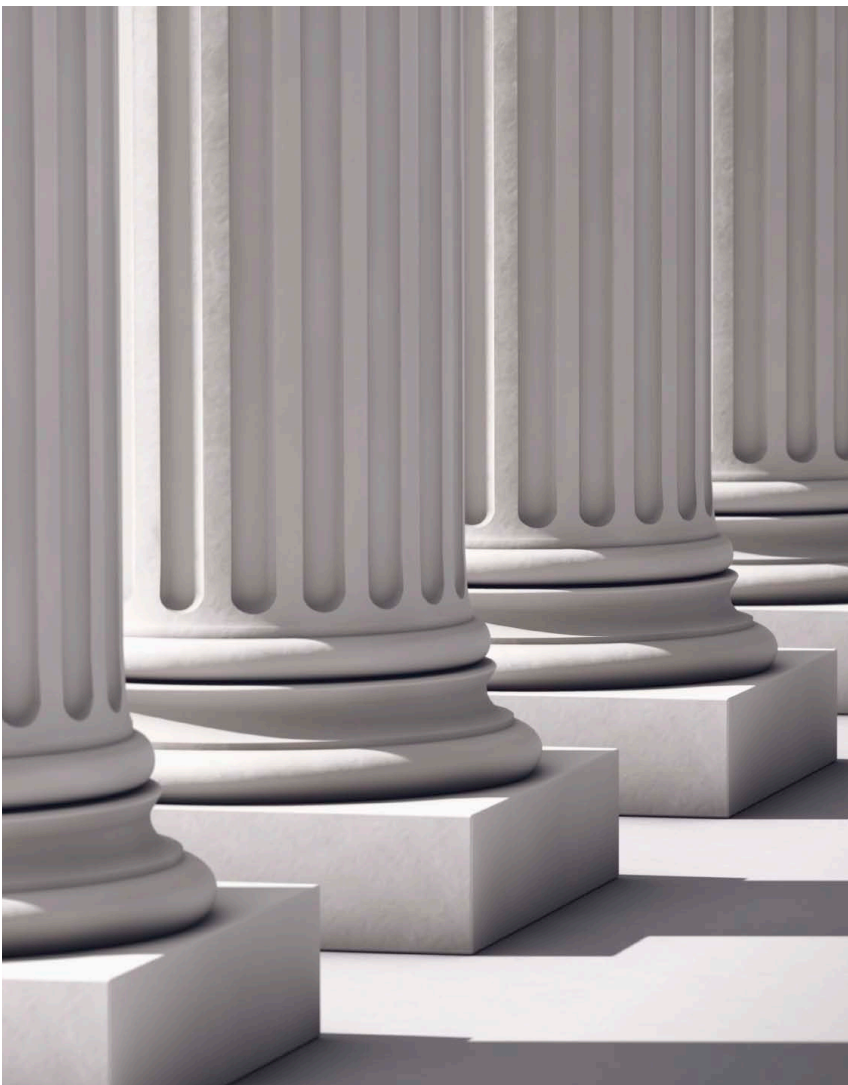




ALBERTA
LAW REFORM
INSTITUTE



PROPERTY DIVISION: LIVING TOGETHER BEFORE MARRIAGE



REPORT FOR DISCUSSION

31

OCT 2017





PROPERTY DIVISION: LIVING TOGETHER BEFORE MARRIAGE

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DISCUSSION || **31**

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The purpose of issuing a Report for Discussion is to allow interested persons the opportunity to consider these proposals and to make their views known to ALRI. You may respond to one, a few or all of the issues raised. Any comments sent to us will be considered when the ALRI Board makes final recommendations.

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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.

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Summary

It is not uncommon for couples to live together before getting married. In some cases, they will acquire significant property, such as a home, furniture and a vehicle. While the *Matrimonial Property Act* [MPA] applies a presumption of equal division to property acquired during the marriage, it exempts the property acquired before the marriage. Consequently, the original value of that property is not divided on separation or divorce; only the increase in value of that property, from the marriage to the trial, may be distributed by the court in a just and equitable manner.

ALRI proposes to extend the presumption of equal division to property acquired by the spouses while they lived together before marriage. If the relationship is an economic partnership, the spouses should be presumed to intend to share property acquired from the beginning of that relationship, including any period of premarital cohabitation. The proposal is intended to make the law clearer, more predictable, and consistent with other family law statutes.

Premarital Cohabitation

Spouses who believe that they are entitled to a share of property acquired during premarital cohabitation or some compensation have to ask the court to take into account the full length of cohabitation in distributing the increase in value of the exempt property, or bring an unjust enrichment claim along with their matrimonial property application, or both. Courts have generally shown a willingness to factor in premarital cohabitation when determining entitlements. Without the benefit of a presumption of equal division, however, the onus to present evidence that they should either receive a share of the increase in value or some compensation for property acquired by their joint efforts during cohabitation remains on non-titled or non-owning spouses. The MPA's focus on the length of marriage also puts property division rules at odds with many family-related statutes, such as the *Family Law Act*, which use the length of the cohabitation as period of reference.

Presumption of Equal Division

Cohabitation is often the point at which couples begin to make contributions to relationship property. When the spouses contribute to the relationship, it is fair that they should be presumed to intend to share gains accumulated during that relationship, including any period of premarital cohabitation. To reduce the need to resort to more complex, time-consuming, costly and uncertain remedies, ALRI recommends that property acquired after couples begin to live together in a relationship of interdependence should be presumptively included in an equal division. The criteria that determine whether a relationship is one of interdependence are set out in the *Adult*

Interdependent Relationships Act. The main objective of this recommendation is not to create new property entitlements, but to facilitate the claim process by extending the presumption of equal division to the entire relationship.

It is important to remember that the presumption of equal division can be rebutted when it would not be just and equitable to equally divide the property. Many factors might speak against an equal division of premarital property, for instance: the property was not acquired in contemplation of cohabitation or marriage, or was acquired while the parties lived separate and apart (e.g. interruption of cohabitation), or when they lived together but not in a relationship of interdependence (e.g. roommates).

