

**The *Matrimonial Property Act*:
A Case Law Review**

Research Paper

**Jonnette Watson Hamilton
and
Annie Voss-Altman**

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Preface

The Alberta Law Reform Institute (ALRI) proposed the legislation that became the *Matrimonial Property Act (MPA)* more than 30 years ago and there has been no substantive amendment to the MPA since then. ALRI has received suggestions that the legislation is in need of revision but there was little consensus as to which areas were in need of review. In order to advance the research, ALRI financed the work of Annie Voss-Altman, a student at the Faculty of Law, University of Calgary, under the supervision of Professor Jonnette Watson Hamilton. It was hoped that their 10 year review of judicial decisions would identify any areas where reform would clarify policy or resolve problematic issues. ALRI's Director reviewed the initial sample cases and the categories contained in the database.

I. Introduction

[1] The *Matrimonial Property Act (MPA)* has been in force for more than 30 years. As Madam Justice Topolniski recently noted, “The *MPA* was enacted in 1978 and has not been amended substantially since.”¹ The area of law that the *MPA* governs — the distribution of property between spouses on marriage breakdown — is an area of life in which economic, political and social attitudes and expectations have changed a great deal, but this particular law has not changed. Are substantive revisions to the provisions of the *MPA* now necessary? What issues, if any, are pressing and problematic? These are the questions this research paper provides partial answers to through a review of the last decade’s case law applying the *MPA*.

[2] We reviewed all of the published Alberta judgments that cited the *MPA* in the ten year period leading up to and including May 2010. The purpose of this case law review was to identify the most frequently raised and the most troublesome issues that the courts dealt with in order to determine whether revisions to the *MPA* might be necessary. In addition, we identified rules and presumptions that have been used by the courts to supplement the *MPA* as their existence might point to gaps in the legislation.

[3] In Part II of this research paper, we briefly set out our methodology so that readers can assess the comprehensiveness and limitations of our review. We describe the database that we constructed and used to identify the patterns we discuss in the substantive portions of this paper. Those patterns are presented in charts in Part III in order to introduce our findings and explain why we identified particular issues as frequently arising and/or troublesome. We identify those issues that merit greater discussion in Part IV and state our reasons for including or excluding an issue in that discussion. In Part IV we describe the issues identified in Part III as

¹ *Horne v. Horne* (2010 ABQB 32 at para. 95 (*Horne*)). The Act was proclaimed in force on January 1, 1979.

the most common and most problematic in more detail, describing sub-issues and adding examples from the case law. We occasionally refer to some of the secondary literature and other provincial legislation in the area when it helps to identify an issue as a pressing one. Finally, in the Conclusion, we offer our own thought on the areas most in need of law reform.

II. Methodology

[4] We reviewed all of the Alberta decisions published in the ten year period up to and including May 2010 which included the phrase “matrimonial property act.” We did not exclude any levels of court, although our searches turned up only one Provincial Court case² and twenty-nine Court of Appeal decisions. The query “matrimonial property act,” with a time limiter of ten years, was used to search three major case law databases: CanLII, Westlaw Canada, and LexisNexis Quicklaw. These searches provided us with a list of 375 cases in the CanLII database, 379 from Westlaw Canada, and 375 cases from LexisNexis Quicklaw.³ The cases in the CanLII database were compared to those in the two commercial databases and 40 additional cases were added to the CanLII 375 to create a master list totaling 415 cases.

[5] Our review of these 415 cases revealed that while 137 of them referred to the *MPA* they were not relevant to this research project. In the majority of these 137 cases, the court either referred to a previous, often unreported, case that had earlier resolved an earlier *MPA* action between the same parties or mentioned that the *MPA* did not apply because the action was brought by formerly cohabitating but unmarried couples. The remaining 278 cases considered at least one contentious issue relevant to this research project and most of the cases considered more than one issue.

² *Campbell v. MacKenzie*, 2003 ABPC 203 (determining that the *MPA* did not apply to a common law relationship)

³ A “matrimonial property act” query does not catch all of the cases in which a judge applies that statute. We are aware of a small number of cases, mainly oral decisions, where the court refers to the *Matrimonial Property Act* only as the *MPA* and never provides a citation to the statute.

[6] We constructed a database based on the issues in the 278 cases that were reviewed in detail. The structure and provisions of the *MPA* dictated most, but not all, of the types of issue.

The Alberta Court of Appeal recently described the structure of the Act in the following manner:

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 be made.⁴

Many of the issues therefore involved questions about what property to include within section 7, the strength of the presumption of equality in section 7(4) and the applicability and importance of the section 8 factors. Most of the other issues involved the interpretation and application of other sections of the *MPA*, although the source of some issues — such as those about cohabitation and costs — is not the *MPA*.

[7] Altogether, some 1,279 issues and sub-issues were identified within the total of 278 cases and noted in the database. The database we created allows sorting and filtering by issue and sub-issue, case name, date, court, judge, type of decision (reserved, memorandum, oral), lawyers, other proceedings (appeals, costs decisions, etc.), *MPA* section number, cases relied upon in a particular case, and cases later relying on that particular case. While the outcome is usually addressed in the notes column, one additional column that would have been very useful to have, but which we did not provide for, was a column noting the result in each case and

⁴ *Jensen v. Jensen*, 2009 ABCA 272 at paras. 17-18 (*Jensen*).

whether it was an equal distribution or not. Each entry in the database is linked to an electronic version of the relevant case and almost all entries include a reference to the specific paragraph where the issue is discussed. It is our hope that this database will not only be used by Alberta Law Reform Institute (ALRI) as they consider recommendations for reform of the *MPA*, but that it also be made available to both academics and practitioners for their research purposes.

