or taking advantage of a partner's emotional state may make a domestic contract unconscionable: see e.g. *Rick v Brandsema*, 2009 SCC 10; *Brown v Silvera*, 2009 ABQB 523, aff'd 2011 ABCA 109.

²²¹ Independent legal advice is helpful to refuting allegations of undue influence, duress, or unconscionability, but it is not essential.

²²² See e.g. *Sporring v Collins*, 2009 ABQB 141.

[477] Without a transition rule for existing agreements, it is possible that an agreement that is currently enforceable at common law would not be enforceable under the new legislation.

2. CONSULTATION RESULTS

[478] Report for Discussion 30 did not specifically consider the effect of new legislation on existing cohabitation agreements. We only received a few comments on this issue, but they all expressed the view that existing agreements should remain enforceable.

[479] When we further explored this issue with lawyers at our 2018 roundtables, most lawyers said that existing agreements should remain enforceable. They were most concerned about partners who had invested time and money to get legal advice, with the expectation that the agreement would be enforceable. Although they recognize that some existing agreements would have been made without legal advice, they did not see any justification for making some or all existing agreements unenforceable.

[480] Some lawyers suggested that a cohabitation agreement that was enforceable at common law before the new legislation comes into force should remain enforceable under the new legislation, even if it does not meet the new requirements.

[481] There were a few lawyers who thought that existing agreements should be addressed under section 8(g) of the MPA. In their view, there should not be a general rule that existing agreements are enforceable. Rather, courts should consider any existing agreements and should have discretion about how much weight to give them. These lawyers thought that a court would usually give great weight to an agreement prepared with independent legal advice, but a court should not be bound by an unbalanced agreement made without any safeguards. This approach would allow courts to consider whether both partners would have entered the agreement had they known they would be giving up rights based on the presumption of equal division.

3. ALRI'S POSITION

[482] New legislation should include a transition rule about existing agreements. Existing agreements that were enforceable before the new legislation comes into force should remain enforceable, even if they do not meet the requirements in new legislation. Courts would still be able to review existing

agreements to ensure they are valid and enforceable at common law. For example, an existing agreement could be set aside if it was the result of duress or undue influence or if it is unconscionable.

[483] The effect of an existing agreement about ownership and division of property that is currently enforceable would not change. An existing cohabitation agreement about ownership and division of property would be enforceable if the partners never marry. An existing hybrid agreement would be enforceable as a cohabitation agreement if the partners never marry. If the parties marry, an existing hybrid agreement would be enforceable as a cohabitation agreement up to the date of marriage. As is currently the case, the hybrid agreement would be enforceable during the marriage only if it met the requirements in sections 37 and 38 of the MPA.

[484] Ensuring existing agreements remain enforceable would be consistent with ALRI's stated goal of promoting the use of agreements. This recommendation would avoid inconvenience, cost, and uncertainty for partners who have already made an agreement. Partners with an existing agreement could continue to rely on it, without incurring new costs to renegotiate or re-execute their agreements.

[485] As discussed in Chapter 3 of this Report, all agreements made after the new legislation comes into force will have to meet requirements to be enforceable by the court when making a property division order under the new legislation.

RECOMMENDATION 17

An agreement about ownership and division of property that was enforceable immediately before new legislation comes into force should remain enforceable after new legislation comes into force.

CHAPTER 10

Transition Issues and Consequential Amendments

A. Transition Issues

[486] The recommendations in this Report would affect adult interdependent partners. They would also affect spouses who lived in a relationship of interdependence before marriage. For both kinds of couples, transition rules are necessary to clarify when the new rules will apply.

1. APPLICATION TO EXISTING COUPLES

[487] The proposals in Report for Discussion 30 and Report for Discussion 31 assumed that new property division rules should apply to couples who separate after the legislation comes into force. In other words, new property division rules would apply to existing couples, who are already in an adult interdependent relationship or marriage. In consultation, some respondents challenged this assumption. It is worthwhile to explain the reasons for this approach in more detail.

[488] There is a general presumption against legislation applying retroactively, that is, changing the legal nature of an event in the past.²²³ To be clear, ALRI does not propose that new property division rules would apply retroactively. They should not apply to former couples who have already reached a final resolution of claims for property division. ALRI's recommended approach respects the presumption against retroactive legislation.