Moreover, couples will retain the option of making an agreement about ownership and division of property. The terms of the agreement would prevail over the default rules of the MPA. Whenever possible, couples should be encouraged to make their own agreements, especially in regard to property acquired during premarital cohabitation.

Exempt Property

Property division rules recognize the relationship as an economic partnership founded on the presumption that the spouses intend to share the fruits of their joint efforts on an equal basis. Property with no connection to that relationship should be exempted. ALRI proposes that property acquired by the spouses before the commencement of the relationship of interdependence should remain exempted from the presumption of equal division.

Transition Issues

To address overlapping issues, ALRI proposes that the default valuation date for property division should be the date on which the parties began to live separate and apart. If the default valuation date remains the date of trial, there should be a priority rule stating that the parties to the relationship that is first in time should value and divide property first.

This Report recommends that amendments to the MPA should apply only to couples who separate after it comes into force.

Issues / Recommendations

ISSUE 1

Should an agreement about ownership and division of property continue in effect if couples marry? 13

RECOMMENDATION 1

An agreement about ownership and division of property should continue in effect if the partners marry, unless the partners agree otherwise.

ISSUE 2

Should the presumption of equal division apply to property spouses acquired during premarital cohabitation? 14

RECOMMENDATION 2

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.

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The default valuation date should be the date on which the parties began to live separate and apart.

RECOMMENDATION 4B

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.

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RECOMMENDATION 5

New property division legislation should only apply to couples who separate after the legislation comes into force.

Table of Abbreviations

LEGISLATION

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

LAW REFORM PUBLICATIONS

RFD 30	<i>Alberta Law Reform Institute, Property Division: Common Law Couples and Adult Interdependent Partners, Report for Discussion 30 (2017)</i>
Nova Scotia Final Report	<i>Law Reform Commission of Nova Scotia, Final Report: Division of Matrimonial Property (2017)</i>

CHAPTER 1

Introduction

[1] Most family law statutes now recognize different forms of interpersonal relationships, including living together as either a precursor or alternative to marriage. Property division is one of the only remaining areas where the legislation has not been amended to reflect this change in living arrangements. The Alberta Law Reform Institute [ALRI] has undertaken a simultaneous review of different property division issues in order to propose comprehensive and cohesive solutions.

[2] The Alberta *Matrimonial Property Act* [MPA] applies only to legally married spouses.¹ The MPA does not apply to common-law partners, including adult interdependent partners defined in the *Adult Interdependent Relationships Act* [AIRA].² As a general principle, any assets acquired by partners while living together without being legally married – whether or not the parties later marry – are excluded from the pool of matrimonial property that is divided under the MPA.³

[3] One of the main issues posed by the MPA is the exclusion of partners who live together in a marriage-like relationship without being legally married. Partners who do not marry cannot bring a claim under the MPA, and must rely on unjust enrichment claims. These types of claims involve much uncertainty, and are often difficult to prove or to settle.

[4] The question of whether common-law partners should have a legislated right to apply for property division on relationship breakdown is addressed in ALRI's Report for Discussion 30 – *Property Division: Common Law Couples and Adult Interdependent Partners* [RFD 30].⁴ RFD 30 recommends that legislated

¹*Matrimonial Property Act*, RSA 2000, c M-8 [MPA], s 1(e). See 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>>.

² Under Alberta law, people living together in a relationship of emotional and economic interdependence are known as adult interdependent partners: see *Adult Interdependent Relationships Act*, SA 2002, c A-4.5 [AIRA]. The definition of “adult interdependent partner” covers a range of relationships of interdependence outside marriage. It includes marriage-like or common-law relationships, as well as committed platonic relationships that meet statutory requirements.

³ MPA, s 7(2)(c).

⁴ Alberta Law Reform Institute, *Property Division: Common-law Couples and Adult Interdependent Partners*, Report for Discussion 30 (2017) [RFD 30], online: <<https://www.alri.ualberta.ca/images/stories/docs/RFD30>>.

property division rules should apply to adult interdependent partners, as defined in the AIRA, and that those rules should be based on the MPA. It also recommends that, for property division purposes, the beginning of the relationship should be when the partners began to live together in a relationship of interdependence. If ALRI's recommendations are accepted, Alberta would join the list of provinces that have extended property division rules to common-law partners.⁵

[5] The prospect of extending property division rules to common-law partners raises the issue of how the law should address spouses who live together before marriage. What should happen when people live together, acquire property and then go on to marry? Should similar property division rules apply to property acquired by spouses during premarital cohabitation, that is, the period they lived together before marriage?

[6] Under the MPA, the market value of property acquired by a spouse before the marriage is exempt from distribution.⁶ Only the increase in value of that property may be distributed. The distribution does not require equal division, but must be just and equitable.⁷ The exemption for premarital property leaves spouses with limited options. They can give up any claim for property acquired during premarital cohabitation. Otherwise, they have to ask the court to take into account the full length of cohabitation in distributing the increase in value under the MPA, or bring an unjust enrichment claim along with their matrimonial property application, or both.⁸

[7] This Report asks whether the presumption of equal division should be extended to property acquired by spouses while living together in a relationship of interdependence before marriage. It also looks at technical issues which would need to be addressed if the presumption were extended.

⁵ Legally married spouses and common-law partners are now treated the same in British Columbia, Manitoba, Northwest Territories, Nunavut and Saskatchewan. The Law Reform commission of Nova Scotia has recently recommended that common law couples should be included in the family property regime: see Law Reform Commission of Nova Scotia, *Final Report: Nova Scotia Matrimonial Property Act* (September 2017) [Nova Scotia Final Report], at 81 – 118.

⁶ MPA, s 7(2)(c).

⁷ MPA, s 7(3).

⁸ MPA, s 8.