[8] Reading the cases and creating the database allowed sorting by issue and sub-issue to determine which issues appeared most often in the case law. Sorting facilitated counting and counting allowed the creation of the charts in Part III. The familiarity with the case law that these exercises engendered allowed a more subjective determination of which issues were most contentious. Particularly troublesome issues were identified by competing lines of cases, by lengthy discussions in numerous cases, by Court of Appeal decisions on issues and by their persistent appearance over the ten year period under review. Finally, sorting by “cases relied upon” identified those cases where the courts enunciated rules and presumptions to fill perceived gaps in the *MPA*.⁵

[9] The most obvious limitation of our methodology is that we captured, for the most part, only those *MPA* cases in which a court had issued written reasons.⁶ We cannot say that the 278 cases we reviewed are representative in any way. We do not know what percentage of matrimonial property cases result in a written decision that becomes publicly available. Statistics on matrimonial property cases do not appear to be available. Statistics on divorce cases are

⁵ Our “cases relied upon” category is a narrow category, much narrower than those used in the citation services provided by the commercial databases. For example, we show *Corbeil v. Bebris* (1993), 141 A.R. 215, as being relied upon 12 times, but Quicklaw indicates that case was followed 4 times, distinguished twice, explained twice and mentioned 18 times. To qualify as a case relied upon for this research project, a case had to be the leading authority for a specific principle, rule, presumption or policy.

⁶ The list of 278 cases includes only twelve oral decisions.

available,⁷ and what these statistics suggest is that the matrimonial property cases in our database are the proverbial “tip of the iceberg,” with the vast majority of such cases not reaching the stage of a published written decision.

III. Summary of Case Law Review

[10] Figures 1 and 2 display the frequency with which issues appeared in the 278 cases that we examined, with Figure 1 listing the most frequently arising issues and Figure 2 the least frequently arising issues. As such, these two charts are the starting points for determining what revisions to the *MPA* might be considered.

[11] The most frequent issue discussed by the courts was whether or not to include something as property within section 7 (assets included). Its corollary — assets excluded — is also a frequently discussed issue. The *MPA* does not define “property,”⁸ and section 7(1) merely provides that “[t]he 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.” These two categories of issue — assets included and assets excluded — both have sub-issues based on the type of things included or excluded. The two categories can therefore be discussed together, with the focus on the types of things that give litigants, their lawyers and the courts the most problems.

⁷ Mary Bess Kelly, “The Processing of Divorce Cases Through Civil Court in Seven Provinces and Territories”, *Juristat* Spring 2010, online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2010001/article/11158-eng.htm>.

⁸ Both “household goods” and “matrimonial home” are defined in s. 1, but these definitions are more relevant to a grant of exclusive possession of the matrimonial home and household goods under Part 2 of the *MPA* than to a division of the property between the spouses under Part 1.