[489] Legislation may apply prospectively to events in the future. It may also apply retrospectively. That is, legislation may change the legal consequences of an ongoing situation that started before the legislation came into force.²²⁴

[490] It is debateable whether ALRI's recommended approach should be characterized as retrospective or prospective application. It may be retrospective, in that it would change the legal consequences of an ongoing situation – in this

²²³ See generally Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis, 2014), ch 25.

²²⁴ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis, 2014), ch 25.

case, a relationship. It may be prospective, because a claim for property division would arise only after a relationship breaks down. New property division rules would apply only if the triggering event occurs after the new legislation comes into force, at a point in the future. Regardless of whether ALRI's recommended approach is retrospective or prospective, it is consistent with general presumptions about the application of legislation.

[491] ALRI's recommended approach is consistent with past practice. Other Alberta legislation has changed the legal consequences of existing relationships. For example, the MPA applies to couples who separate after the legislation came into force, regardless of when they were married. Similarly, AIRA applies to relationships that began before and after it came into force.²²⁵

[492] ALRI's recommended approach is also consistent with other jurisdictions. In most of the jurisdictions with legislated property division rules for partners, legislation explicitly states that the rules apply regardless of when the relationship began.²²⁶

[493] In consultation, a few respondents suggested that new legislation should apply only to couples who begin their relationship after it comes into force.

[494] There are several reasons why new legislation should apply to existing couples. First, reform is needed to help couples who are separating now. A key goal of this project is to reduce the number of people who must rely on claims for unjust enrichment to divide property. This goal is best accomplished if new legislation applies to existing couples if they separate after the legislation comes into force. Second, a transition depending on the date the relationship began would not address the differential impact on same sex couples. It would preserve the discriminatory effect of the current law. Third, if legislation did not apply to existing couples, the transition would take decades. Some existing relationships may last nearly a lifetime. It would be impractical, confusing, and inefficient to have two different sets of property division rules – one set of rules for existing couples and a different set of rules for couples who begin their relationship after the legislation comes into force – for decades to come.

²²⁵ *The Matrimonial Property Act*, SA 1978, c 22, s 40; AIRA, s 2.

²²⁶ See *The Family Property Act*, SS 1997, c F-6.3, s 3; *Family Property Act*, CCSM c F25, s 2(1), 2.1(1); *Family Law Act*, SNWT 1997, c 18, s 34; *Family Law Act*, SNWT (Nu) 1997, c 18, s 34. Although British Columbia's legislation does not include an explicit provision to this effect, British Columbia courts have interpreted its *Family Law Act*, SBC 2011, c 25 as applying to partners regardless of when the relationship began: see *Newton v Crouch*, 2016 BCCA 115; *Matteucci v Greenberg*, 2016 BCCA 116.

[495] Existing couples may opt-out of legislated property division rules by making an agreement. If both partners or spouses in an existing couple want to avoid the effect of new property division rules, they may make an agreement. In an agreement, they could choose the rules about division of property that reflect their specific circumstances and intentions.

2. APPLICATION TO SEPARATED COUPLES

[496] New property division rules should apply to existing couples, but not to former couples who have already reached a final resolution of claims for property division. What about couples in between, who have already separated but have not reached a final resolution?

[497] In both Report for Discussion 30 and Report for Discussion 31, ALRI considered a transition rule for couples in the process of resolving claims for property division. We identified at least four events that could be a dividing line: the time of separation, issuing a statement of claim, setting a matter down for trial, and trial.

[498] Our preliminary recommendation was that the dividing line should be at separation. The existing law would apply to couples who separate before new legislation comes into force. New property division rules would apply to couples who separate after new legislation comes into force. Our preliminary recommendation was:

New property division legislation should only apply to couples who separate after the legislation comes into force.