CHAPTER 2

The Need for Reform

[8] In RFD 30, ALRI recommended legislated rules for division of property upon the breakdown of a relationship between common-law partners. Property division rules would apply to couples who meet the requirements of being adult interdependent partners. Once recognized by law as adult interdependent partners, the date that the partners began living together in a relationship of interdependence would be treated as the start of the relationship for property division purposes.⁹ Recommendation 7 of RFD 30 reads:

Recommendation 7

For purposes of property division, an adult interdependent relationship began on the date that the partners began living together in a relationship of interdependence, unless the partners agree otherwise

[9] RFD 30 stops short of making a similar recommendation for couples who live together before marriage. While it is true that premarital cohabitation falls within the broader cohabitation category, its implications are generally more limited in scope. Couples who live together before marriage have access to legislated division rules for most of their assets. The problem, however, is that those rules only apply to matrimonial property. Anything acquired before the date of the marriage is exempt property under the MPA.

[10] Spouses who believe that they are entitled to a share of property acquired before the marriage currently have to show to the court that there are factors supporting a distribution of the increase in value of exempt property, or have to rely on other remedies, such as unjust enrichment. Such claims put the onus on the applicant to present evidence that they should receive some compensation. If RFD 30's recommendations are implemented, spouses who lived together and acquired property before marriage would be treated differently than common-law partners who would have the benefit of a presumption of equal division for their entire relationship.

[11] This Report asks whether the presumption of equal division should extend to property acquired by spouses while living together before marriage.

⁹ See RFD 30, Recommendations 5–7. Couples in relationships that do not survive the “waiting period” who never become adult interdependent partners would not have legislated obligations to divide property.

While there are strong arguments in favour of extending the presumption of equal division to the beginning of the relationship, including any period of premarital cohabitation, this change will inevitably have a retrospective effect on property rights if the spouses separate or divorce. Such recommendation should only be made after careful review.

A. Premarital Cohabitation

[12] The question of whether property acquired during premarital cohabitation should be included in the pool of matrimonial property is important because of the increasing number of couples who choose to live together before getting married. Before marrying, partners may live together for years and acquire property.¹⁰

[13] In some cases, couples will live together long enough to qualify as adult interdependent partners; for others, the cohabitation will be shorter. Either way, they will likely start acquiring property. Leaving the exemption for property acquired before marriage “as is” means that married spouses have to rely on unjust enrichment to divide property acquired during premarital cohabitation, without the benefit of the presumption of equal division. If RFD 30’s recommendations are implemented, couples who go on to marry would be treated differently than those who continue to live as common-law partners.

[14] For example, consider two couples who began and ended their relationships at the same time. The first couple has lived together for seven years in a common-law relationship that is a relationship of interdependence. If RFD 30’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 four years, they lived together in relationship of interdependence. Then they married, and have lived together for three more years. In their case, the presumption of equal division would not apply to the entire seven-year relationship. Under the current law, the presumption would only apply to non-exempt property, that is, property acquired during the three years after their marriage.

¹⁰ According to the Statistics Canada 2016 Census of Population, there were 160, 130 couples in Alberta who were living together without being legally married, or 16.8 per cent of all couples in Alberta: Statistics Canada, *Families, Household and Marital Status Highlight Tables* (Ottawa: Statistics Canada, July 2017), online: <<http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/fam/Table.cfm?Lang=E&T=11&Geo=00>>.

[15] Inconsistency in property division rules would be even more problematic for couples who acquired adult interdependent partner status before getting married. If all property acquired before marriage remained exempt property under the MPA, adult interdependent partners who later marry might have to bring multiple claims for each period of their relationship or lose entitlements they would otherwise have access to had they not married. 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 transition from a common-law relationship to marriage. To force those individuals to bring separate claims would also add to the costs of litigation and would increase uncertainty.

[16] The MPA recognizes that marriage is a form of economic partnership and that the fruits of the spouses' joint efforts should be shared between them on marriage breakdown. Unless spouses have a written agreement about ownership and division of property, matrimonial property is divided between the spouses when the marriage ends, regardless of in whose name it is held. This comprises most of what is owned by both spouses and by each of them, including the matrimonial home, household goods, vehicles, employment pensions, business interests, investments, stocks and bonds.¹¹

[17] There are, however, exceptions. In *Jensen v Jensen*, the Court of Appeal summarized the MPA's division scheme:¹²

Section 7 of the *MPA* sets out a scheme for the distribution of property between spouses. Certain property, including property acquired by a spouse before marriage, is classified as exempt from distribution under that section: s. 7(2). Any increase in the value of exempt property during the course of the marriage may be distributed in a manner that the court considers just and equitable: s. 7(3). Section 8 sets out the factors to be taken into consideration in making such a distribution. Section 7(4) deals with the distribution of non-exempt matrimonial property. It sets forth a legal presumption of equal distribution. Only where, after considering the factors in s. 8, the court concludes it would be unjust or inequitable to divide the property equally may an unequal distribution of non-exempt property

¹¹ MPA, s 7. The MPA provides a formula for dividing property. All the property owned by the spouses is divided into categories. Each category has its own rules for distribution. Property in one category is exempt from distribution, which means the spouse who owns the property keeps it. Property in a second category is distributed in a way that the court considers fair, taking relevant circumstances into account. The third category includes most property acquired during the marriage. There is a presumption that each spouse will receive an equal share of property in the third category.

¹² *Jensen v Jensen*, 2009 ABCA 272 at paras 17 – 18 [*Jensen*].

be made. There is no formula for applying the s. 8 factors. The presumption of equality for non-exempt property acquired during marriage is the closest the Legislature came to imposing a rule for matrimonial property distribution. (See *Dwelle v. Dwelle* (1982), 46 A.R. 1, 31 R.F.L. (2d) 113 (Alta. C.A.)).