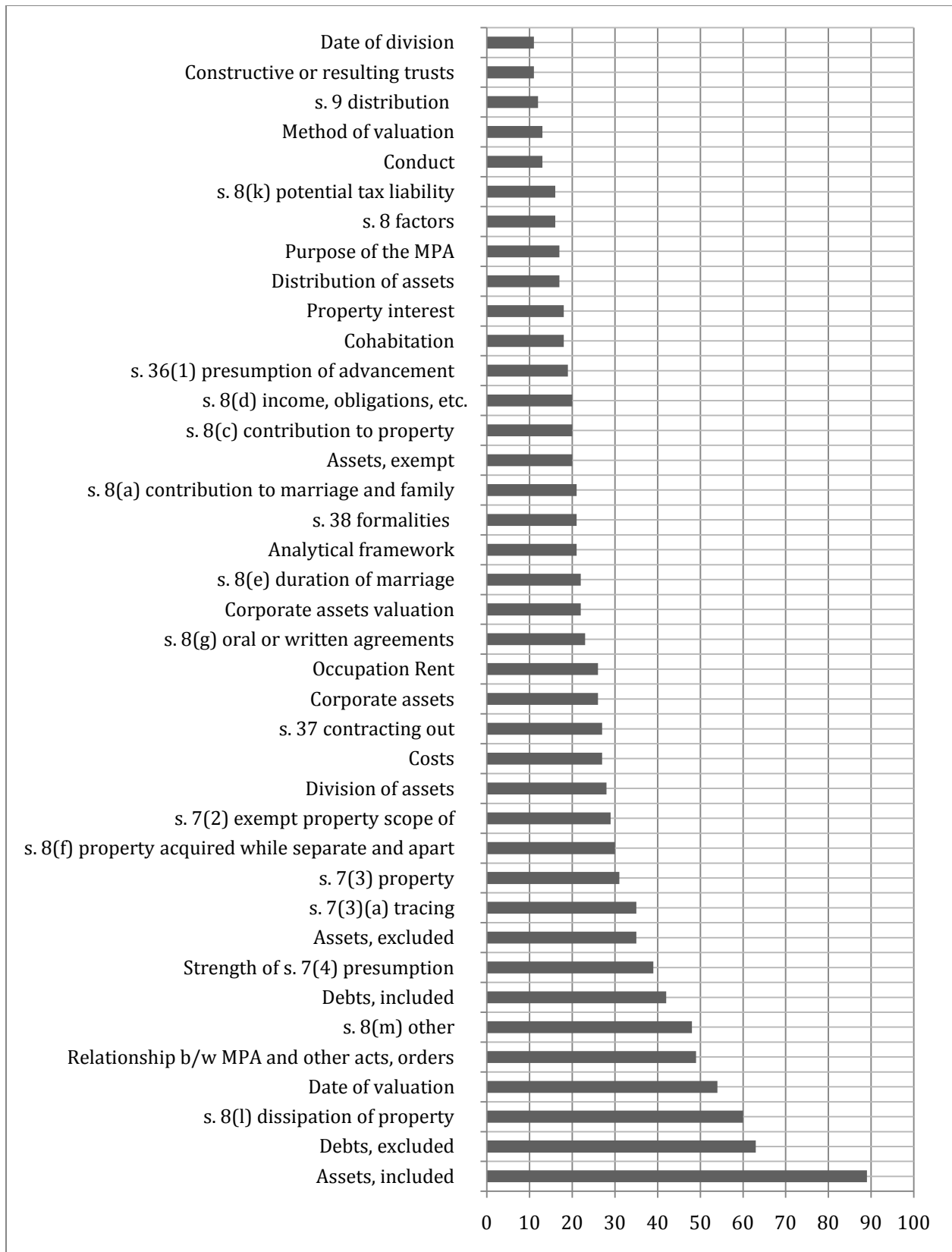


Figure 1: Frequently Raised Issues

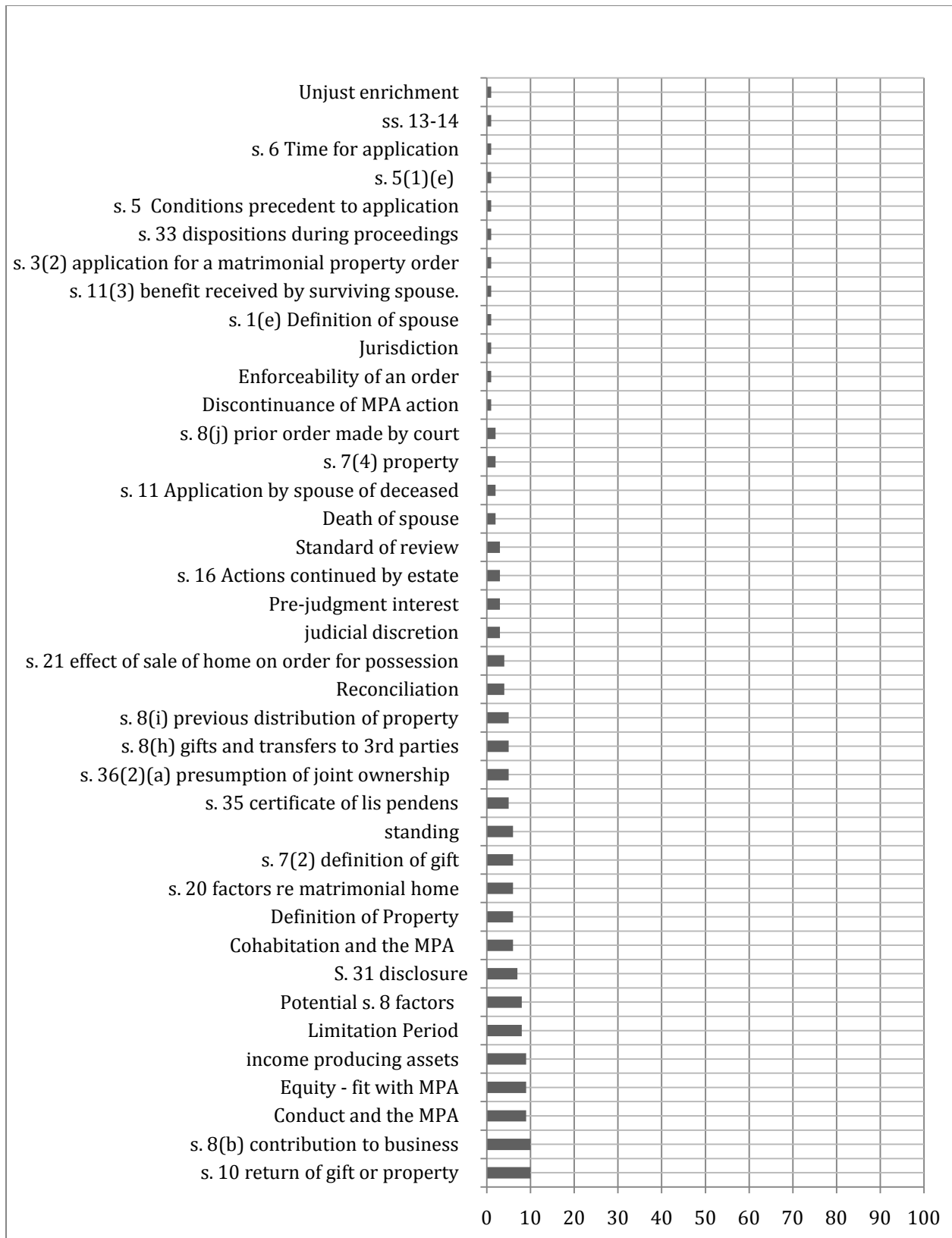


Figure 2: Infrequently Raised Issues

[12] Figures 3 and 4 graphically display the types of things that figure most prominently in disputes about whether or not they are property, with Figure 3 showing which types have been excluded by the courts and Figure 4 indicating which have been included. Figures 3 and 4 do not include types of things argued about in only one case. Figure 3 indicates that very few things are not seen as “property.”