[499] Both the technical survey and the premarital survey included a question about this proposal. Respondents were asked to choose between four options: they could agree with ALRI's preliminary recommendation that the dividing line should be at separation or choose between three other options: issuing a statement of claim, setting a matter down for trial, or other.²²⁷ In the technical survey, 63 per cent of respondents agreed with ALRI's preliminary recommendation. In the premarital survey, 67 per cent of respondents agreed with ALRI's preliminary recommendation. The next most popular choice in both surveys was that the dividing line should be issuing a statement of claim. In the

²²⁷ The survey asked those who selected "other" to explain in the text box below the multiple choice question. All respondents could provide comments in the text box.

technical survey, 20 per cent of respondents selected this option. In the premarital survey, 23 per cent of respondents selected it.

[500] ALRI has concluded that separation is the appropriate dividing line. It may be confusing and inefficient to change the rules for couples who may already be working towards resolution. Some couples may begin to work towards resolution as soon as they decide to separate. They may have to resolve issues about parenting and support, as well as property. Resolution may require balancing many factors, and a change in one might affect others. It should not be assumed that every couple will litigate, or that steps in litigation are the best measure of progress towards resolution.

RECOMMENDATION 18

New property division legislation should apply to adult interdependent partners or spouses who separate after the legislation comes into force.

3. TRANSITION PERIOD

[501] There should be a transition period before new legislation comes into force. The transition period would allow time for individuals and lawyers to learn about the change in the law. It should also provide time for existing couples to make agreements about ownership and division of property if they wish to avoid the default rules in new legislation.

[502] The transition period should allow a reasonable amount of time for existing couples to learn about the change in the law and consider how to respond. There are many situations where couples may want to opt-out of new property division rules, modify rules to suit their specific circumstances, or make arrangements for specific property. In consultation, some respondents told us they chose to live in a common-law relationship to avoid being affected by the MPA. Couples in this situation may want to make an agreement to avoid legislated property division rules. There may be some couples who entered an adult interdependent partner agreement without anticipating it could affect property. For example, we heard some anecdotal information about partners who entered adult interdependent partnership agreements primarily to obtain pension or health benefits. If they do not intend to divide property, these partners may want to make an agreement about ownership and division of property that reflects their actual intentions. Some spouses may not want to divide property acquired during premarital cohabitation. They may want to

make an agreement to exclude that property from division. In any of these situations, couples would require some time to negotiate and enter an agreement.

[503] The transition period should give partners time to negotiate without undue pressure. If a couple cannot reach an agreement, it is possible that one partner will decide to separate before new legislation comes into force, in order to divide property under the existing law. It may be impossible to completely avoid this unfortunate side-effect, but it should not be encouraged.

RECOMMENDATION 19

There should be a transition period before new legislation comes into force, providing a reasonable amount of time for partners or spouses who do not want legislated property division rules to apply to make an agreement about ownership and division of property.

B. Consequential and Related Amendments

[504] Most of the consequential amendments to implement new property division rules for adult interdependent partners would be minor ones. Mainly, cross-references to the MPA in other Alberta legislation should be updated.²²⁸

[505] There is one significant issue that requires amendments to pension legislation. Provisions in pension legislation about division of pension benefits apply only to spouses. The legislation permits spouses to divide pension benefits, but prevents unmarried pension partners from doing so.

[506] If a pension plan member has a partner or spouse, and the relationship meets certain conditions, the partner or spouse is considered a “pension partner.”²²⁹ Pension partners may be married or unmarried. The definition for

²²⁸ Cross-references in statutes include *Wills and Succession Act*, SA 2010, c W-12.2, ss 58, 93; *Estate Administration Act*, SA 2014, c E-12.5, ss 10, 11; *Law of Property Act*, RSA 2000, c L-7, s 21. There are also cross-references in regulations, including the *Alberta Rules of Court*, Alta Reg 124/2010; *Surrogate Rules*, Alta Reg 130/1995; *Personal Property Security Regulation*, Alta Reg 95/2001.

²²⁹ See e.g. *Employment Pension Plans Act*, SA 2012, c E-8.1, s1(3)

1(3) Persons are pension partners for the purposes of this Act on any date on which one of the following applies:

- (a) they
 - (i) are married to each other, and
 - (ii) have not been living separate and apart from each other for a continuous period longer than 3 years;
- (b) if clause (a) does not apply, they have been living with each other in a marriage-like relationship

unmarried pension partners partly overlaps with the definition of adult interdependent partners under AIRA, but it is not exactly the same. In particular, it excludes non-conjugal partners and there is no option to shorten or eliminate the required period of cohabitation by entering an agreement. The reason for the differences is that the definition of pension partner must harmonize with federal legislation.