[18] For division purposes, the commencement of the spouses' economic partnership is the marriage date, regardless of whether their joint contribution to the wealth of the domestic unit actually started years before they married. Any property acquired before the marriage is exempted, even if the parties were living together in a relationship of interdependence.¹³ Courts have no choice but to exempt the market value at marriage from distribution.¹⁴ Their only latitude is to distribute the increase in value of that property and, even then, there is no presumption of equal division.¹⁵

[19] The increase in value of property acquired before marriage, that is, the difference between the market value at the time of the marriage and the market value at the time of the trial, if any, is distributed in a just and equitable manner.¹⁶ While there may be cases where a 50/50 division of the increase in value ends up being what is just and equitable in the circumstances, equal division is not presumed.¹⁷

[20] Making a claim for unjust enrichment is often the only way for former spouses to get a share of property acquired during premarital cohabitation. Unjust enrichment claims in the family context have been slightly simplified by the introduction of the concept of "joint family venture" as defined in *Kerr v Baranow*.¹⁸ If a joint family venture is established, the claimant must prove that

¹³ MPA, s 7(2).

¹⁴ The exempt value of property described in subsection 7(2) can never be distributed between spouses, either equally or equitably.

¹⁵ MPA, s 7(4). The presumption of equal division does not apply to property referred to in subsections 7(2) and 7(3), which includes the increase in value of property acquired before marriage.

¹⁶ MPA, s 7(3).

¹⁷ There seems to be some willingness to equally distribute the increase in value of property acquired before marriage under subsection 8(m) of the MPA: see note 40 and discussion below. Assets acquired by spouses while living together before marriage have also been divided based on unjust enrichment: see e.g. *Panara v Di Ascenzo*, 2005 ABCA 47 [*Panara*] and *Jensen*, note 12.

¹⁸ See *Kerr v Baranow*, 2011 SCC 10 [*Kerr*]. Although this decision does not establish a presumption of equal division, it nevertheless challenges the treatment of spouses who make unjust enrichment claims as "unpaid employees". It recognizes that claimant spouses may be co-venturers who are entitled to a share of jointly acquired assets, and not merely hired help. The Court made it easier for common-law partners to obtain equitable division of assets where relationships can be described as "joint family ventures". As Justice Cromwell stated, "the money remedy in those circumstances should not be based on a minute totting up of the give and take of daily domestic life, but rather should treat the claimant as a co-venturer, not as the hired help" (*Kerr* at para 7).

the other party was unjustly enriched. Even when the court concludes that there is unjust enrichment, there is no presumption of equal division and no formula to determine the award. The amount of money to be paid is “calculated on the basis of the share of those assets proportionate to the claimant’s contributions”.¹⁹ Rarely will a claim result in a 50/50 division on the basis of unjust enrichment. This type of claim remains complex and expensive; and the outcomes are unpredictable.

[21] 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 while living together, to be resolved under the law of unjust enrichment.²⁰

[22] The fact that the MPA was enacted when premarital cohabitation was uncommon likely explains why it does not make express provision for the time that spouses live together before marriage. Nowadays, however, cohabitation is often the starting point of conjugal life. Data shows that the majority of people aged 20 to 29 expected to live in a common-law relationship before marriage.²¹ It is therefore time to ask whether there should be a presumption that spouses will equally divide all property acquired throughout the course of their relationship, including any premarital cohabitation period.

B. The Particular Case of Same Sex Couples

[23] The exemption of property acquired during premarital cohabitation potentially impacts same sex couples differently because of the relatively short time since they gained the right to legally marry. Unlike opposite sex couples,

¹⁹ *Kerr*, note 18 at para 100. Awards range from zero to 50 per cent of family assets. As noted, some plaintiffs receive nothing from a long-term relationship: see e.g. *Rubin v Gendemann*, 2011 ABQB 71, aff’d 2012 ABCA 38 [*Rubin*] and *Montgomery v Schlender*, 2012 ABQB 332. Some plaintiffs in long-term relationships have received awards in the range of 30 per cent of assets acquired during the relationship: see e.g. *Lemoine v Griffith*, 2012 ABQB 685, aff’d 2014 ABCA 46 and *Thompson v Williams*, 2011 ABQB 311. Less often, plaintiffs receive awards approximating equal division: see e.g. *Brick v Cross*, 2014 ABQB 35 and *Buchner v Long*, 2016 ABQB 523. In still other cases, courts have made awards that appear to be in the nature of fee-for-services: see e.g. *Boissoneault v McNutt*, 2011 ABQB 568, aff’d 2012 ABCA 365 and *Mailhot v Galbraith*, 2014 ABQB 396.

²⁰ See e.g. *Panara*, note 17.

²¹ See http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/2011003/fig/fig3_3-2-eng.cfm.

same sex couples had no option but to live common-law as they could not legally marry before July 2005.²²

[24] In *Walsh v Bona*, the Supreme Court ruled that the exclusion of common-law relationships from the operation of Nova Scotia's *Matrimonial Property Act* laws is not discriminatory because common-law partners have freely chosen to avoid the institution of marriage and the legal consequences that flow from it.²³ Justice Bastarache then stated:²⁴

In my view, people who marry can be said to freely accept mutual rights and obligations. A decision not to marry should be respected because it also stems from a conscious choice of the parties. It is true that the benefits that one can be deprived of under a s. 15(1) analysis must not be read restrictively and can encompass the benefit of a process or procedure, as recognized in *M v. H*, *supra*. It has not been established, however, that there is a discriminatory denial of a benefit in this case because those who do not marry are free to take steps to deal with their personal property in such a way as to create an equal partnership between them. If there is need for a uniform and universal protective regime independent of choice of matrimonial status, this is not a s. 15(1) issue. The *MPA* only protects persons who have demonstrated their intention to be bound by it and have exercised their right to choose.

[25] *Walsh* was based on a principle of freedom to choose between different marital statuses that had different legal consequences for spouses. This principle later played a significant role in *Quebec (Attorney General) v A*.²⁵ While the majority concluded that *Walsh* did not bind the Court, four of the five majority judges still focused on freedom of choice to find that the breach of equality rights was justified under section 1 of the *Charter*.²⁶ 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*.²⁷

²² 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. Section 2 of the Act provides a gender-neutral definition of civil marriage.

²³ *Walsh v Bona*, [2002] 4 SCR 325 [*Walsh*].

²⁴ *Walsh* at para 55.