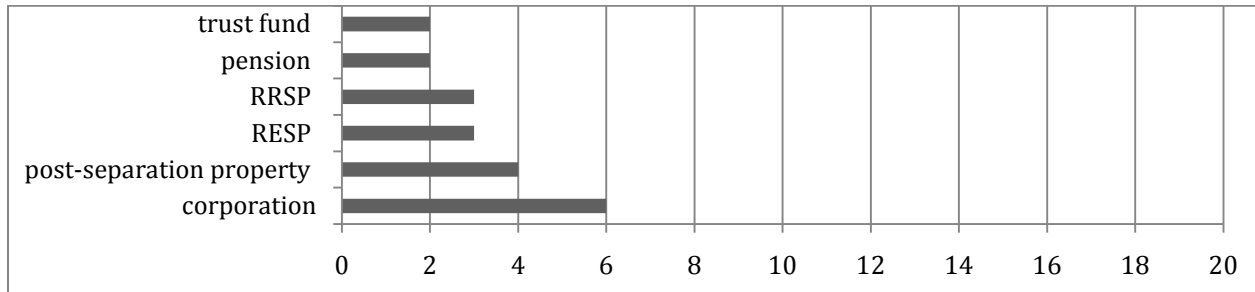


Figure 3: Assets excluded

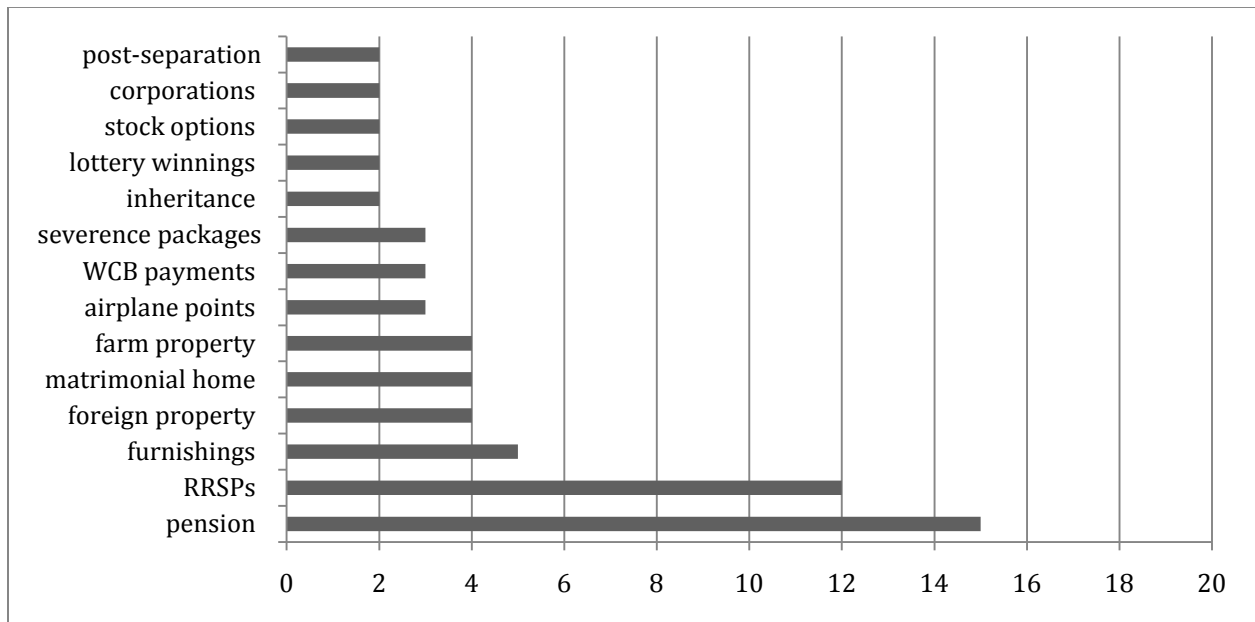


Figure 4: Assets included

[13] Figures 3 and 4 make clear that the most contentious types of property are pensions and RRSPs, which turn out to be problematic in three ways: as to characterization as property,

valuation and method of distribution. We mention the method of distribution issue later when it appears on the list of leading cases and their rules: see Figure 9. We therefore discuss all three issues in a discussion of pensions in Part IV.G.2. Corporate assets and property acquired post-separation may not stand out as disproportionate in frequency in Figures 3 and 4, but corporate assets and the valuation of corporate assets do independently make our list of most frequently raised issues: see Figure 1. We therefore deal with it in Part IV.G.1. We also note that section 8(f), which asks a court to consider whether the property was acquired when the spouses were living separate and apart when making a distribution under section 7(4), figures prominently as an issue in its own right in Figure 1. Because post-separation debts are frequently an issue and can be acquired at the same time as post-separation property, we will discuss post-separation property, including debts, as a separate issue in Part IV.M.

[14] Debts excluded and debts included both appear in the top ten issues in terms of frequency. The *MPA* is silent on the topic of debts owed by both spouses or one of them and so arguments about debts and how to deal with them are frequent. Although debt could be dealt with as an aspect of the definition and scope of “property,” we will deal with it separately in Part IV.H. because the type of debt, shown on Figures 5 and 6, appears to be an important factor.