[507] Pension legislation includes a restriction on alienation, so pension plan members cannot lose, sell, or give their benefits to anyone else.²³⁰ There is a specific exception that allows spouses to divide pension benefits in accordance with a matrimonial property order.²³¹ Some legislation, but not all, also permits division of pension benefits in accordance with a matrimonial property agreement.²³² In Alberta pension legislation, matrimonial property order and matrimonial property agreement are defined with reference to the MPA.²³³ The legislated exception therefore applies only to spouses.

[508] There is no equivalent exception for unmarried pension partners.²³⁴ Under the legislation, they cannot divide pension benefits even if they agree to do so.

-
- (i) for a continuous period of at least 3 years preceding the date, or
 - (ii) of some permanence, if there is a child of the relationship by birth or adoption.

²³⁰ See e.g. *Employment Pension Plans Act*, SA 2012, c E-8.1, s 72. See also Rita Richardson, “Pensions and Death: In a Family Law Context” in *All That Touches Family Law* (Alberta: Legal Education Society of Alberta, 2015) at 2.

²³¹ See e.g. *Employment Pension Plans Act*, SA 2012, c E-8.1, s 72(4)(b); *Local Authorities Pension Plan*, Alta Reg 366/1993, s 109(2)(a)(i); *Teachers’ and Private School Teachers Pension Plans*, Alta Reg 203/1995, Schedule 1, s 62(2)(a).

²³² *Employment Pension Plans Act*, SA 2012, c E-8.1, s 72(4)(b); *Pooled Registered Pension Plans Act*, SA 2013, c P-18.5, s 49(3)(a)(i).

²³³ See e.g. *Employment Pension Plans Act*, SA 2012, c E-8.1, s 78:

78 In this Division,

(a) “agreement” means a written agreement that provides for the division and distribution of a benefit and that meets the requirements of section 37 of the Matrimonial Property Act, and that is enforceable under section 38 of that Act;

(b) “matrimonial property order” means a matrimonial property order within the meaning of the Matrimonial Property Act, or a similar order enforceable in Alberta of a court outside Alberta, that affects the division and distribution of a benefit; ...

See also *Pooled Registered Pension Plans Act*, SA 2013, c P-18.5, s 63; *Members of the Legislative Assembly Pension Plan Act*, RSA 2000, c M-12, Schedule 1, s 1(1)(l); *Public Sector Pension Plans (Legislative Provisions) Regulation*, Alta Reg 365/1993, s 21(1)(i); *Local Authorities Pension Plan*, Alta Reg 366/1993, s 2(1)(y); *Management Employees Pension Plan*, Alta Reg 367/1993, s 2(1)(y); *Public Service Pension Plan*, Alta Reg 368/1993, s 2(1)(y); *Special Forces Pension Plan*, Alta Reg 369/1993, s 2(1)(y); *University Academic Pension Plan*, Alta Reg 370/1993, s 2(1)(y); *Teachers Pension Plans (Legislative Provisions) Regulation*, Alta Reg 204/1995, s 29(1)(h); *Teachers’ and Private School Teachers Pension Plans*, Alta Reg 203/1995, Schedule 1, s 1(1)(z); *Provincial Judges and Master in Chambers Registered and Unregistered Pension Plans*, Alta Reg 196/2001, Schedule 1, s 1(1)(l).

²³⁴ There is a narrow condition that could allow unmarried partners to enforce a property division order made outside Alberta. A matrimonial property order is defined to include “a similar order enforceable in Alberta of a court outside Alberta”: see e.g. *Employment Pension Plans Act*, SA 2012, c E-8.1, s 78(b). If partners living in a jurisdiction that has legislated property division rules for partners – such as British Columbia or

Continued

The legislation also prevents a court from making an order dividing pension benefits between unmarried partners as a remedy for unjust enrichment.