²⁵ *Quebec (Attorney General) v A*, [2013] 1 SCR 61 [*Quebec v A*].

²⁶ *Quebec v A* at paras 382–385, 400–409 (Deschamps, Cromwell and Karakatsanis JJ) and paras 410–415 (McLachlin CJ).

²⁷ *Quebec v A* at paras 207–282 (LeBel, Fish, Rothstein and Moldaver JJ).

[26] *Walsh* and *Quebec v A* were cases in which opposite sex common-law partners chose not to marry. That freedom of choice was held either to negate a breach of the right to equality or to justify the reasonableness of the infringement. But these decisions leave the issue open in respect of same sex couples. If the freedom to choose whether or not to marry is paramount, the problem of property division on same sex marriage breakdown boils down to this question: is the exemption of property acquired during premarital cohabitation a discriminatory denial of benefit in the case of same sex couples who could not choose to marry before the legalization of same sex marriage?

[27] Looking at the larger social, political and legal context is particularly important when the legislation appears neutral on its face.²⁸ The MPA may not be discriminatory in purpose but still be discriminatory in effect. The differential impact that the exemption of property acquired during premarital cohabitation may have on married same sex couples who acquired property when they had no other option but cohabitation could expose the MPA to a constitutional challenge for adverse effect discrimination.

C. Consistency with Other Legislation

[28] Changing the current legislation to include property acquired during premarital cohabitation would recognize what is often done as a matter of discretion in many instances. Courts have shown a greater willingness to factor in any period of premarital cohabitation to the length of the marriage when determining entitlements.²⁹

[29] Legislatures have also amended family-related statutes to make it clear that the commencement of cohabitation in a settled relationship can be treated as the appropriate start date. The length of cohabitation is generally the period of reference used in family law legislation. 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 support.³⁰

²⁸ *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 66 and *Ermineskin Indian Band and Nation v Canada*, [2009] 1 SCR 222 at para 193, citing *R v Turpin*, [1989] 1 SCR 1296 at para 50.

²⁹ See note 40 and discussion below.

³⁰ *Family Law Act*, SA 2003, c F-4.5, s 58(a)(i) [emphasis added].

[30] The federal *Divorce Act* contains a similar provision.³¹ The federal *Spousal Support Advisory Guidelines* (SSAG) which were developed to bring more certainty and predictability to the determination of spousal support read:³²

3.3.5 Length of marriage

Under the Advisory Guidelines length of marriage is a primary determinant of support outcomes in cases *without* dependent children. Under the *without child support* formula the percentage of income sharing increases with length of the marriage; the same is true for duration of support.

Length of marriage is much less relevant under the *with child support* formula, although it still plays a significant role in determining duration under that formula.

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.**

[31] Many jurisdictions – even those that exclude common-law relationships from their matrimonial property regime – now include property acquired before marriage in the pool of matrimonial property.³³

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

³¹ *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 15.2(4)(a). The *Pension Benefits Division Act*, SC 1992, c 46, Schedule II and the *Canada Pension Plan*, RSC 1985, c C-8 also take into account credits accumulated during a common-law union that resulted in a legal marriage.

³² Canada, Department of Justice, *Spousal Support Advisory Guidelines: Report on Revisions* (July 2008) [emphasis in original], online: Department of Justice <<http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/toc-tdm.html>>.

³³ This is the approach adopted in a number of Canadian jurisdictions: see e.g. British Columbia’s *Family Law Act*, SBC 2011, c 25, ss 3, 85; Manitoba’s *The Family Property Act*, CCSM c F25, s 4(2)(a); and Saskatchewan’s *The Family Property Act*, SS 1997, c F-6.3, s 23(1). For instance, New Brunswick’s *Marital Property Act*, SNB 2012, c 107 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 at 126–127.

[33] There are other advantages to applying property division rules to property acquired during premarital cohabitation. First, that approach reduces the number of people who must rely on claims for unjust enrichment to divide property. This also ensures the law treats all couples alike, regardless of whether they are married or in an adult interdependent relationship. Moreover, treating all couples alike would avoid perpetuating discrimination against certain same sex couples who had no option but common-law relationships until same sex marriage was recognized. It would be unfair if they could not benefit from the presumption of equal division for this period.

[34] These reasons all support ALRI's preliminary view that the presumption of equal division should apply from the beginning of the relationship of interdependence, whether it begins with cohabitation or marriage.³⁴

³⁴ This is the approach adopted in British Columbia: *Family Law Act*, SBC 2011, c 25, s 3(3)(a). Pursuant to this provision, a relationship between spouses begins on the earlier of the date on which they began to live together in a marriage-like relationship, or the date of their marriage. While Manitoba's *The Family Property Act*, CCSM c F25 does not expressly address the issue of property acquired during the "waiting period", the court in *Stuart v Toth*, 2011 MBCA 42 concluded that the pool of property extends back to the moment when the couple began living in a marriage-like relationship.

CHAPTER 3

Dividing Property Acquired Before Marriage

[35] The MPA defines the property to be distributed and provides a formula for dividing property when spouses separate or divorce. The Act provides default rules applicable in the absence of an agreement by the parties.

A. Ownership and Division Agreements

ISSUE 1

Should an agreement about ownership and division of property continue in effect if couples marry?

[36] Agreements allow couples to choose rules that suit their specific needs. Agreements can protect parties by spelling out what property can be divided and how it will be divided. Some agreements are made specifically in contemplation of marriage. Others are not. Common-law partners who enter a cohabitation agreement do not necessarily plan for the possibility that they would marry. However, if they do go on to marry, what should happen to the cohabitation agreement? Should the agreement carry forward, or be revoked upon marriage?

[37] Most Canadian jurisdictions have legislation stating that a cohabitation agreement is considered to be a marriage agreement if the partners later marry.³⁵ In RFD 30, it was concluded that a couple who have already negotiated rules that they consider fair in their specific circumstances should not be required to renegotiate.³⁶ ALRI has recommended that a cohabitation agreement should

³⁵ See Ontario, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Yukon, the Northwest Territories, and Nunavut: *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.