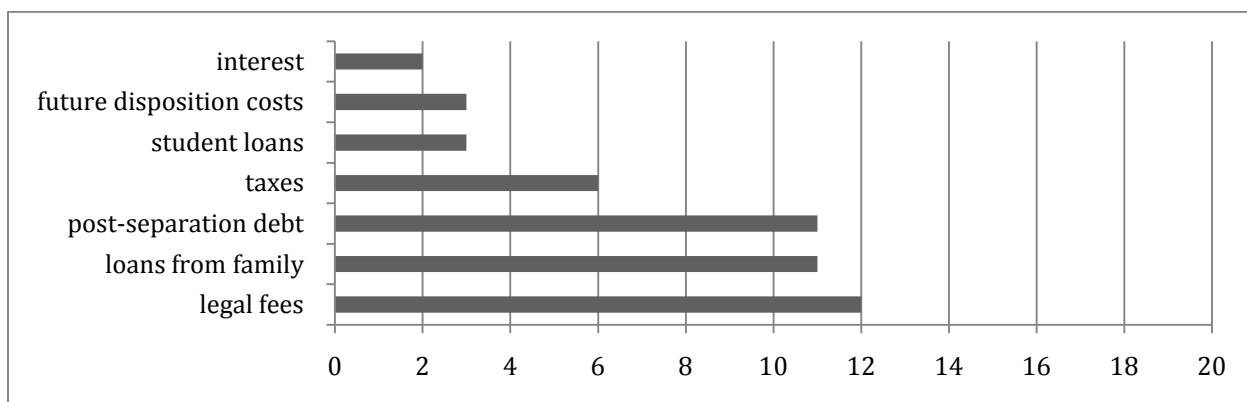


Figure 5: Debts excluded

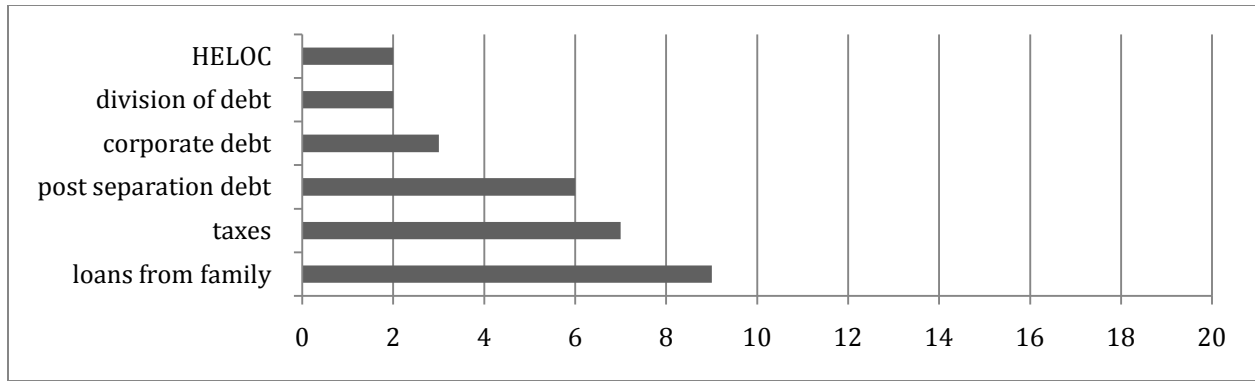


Figure 6: Debts included

[15] In addition to post-separation debt, taxes and loans from family members appear as frequent issues in both Figure 5 and 6. However, we discuss neither in Part IV. Taxes are most often contentious in the valuation of corporations and we do discuss them as part of that topic. The treatment of loans from family members is not really contentious as a matter of law. As was observed in *Sparrow v. Sparrow*: "When a marriage breaks down, the parents of one spouse will often claim a debt is owing for money that was advanced by them to their child during the course of the relationship. Courts rightly look at such claims with suspicion."⁹

[16] Related to post-separation debt, but treated quite differently by the courts, is the issue of occupation rent, an issue that figures prominently in Figure 1. Occupation rent is also an issue that has made the Court of Queen's Bench decision in *Kazmierczak v. Kazmierczak*¹⁰ one of the most frequently relied upon cases, as can be seen in Figure 9. We discuss occupation rent in Part IV.P.

[17] Dissipation of property, the section 8(l) factor, is the third more frequently arising issue. It is the most frequently considered section 8 factor. It appears to be a way for lawyers to argue

⁹ *Sparrow v. Sparrow*, 2006 ABCA at para. 55 (*Sparrow*).

¹⁰ 2001 ABQB 610 (*Kazmierczak* QB).

and judges to consider conduct in justifying unequal distribution of section 7(4) property. It is a particularly troublesome issue, although it has benefited from the guidelines for the identification of dissipation that were set out in *Cox v. Cox*,¹¹ one of the most frequently relied upon cases (see Figure 9). Dissipation is discussed in Part IV.L.

[18] The date of valuation continues to be a contentious issue and we discuss it in Part IV.E. In our review, it is the fourth most frequently discussed matter. The *MPA* is silent on the date of valuation but the first important Court of Appeal decision on the *MPA*, *Mazurenko v. Mazurenko*,¹² held that the date of valuation is the date of trial. Nevertheless, almost thirty years after *Mazurenko* was decided, courts continue to use other dates: see Figure 12. The apparent lack of discretion to choose a date for valuation appears to be a troublesome issue in some instances. The date of valuation therefore appears to be both a common and a problematic issue, especially if one also includes the number of date of division issues. Date of division, as an issue on its own, barely makes Figure 1 because it has arisen so recently, but it is a way judges avoid using the date of trial as the date of valuation.¹³

[19] The fifth most frequently considered issue concerned the relationship of the *MPA* and other acts. The other legislation that interacts most often in a controversial manner with the *MPA* is shown on Figure 7. Not surprisingly, there is frequent interaction with the *Divorce Act* and with spousal support orders. The approach used in most decisions follows *Corbeil v. Corbeil*, where the Court of Appeal stated that an order for retroactive support must take into account property division.¹⁴ In addition, *Corbeil* decided that support arrears can be capitalized

¹¹ 1998 ABQB 987.

¹² (1981), 124 D.L.R. (3d) 406, 15 Alta. L.R. (2d) 357, 30 A.R. 34, 23 R.F.L. (2d) 113 (C.A.); leave to appeal denied [1981] S.C.C.A. No. 108 (*Mazurenko*)

¹³ See e.g. *Buckler v. Buckler*, 2009 ABQB 175 (*Buckler*) and *Nasin v. Nasin*, 2008 ABQB 219 (*Nasin*).

¹⁴ 2001 ABCA 220 at para. 60 (*Corbeil*)

and granted in lump sum as part of the division or to offset an equalization payment¹⁵ Still, retroactive support for spouses or children remains a controversial matter, as does the question of setting off arrears against adjusting or equalizing payments ordered under the *MPA*, and both are discussed in more detail in Part IV.I.3.

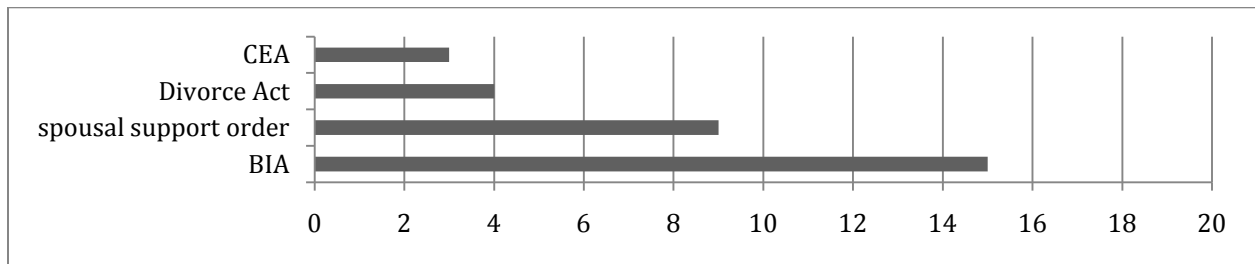


Figure 7: Relationship between MPA and Other Legislation

[20] The other two statutes that raise matrimonial property issues — the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*) and the *Civil Enforcement Act*, RSA 2000, c C-15 (*CEA*) — are both related to debt, and they could be seen as part of that overarching issue. However, the issues involving the *CEA* and *BIA* are predominantly issues about whether a matrimonial property claim is property and about priorities, different issues than the usual debt issues and we will deal with them separately in Part IV.I.1. and 2.