[509] In consultation, a few respondents mentioned this distinction. Some lawyers told us it can cause difficulty when common-law partners or adult interdependent partners divide property. We heard that partners sometimes divide other property unequally in favour of the non-pension plan member partner to offset the pension benefits that cannot be divided. This solution is not perfect, however, especially when the pension is the couple's biggest asset.

[510] The Alberta Court of Queen's Bench recently considered whether pension legislation discriminates against unmarried pension partners, in *Lubianesky v Gazdag*.²³⁵ The court held that the distinction between married and unmarried pension partners violates the *Canadian Charter of Rights and Freedoms*.²³⁶ The case involved an unmarried couple that had made a comprehensive separation agreement. One partner agreed to transfer a lump sum from his pension to the other partner. The pension administrator, following the legislation, would not make the transfer. In an unopposed application, the Court declared that the legislation discriminated on the grounds of marital status, as it denied a benefit to unmarried pension partners that is available to married pension partners. The Court remedied the violation by reading in language, so the applicable section of the *Employment Pensions Plan Act* includes unmarried pension partners.

[511] The Court's declaration in *Lubianesky* is not a complete solution. The declaration is limited to one section of one statute. A complete solution requires amendments to all Alberta pension legislation, including the remaining sections of the *Employment Pension Plans Act*, the *Pooled Registered Pension Plans Act*, *Members of the Legislative Assembly Pension Plan Act*, and regulations under the *Public Sector Pension Plans Act*, *Teachers' Pension Plans Act*, and others.²³⁷

Saskatchewan—obtained a court order to divide pension benefits, it appears the order could be enforced in Alberta.

²³⁵ *Lubianesky v Gazdag*, 2018 ABQB 290.

²³⁶ *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

²³⁷ *Pooled Registered Pension Plans Act*, SA 2013, c P-18.5; *Members of the Legislative Assembly Pension Plan Act*, RSA 2000, c M-12; *Public Sector Pension Plans (Legislative Provisions) Regulation*, Alta Reg 365/1993; *Local Authorities Pension Plan*, Alta Reg 366/1993; *Management Employees Pension Plan*, Alta Reg 367/1993; *Public Service Pension Plan*, Alta Reg 368/1993; *Special Forces Pension Plan*, Alta Reg 369/1993; *University Academic Pension Plan*, Alta Reg 370/1993; *Teachers Pension Plans (Legislative Provisions) Regulation*, Alta Reg 204/1995; *Teachers' and Private School Teachers Pension Plans*, Alta Reg 203/1995; *Provincial Judges and Master in Chambers Registered and Unregistered Pension Plans*, Alta Reg 196/2001.

RECOMMENDATION 20

Alberta pension legislation should be amended so that unmarried pension partners can divide pension benefits in the same way as spouses.

C. Conclusion

[512] Alberta law has long recognized that partners have obligations to each other. Under the law of unjust enrichment, however, it is difficult for partners to understand their obligations. The law of unjust enrichment makes it difficult for partners to settle disputes about property and pushes them towards litigation that is likely to be long, expensive, and risky for both partners. Reform is needed to improve access to justice.

[513] Wherever possible, partners should be encouraged to make their own agreements about property. ALRI recommends reforms that would clearly describe how partners may make enforceable agreements, while providing safeguards against unfair or poorly thought out agreements.

[514] The fact remains that partners do not always make their own agreements about property. To achieve effective reform, there must also be legislated rules to replace the law of unjust enrichment. ALRI has concluded that legislated rules should be consistent with existing Alberta legislation and should treat partners and spouses similarly. The rules should apply to adult interdependent partners, and should be based on the MPA. A few small adjustments would be required to tailor rules in the MPA for adult interdependent partners.

[515] To ensure fair treatment of all couples, ALRI recommends that the presumption of equal division apply to property acquired from the beginning of a relationship of interdependence. This change would affect spouses who lived in relationship of interdependence before marriage.

[516] ALRI recommends legislated rules to make the law clearer and more predictable, improving access to justice for separating couples.



Web: alri.ualberta.ca

Phone: 780.492.5291

Email: lawreform@ualberta.ca

Follow us on Twitter! @ablawreform