³⁶ For similar reasons, the rule that a will is revoked by the testator's marriage has been abolished in Alberta: *Wills and Succession Act*, SA 2010, c W-12.2, s 23(2). See Alberta Law Reform Institute, *Wills and the Legal Effects of Changed Circumstances*, Final Report 98 (2010) at 32–36, online: <<https://www.alri.ualberta.ca/docs/fr098.pdf>>.

continue to have effect after the marriage, unless the couple makes a new agreement.³⁷

[38] If this recommendation is implemented, the subsequent marriage of common-law partners would not change the terms of a cohabitation agreement to bring in property acquired during the cohabitation if they had previously agreed to not divide it. It would be presumed that they would want their agreement to prevail over the default rules in the MPA.

[39] **For a full discussion on this issue, we refer the reader to RFD 30.**

RECOMMENDATION 1

An agreement about ownership and division of property should continue in effect if the partners marry, unless the partners agree otherwise.

[1] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

B. Presumption of Equal Division

ISSUE 2

Should the presumption of equal division apply to property spouses acquired during premarital cohabitation?

[40] Whenever possible, couples should be encouraged to make their own agreements about ownership and division of property at the beginning of the cohabitation. Data has shown, however, that many couples do not make agreements.³⁸ In many cases, the MPA rules will dictate what and how property is distributed between the spouses. The question of whether the presumption of equal division should be extended to apply to property during premarital cohabitation as default rule.

³⁷ See RFD 30, Recommendation 4.

³⁸ In a recent Alberta survey, a large majority of respondents – 83.1 per cent of married spouses and 77.1 per cent of common-law partners – said they did not have a written agreement about how they would divide property if they split up: see 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.

[41] To better understand the mechanics of property division one must look at section 7 of the MPA in its whole:

7(1) The Court may, in accordance with this section, make a distribution between the spouses of all the property owned by both spouses and by each of them.

(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,

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.

(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.

(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.

[42] The presumption of equal division in subsection 7(4) applies to property acquired by a spouse during the marriage and not otherwise excluded in (2) or (3). The market value of the original property at the time of the marriage or acquisition is never divided (section 7(2)). Any increase in the value of exempt property, from the marriage or acquisition to the trial, is distributed in a manner that the court considers just and equitable (s 7(3)). No statutory presumption of equal division exists with respect to the increase in value of exempt property. Section 8 sets out the factors to be taken into consideration in making such a distribution:

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.

[43] Over the years, case law has developed to assist courts in the exercise of their discretion.³⁹ For instance, subsection 8(m), which provides that courts can take into consideration “any fact or circumstance that is relevant”, has been used to factor in the years the parties lived together before marriage, especially in cases of long cohabitation. However, courts’ willingness to use section 8 factors to equally 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 non-titled or non-owning spouses to prove that equal division of the increase in value is just and equitable in the circumstances.

[44] There is no doubt that a statutory presumption of equal division for property acquired during premarital cohabitation would simplify claims by non-titled or non-owning spouses. The question, however, is whether extending the presumption of equal division is supported by policy-based arguments.

³⁹ For instance, courts included the period of premarital cohabitation for purposes of dividing the increase in value of exempt property (or pension accrued before marriage) in *T(JG) v N(T)*, 2001 ABQB 949, rev’d on different grounds 2003 ABCA 195; *Underhill v Underhill*, 2005 ABQB 777; *Verburg v Verburg*, 2010 ABQB 201; and *Hughes v Hughes*, 2006 ABQB 468, but did not in *Behiels v McCarthy*, 2010 ABQB 281 and *Bzdziuch v Bzdziuch*, 2001 ABQB 306, aff’d on additional grounds [2001] CarswellAlta 805. In *Klinck v Klinck*, 2010 ABCA 5, leave to appeal to SCC requested [2010] CarswellAlta 302, at para 7, the Court of Appeal decided that the trial judge’s application of sections 7(3) and 8 of the MPA and the conclusion that “there are no factors under s. 8 of the Act that militate against an equal division” were not reviewable errors of law or principle (see *Klinck v Klinck*, 2008 ABQB 526 at para 31).

[45] In *Jensen*, the Court of Appeal explained that:⁴⁰

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.

[46] The same reasoning will often apply when marriage is preceded by cohabitation. If the relationship is an economic partnership to which both spouses contribute, they should share any gains accumulated throughout the entire relationship. Fairness would require that the presumption of equal division apply to property acquired during the relationship, including any periods of premarital cohabitation.

[47] That is not to say that every instance of premarital cohabitation should have an impact on property division. Not all couples who live together will have an economic partnership from the start, even when they later marry. A relationship may evolve and change character over time. The law needs a clear test to determine whether and when the presumption of equal division should apply to property acquired before marriage.

[48] Alberta legislation provides such a test when recognizing relationships of interdependence. Only certain relationships meet the criteria to be recognized as relationships of interdependence under AIRA. Partners in a relationship of interdependence must “share one another’s lives”, be “emotionally committed to one another”, and “function as an economic and domestic unit”.⁴¹ Merely living together is not enough to establish a relationship of interdependence.

[49] Interdependence is based on observable factors which focus on both the emotional and economic aspects of a relationship.⁴² These factors are similar to

⁴⁰ *Jensen* at para 1.

⁴¹ AIRA, s 1(f).

⁴² AIRA, s 1(2) provides:

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

Continued

the factors used by Canadian courts to determine whether a relationship is conjugal or marriage-like.⁴³ Those factors are not trivial. To be considered in a relationship of interdependence, two people need to be much more than roommates or in a casual relationship.

[50] For example, consider roommates who have lived together for five years. There has been some economic and domestic integration in terms of sharing household chores, paying for utilities and buying furniture. Each has been in a relationship with another person during that time. After five years as roommates, both are single. Their relationship quickly develops into a relationship of interdependence, as defined in the AIRA. Within one year they marry, and live together two more years. In such a case, the presumption of equal division would apply only to property acquired after the relationship became interdependent, i.e. during the last three years of cohabitation; the five years they lived together as roommates would not meet the high bar of interdependence criteria.