[21] The sixth most frequently raised issue concerns section 8(m) and the courts’ ability to take into account in a distribution “any fact or circumstance that is relevant.” The existence of this factor is a hallmark of the Alberta approach because it highlights the courts’ discretion in reaching a just and equitable distribution. What other facts or circumstances have commonly been raised? Figure 8 summarizes this data. Except for inflation, the most common candidates for “other factors” all relate to conduct: disclosure or non-disclosure, credibility and other

¹⁵ *Ibid.* at para. 66.

conduct. Non-disclosure and credibility issues, however, seem to cause the courts the most problems and we will focus on those candidates for section 8 status alone in Part IV.O, as well as discussing conduct as a more general category in Part IV.R.

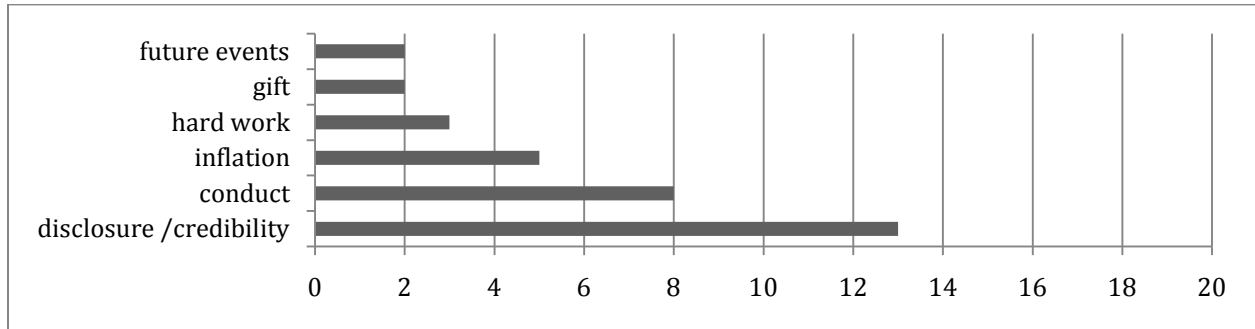


Figure 8: Section 8(m) factors

[22] Before continuing to note various section 8 factors, we should state that we have discussed the section eight factors collectively in their role in dividing the increases in value of exempt property separately in Part IV.K. We have done so because the role of sections 8 is different depending on whether the property is within the section 7(3) category or the section 7(4) category.

[23] The eighth most frequent issue is the question of the strength of the presumption of equal sharing in section 7(4). As was the case with the date of valuation, this issue should have been settled by *Mazurenko* but there is still resistance. In *Mazurenko*, Stevenson J.A. (as he then was) emphasized that rebutting the presumption of equal distribution is an exception to the rule.¹⁶ The strength of the presumption plays a key role in the interaction of section 7(4) and the factors in section 8 and is discussed in Part IV.D.

¹⁶ *Mazurenko*, *supra* note 12 at para. 20.

[24] Rounding out the top ten issues is that of tracing exempt property under section 7(3)(a) and, at number eleven, the more overarching issue of section 7(3) and the sharing of increases in value of exempt property, a sharing that does not include any presumption of equality. We discuss the two together in Part IV.J.

[25] We have already mentioned the twelfth issue, that of section 8(f) and property acquired while the spouses were living separate and apart. The twelfth issue is controversial in ten per cent of the cases we reviewed, and issues one through eleven are debated in ten to thirty per cent of the cases. All of the remaining issues, however, are discussed in less than ten per cent of the cases. We are no longer talking about frequently raised issues and, although we have pointed out that some of the frequently raised issues are also the most troublesome ones, we now turn to issues that are problematic, even if not frequently raised.

[26] One way to identify problematic issues is to look at the rules or presumptions that have been created by the courts to supplement the *MPA*, principles and presumptions that are taken up and relied upon by subsequent courts. As can be seen in Figure 9, there is a relatively small number of leading cases and relied-upon rules and presumptions to aid in the interpretation and application of the provisions of the *MPA*. There are three Supreme Court of Canada decisions, none of them appeals involving the Alberta *MPA*.¹⁷ Of the sixteen Alberta decisions, nine were rendered by the Court of Appeal and seven by the Court of Queen's Bench.¹⁸ Somewhat surprisingly, many of the cases are decisions rendered within the last ten years. Only six of the nineteen cases were decided prior to 2000. Finally, there are only ten discrete issues in this list.

¹⁷ *Maroukis v. Maroukis*, [1984] 2 S.C.R. 137 (*Maroukis*) was an appeal from the Court of Appeal of Ontario involving the *Family Law Reform Act*, R.S.O. 1980, c. 152; *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550 (*Hartshorne*) is an appeal from the Court of Appeal of British Columbia under the *Family Relations Act*, R.S.B.C. 1996, c. 128; and *Peter v. Beblow*, [1993] 1 S.C.R. 980 is also an appeal from the Court of Appeal of British Columbia and involved a common law relationship.

¹⁸ In *Kazmierczak v. Kazmierczak*, it is the Court of Queen's Bench decision that is most relied upon (*Kazmierczak* QB, *supra* note 10) and not the Court of Appeal decision (*Kazmierczak v. Kazmierczak*, 2003 ABCA 227 (*Kazmierczak* CA)).

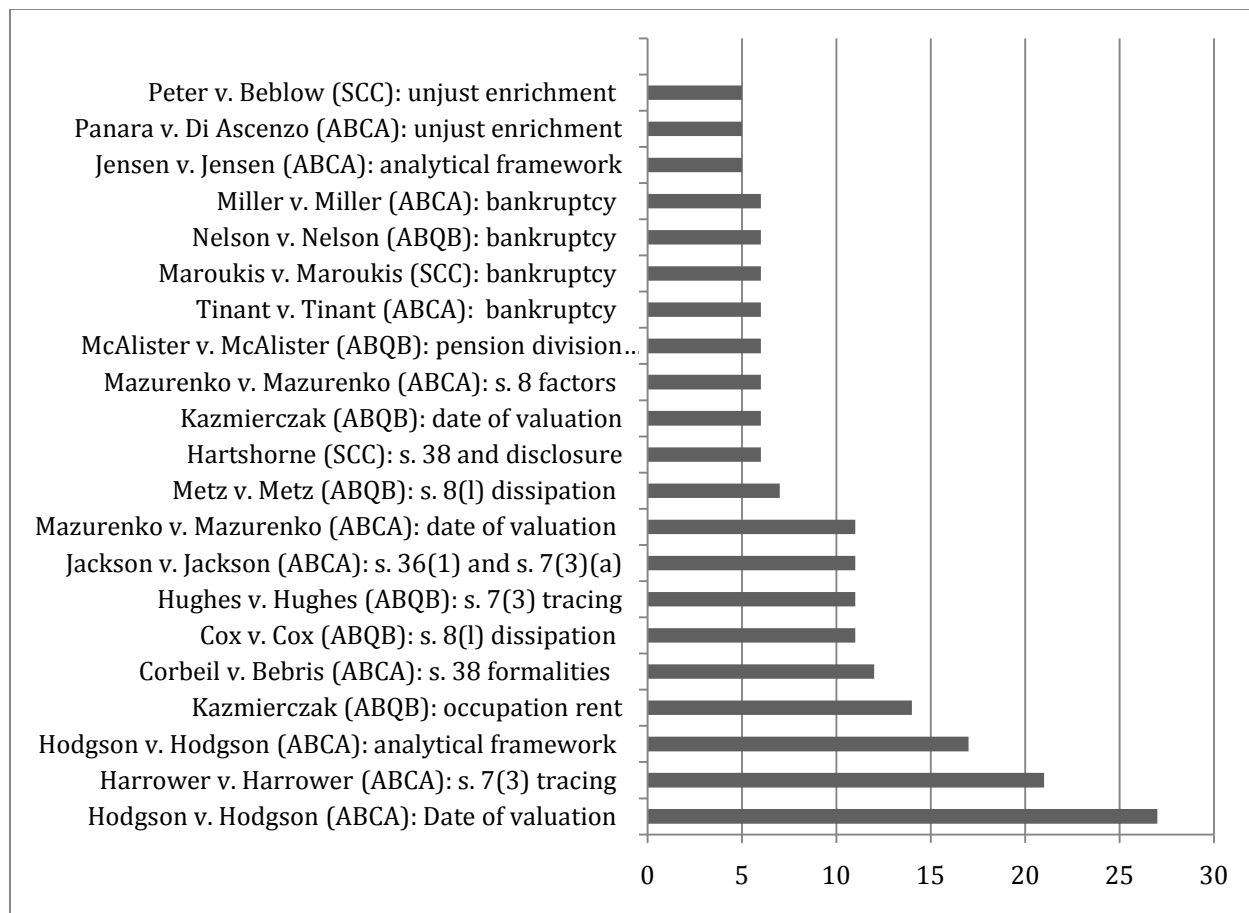


Figure 9: Most Relied Upon Cases and Rules/Presumptions

[27] We have already discussed half of the ten issues listed in Figure 9 in our discussion of the most frequently raised issues: bankruptcy, date of valuation, dissipation, section 7(3)(a) tracing and occupation rent. The prominent appearance of these issues in both Figure 1 and Figure 9 suggests that these are among the most troublesome of *MPA* issues as the judge-made rules and presumption have not quieted discussion of those issues.

[28] The remaining five of the issues listed in Figure 9 suggest that cohabitation (which necessitates unjust enrichment as a cause of action), the analytical framework used to apply the *MPA*, the method of distributing pensions, section 38 and contracting out of the *MPA* and the

presumption of advancement in section 36 are also troublesome. However, because these issues do not appear frequently in the case law, the principles or presumptions for which the cases are cited appear to settled controversies. In these cases, the quieting rules or presumptions might be considered for codification in the *MPA*.

[29] The appearance of *Peter v. Beblow* and *Panara v. Di Ascenzo* on the list of cases and rules most relied upon does not suggest the need to codify rules to supplement the *MPA*. Instead, it raises the vexing issue of cohabitation. The Supreme Court of Canada's 1993 decision in *Peter v. Beblow*¹⁹ is one of the leading Canadian authorities on unjust enrichment and the availability of the constructive trust as a remedy when one person had made a substantial contribution to the property of another person without compensation and those two persons are not married to each other. The Court of Appeal decision in *Panara v. Di Ascenzo*²⁰ is one of the leading Alberta authorities on the same subjects. In the *MPA* context, *Peter v. Beblow* is relied upon, for example, in cases where one or both married persons acquired property during a period of cohabitation before marriage.²¹

[30] Cohabitation makes our list of controversial issues even though the courts usually merely note that the *MPA* does not apply to unmarried couples and those cases are not even included in our list of 278 reviewed cases. Cohabitation appears on the list of frequently raised issues in Figure 1 and the more limited category of cohabitation and the *MPA* — marking out cases where the issue was the relationship of the *MPA* and cohabitation — appears in Figure 2. If we add constructive and resulting trusts discussions, as well as the infrequently appearing

¹⁹ *Supra* note 17. It sets out the elements that must be proven for an action for unjust enrichment to succeed: "(1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment." It also determined that the remedy of a constructive trust is appropriate when "monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed." It is relied upon for these common law tests.

²⁰ 2005 ABCA 47 (*Panara*).

²¹ See e.g. *Bos v. Bos*, 2007 ABQB 604; *Hughes v. Hughes*, 2006 ABQB 468 (*Hughes*).

unjust enrichment issues, to the cohabitation issues because both the unjust enrichment cause of action and the constructive trust remedy arise in the family property context in connection with cohabiting but unmarried couples, cohabitation would appear in the “top ten” issues. Even so, it is its problematic nature which attracts our attention in Part IV.B., especially as more and more couples cohabit before they marry.

[31] The second of the remaining five issues is the four-step analytical framework adopted by the courts to resolve matrimonial property disputes. The framework, first enunciated by the Court of Appeal in 2005 in *Hodgson v. Hodgson*,²² was confirmed indirectly by that court in *Jensen v. Jensen*.²³ As the framework flows from the analytical structure of section 7, it is not clear the framework provides any supplemental rules or presumptions. Nevertheless, because of the strong reliance on the framework, we will discuss it in more detail in Part IV.C.