[51] If the criteria required to establish a relationship of interdependence are not met, the fact that the parties live under the same roof is not enough to presume that they intended to share property acquired during that period. The focus is on the quality of the relationship during cohabitation. In other words, the question is: whether the parties lived together in a relationship of interdependence before marriage? If not, there is no reason to include the property acquired during premarital cohabitation in the pool of matrimonial property.

[52] Should the spouses live together in a relationship of interdependence for a minimum “waiting period” for the presumption of equal division to apply to property acquired during premarital cohabitation? For comparison, adult interdependent partners typically have to live together for three years before

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- (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.

⁴³ These factors were developed in *Molodowich v Penttinen* (1980), 17 RFL (2d) 376 at para 16, (Ont Dist Ct). Factors taken into account to determine whether a conjugal relationship exists include: permanence and exclusivity of the relationship, living arrangements, level of intimacy, performance of domestic services, social conduct and community recognition, financial support, and attitude and conduct towards any children. Those factors may vary in degree and do not all have to be present for a court to conclude that there is a relationship of interdependence. See e.g. *Canada (Attorney General) v Hislop*, 2007 SCC10, [2007] 1 SCR 429; *Reference re Same-Sex Marriage*, 2004 SCC79, [2004] 3 SCR 698; *Walsh; M v H*, [1999] 2 SCR 3; *Miron v Trudel*, [1995] 2 SCR 418; *Egan v Canada*, [1995] 2 SCR 513. See also *Rogers v Bogi Estate*, 2012 ABQB 253; *Pinksen v Barritt*, 2012 ABPC 41; *Rubin*; and *E V F v W M*, 2010 ABQB 451.

their relationship takes on certain legal obligations. However, married spouses are automatically eligible for property division under the MPA. Unlike adult interdependent partners, they do not have to prove that they have lived together for any period of time. Their obligation to divide property comes from the status of being married.

[53] For example, a couple lives together in a relationship of interdependence for two-and-a-half years before marriage. While their relationship met the interdependence criteria, they married within the three year waiting period, and therefore never became adult interdependent partners under the AIRA. In such a case, the fact that the spouses did not live together long enough before marriage to qualify as adult interdependent partners would be irrelevant. The focus would strictly be on whether they were living in a relationship of interdependence during those two-and-a-half years. If the premarital cohabitation meets the interdependence criteria, the whole length of the relationship will be taken into account for purposes of property division.

[54] Moreover, it is important to remember that 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.⁴⁴ A titled or owning spouse may argue that it would be unjust or inequitable to equally divide a property with the other spouse, especially if that property was not acquired in contemplation of cohabitation or marriage.

[55] Finally, it should be noted that couples who do not want the presumption of equal division to apply to property acquired during premarital cohabitation always have the option to set out different division rules by agreement.⁴⁵ Thus, they can agree to exclude all or specific premarital property from division. The MPA requires that an agreement be in writing and that each partner obtain

⁴⁴ In *Mazurenko v Mazurenko*, [1981] 30 AR 34, leave to appeal to SCC refused, at para 20, Stevenson J.A. stated:

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.

⁴⁵ MPA, s 37.

independent legal advice.⁴⁶ The terms of the agreement would prevail over the default rules of the MPA.

[56] ALRI's preliminary recommendation is, therefore, that for purposes of property division, when spouses live together before marriage their relationship is presumed to have begun on the date that they began living together in a relationship of interdependence, unless they agree otherwise. The presumption of equal division would apply to any property acquired while living in a relationship of interdependence.

RECOMMENDATION 2

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.

[57] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

C. Interruption of Cohabitation

[58] The condition to access the right to apply for matrimonial property division is to be party to a marriage; married spouses do not need to live together for a legislatively prescribed period of time to establish their status under the MPA.⁴⁷ Consequently, a break in cohabitation would have no impact on the status of married spouses. On the other hand, such a break might affect their entitlement to share in property acquired during that period. Subsection 8(f) already provides that courts have to take into consideration "whether the property was acquired when the spouses were living separate and apart". A long interruption in premarital cohabitation could also lead the court to the conclusion that there is no sufficient connection with the marriage to consider it part of the same relationship.⁴⁸ In any event, the analysis should remain contextual and will depend on the parties' intention.⁴⁹

⁴⁶ MPA, s 38.

⁴⁷ See note 42.

⁴⁸ For example, in the case of an adult interdependent relationship, subsection 10(1)(b) of the AIRA provides that:

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:

Continued

D. Exempt Property

ISSUE 3

Should property acquired by the spouses before the commencement of the relationship of interdependence be exempt?

[59] Under Recommendation 1, the presumption of equal division would apply to all assets acquired by the spouses while living together in a relationship of interdependence. Conversely, property acquired before the relationship began (e.g. property acquired by the parties while single or casually dating) would still be exempt.

[60] Most jurisdictions exempt property acquired by the spouses before their conjugal relationship started. While the wording varies slightly, the objective is the same: exclude assets that have no connection to the joint efforts of the spouses from the pool of matrimonial property that is to be divided between them.⁵⁰

[...]

(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;

⁴⁹ See, for instance, *Chatten v Fricker*, 2005 ABQB 972 and *Shunamon v Diegel*, 2008 ABQB 291.

⁵⁰ See British Columbia's *Family Law Act*, SBC 2011, c 25, s 85 and Manitoba's *The Family Property Act*, CCSM c F25, s 4(2). For example, Saskatchewan's *The Family Property Act*, SS 1997, c F-6.3, s 23(1) provides:

Property exempt from distribution

23(1) Subject to subsection (4), the fair market value, at the commencement of the spousal relationship, of family property, other than a family home or household goods, is exempt from distribution pursuant to this Part where that property is:

- (a) acquired before the commencement of the spousal relationship by a spouse by gift from a third party, unless it can be shown that the gift was conferred with the intention of benefitting both spouses;
- (b) acquired before the commencement of the spousal relationship by a spouse by inheritance, unless it can be shown that the inheritance was conferred with the intention of benefitting both spouses; or
- (c) owned by a spouse before the commencement of the spousal relationship [emphasis added].

(2) Subject to subsection (4), property acquired as a result of an exchange of property mentioned in subsection (1) is exempt from distribution pursuant to this Part to the extent of the fair market value of the original property mentioned in subsection (1) at the commencement of the spousal relationship.

In its report on division of matrimonial property, the Law Reform Commission of Nova 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 at 120 – 125.

[61] The pool of property to be equally divided would then include property acquired while the spouses lived together in a relationship of interdependence before marriage, but not before that.⁵¹

RECOMMENDATION 3

Property acquired by the spouses before the commencement of the relationship of interdependence should be exempt from the presumption of equal division.

[62] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

E. Overlapping Claims

ISSUE 4

How should property division legislation address overlapping claims, where both a spouse and an adult interdependent partner have claims to the same property?

[63] A married person cannot have an adult interdependent relationship while still living with their spouse.⁵² But if spouses are living separate and apart, either one can have an adult interdependent partner. In such a case, there is a possibility of overlapping claims to property.

[64] For instance, an individual may start making contributions to maintaining, improving, or acquiring property with a new partner while still having unsettled property division claims from a previous marriage. Because Alberta law requires matrimonial property to be valued and divided at the time of trial, there could be some overlap. In other words, if the commencement of the relationship of interdependence is used to determine the beginning of the valuation period for the new relationship, and the trial date is used to determine the end of the valuation period for the former one, entitlements could be difficult to decide.

⁵¹ In some cases, a spouse may be able to set aside the pre-relationship property exemption by demonstrating that the property has been brought into the marriage (family assets) or acquired in specific contemplation of cohabitation or marriage.

⁵² AIRA, s 5(2).

[65] The MPA gives courts some flexibility to address overlapping claim situations. In particular, subsection 8(f) allows a court to use discretion in distributing property “acquired when the spouses were living separate and apart”.⁵³ While useful, this provision does not provide much predictability as it relies entirely on the court’s discretion.

[66] In RFD 30, ALRI made preliminary recommendations for a more predictable, legislated approach to the issue of overlapping claims.

1. VALUATION DATE

[67] The first proposal is to value matrimonial property at the time of the separation, instead of trial. This would be also in line with ALRI’s Final Report 107 – *Matrimonial Property Act: Valuation Date*.⁵⁴ Recommendation 4 in this 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.

[68] ALRI has recommended that the MPA be amended to provide for valuation at separation. If this recommendation is implemented, it would have the benefit of providing a uniform solution for both married spouses and adult interdependent partners faced with overlapping claim issues.

RECOMMENDATION 4A

The default valuation date should be the date on which the parties began to live separate and apart.

[69] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

2. PRIORITY RULE

[70] If Recommendation 4A is not accepted and the default valuation date remains the date of trial, ALRI has recommended that there should be a priority rule to address overlapping claims in which the parties to the relationship that is

⁵³ MPA, s 8(f).

⁵⁴ Alberta Law Reform Institute, *Matrimonial Property Act: Valuation Date*, Final Report 107 (2015) at 29, online: <<https://www.alri.ualberta.ca/docs/FR107.pdf>>.

first in time should value and divide property first. This priority rule should not, however, be absolute. The rule should be subject to the factors in section 8 of the MPA.⁵⁵ For instance, courts should have the discretion to set aside the priority rule when there is a long delay between the first couple's separation and the trial of their property claims, so a new partner's substantial contributions to property do not unfairly go to a former spouse.⁵⁶

[71] **For a full discussion on this issue, we refer the reader to RFD 30.**

RECOMMENDATION 4B

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.

[72] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

F. Transitional Issues

ISSUE 5

What transition rule should apply to new property division legislation?

[73] There is a general presumption against legislation operating retroactively, that is, changing the legal nature of an event in the past. However, it can operate retrospectively, that is, allot new consequences for an ongoing situation that started before the enactment or amendment of the statute. For instance, the MPA applies to couples who separate after the legislation came into force, regardless of when they were married. Similarly, the AIRA applies to adult interdependent relationships, whether the relationships began before or after it came into force.⁵⁷

[74] Amendments to the current regime could have an effect on the rights of married spouses who relied on the statutory exemption of property acquired before marriage, and did not provide otherwise in a written agreement. That is why it is important that transitional provisions allow individuals to make new

⁵⁵ These factors include "whether the property was acquired when the spouses were living separate and apart" and "any fact or circumstance that is relevant": see MPA, ss 8(f), 8(m).

⁵⁶ See e.g. *Doege v Doege*, 2015 ABQB 802.

⁵⁷ *The Matrimonial Property Act*, SA 1978, c 22, s 40; AIRA, s 2.

arrangements regarding the ownership and division of property they acquired during premarital cohabitation. Couples should have the option to make special arrangements for specific property or all property acquired before marriage, if they do not want that property to be included in the pool of property to be equally divided.⁵⁸

1. TRANSITION PERIOD

[75] ALRI recommends a transition period before new legislation comes into force to provide time for couples to make agreements about ownership and division of property if they do not wish to be covered by those changes.

2. APPLICATION TO SEPARATED COUPLES

[76] ALRI also proposes that new property division legislation should apply only to couples who separate after it comes into force, regardless of when the relationship began. This would mean that couples who have already separated would be excluded from the application of the new legislation, including couples who have separated but have not reached a final resolution of claims for property division when new legislation comes into force. We would appreciate comments on whether new legislation should apply to these couples.⁵⁹

[77] **For a full discussion on this issue, we refer the reader to RFD 30.**

RECOMMENDATION 5

New property division legislation should only apply to couples who separate after the legislation comes into force.

[78] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

⁵⁸ See MPA, ss 37–38.

⁵⁹ There are other places where a line could be drawn: at the time of separation, at the time a statement of claim is issued, at the time a matter is set down for trial, at trial, or at some other time.

Deadline for comments on the issues raised in
this document is **December 15, 2017**



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