[32] The three remaining issues in Figure 9 — the distribution of pensions, section 38 and contracting out of the MPA and the presumption of advancement in section 36 — all make our list of most frequently raised issues independently. The distribution of pensions has been the subject of law reform commission reports in the past,²⁴ is the subject of study by the Manitoba Law Reform Commission at present,²⁵ and the difficulty of dealing with their distribution does not seem to have decreased. Indeed, income-producing assets of various types appear to give the courts difficulties and the property and distribution issues connected to corporate assets, agricultural land and pensions will be considered together in Part IV.G. We have taken the liberty of adding farm and ranch properties to the list of income-producing assets to be

²² 2005 ABCA 13 (*Hodgson*).

²³ *Supra* note 4.

²⁴ Alberta Law Reform Institute, *Division of Pension Benefits Upon Marriage Breakdown* (Edmonton: Alberta Law Reform Institute, September 1995).

²⁵ Manitoba Law Reform Commission, Current Projects, Distribution of Pensions, online: <http://www.gov.mb.ca/justice/mlrc/projects.html>.

discussed because these assets are the contentious subject matter of the most recent Court of Appeal decisions, *Jensen*²⁶ and *Klinck v. Klinck*.²⁷

[33] The problems of income-producing assets — and also depreciated assets — is related to the issue of the method of division or distribution of assets in general, issues found in Figure 1. A breakdown of assets divided by percentage of total matrimonial property and those divided *in specie* (i.e., asset by asset) in cases where the method of division was itself an issue can be seen in Figure 10 and is discussed in Part IV.U. The arguments about whether to distribute assets *in specie* arises frequently with respect to corporate, farm and other income producing assets, reinforcing their commonalities.

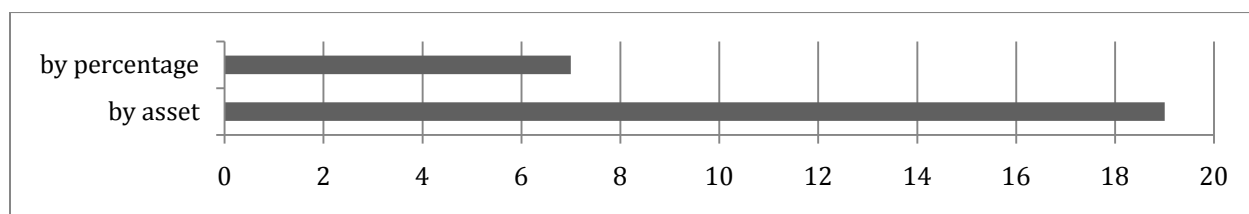


Figure 10: Division of assets

[34] The types of sub-issues associated with the section 38 formalities of contracting out of the *MPA* are summarized in Figure 11 and discussed in Part IV.V. The major sub-issue appears to be that of independent legal advice, something not required by the *MPA* but something which does seem to cause the courts concern. The duty of care sub-issue is related to disclosure, which is dealt with separately in Part IV.S.

²⁶ *Supra* note 4.

²⁷ 2010 ABCA 5 (*Klinck*).

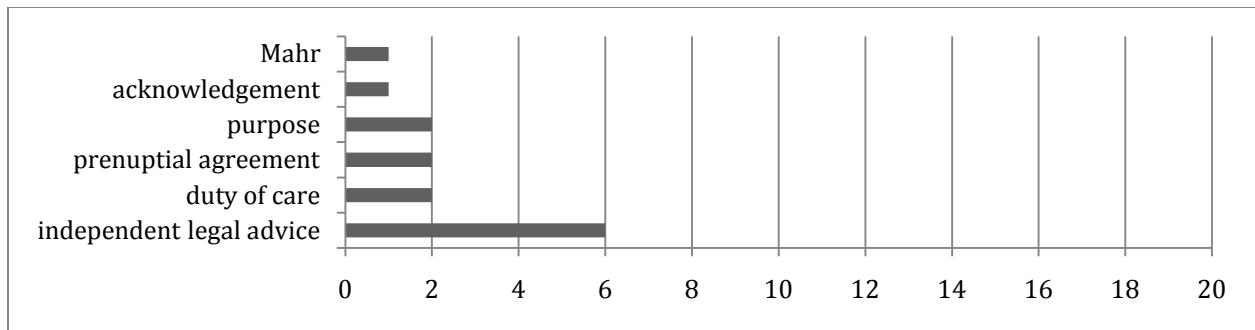


Figure 11: Section 38 formalities

[35] The final issue listed in Figure 9 concerns section 36(2) and the presumption of advancement. Section 36(1) provides that the Court “shall not apply the doctrine of presumption of advancement to a transaction between the spouses in respect of property acquired by one or both spouses before or after the marriage.” However, section 36(2) states that, notwithstanding subsection 36(1), “the fact that property is placed or taken in the name of both spouses as joint owners is proof, in the absence of evidence to the contrary, that a joint ownership of the beneficial interest in the property is intended,” The Court of Appeal decision in *Jackson v. Jackson*²⁸ — and its companion decision in *Harrower v. Harrower*²⁹ — was released more than twenty years ago. In *Jackson v. Jackson*, the husband’s mother gifted to the husband \$60,000 and that money was used as the down payment on a jointly-owned matrimonial home. The Court of Appeal upheld the decision of the trial judge, concluding that the husband had gifted half of the funds to his wife, making that half of the original gift from his father divisible as matrimonial property. Section 36(2) is therefore understood to set out a rebuttable presumption that an exempt asset loses half of its value as exempt property upon being placed in joint ownership, unless the presumption is rebutted. The application of *Jackson v. Jackson*’s interpretation of section 36(1) does not seem to be at all problematic. The only issue appears to

²⁸ (1989), 97 A.R. 153 (C.A.) (*Jackson*).

²⁹ (1989), 97 A.R. 141 (*Harrower*).

be a factual one, namely, whether there is evidence to rebut the presumption or not. As a result, we do not discuss this matter in Part IV.

[36] Another possible issue that is best seen by comparing Figures 1 and 2 is the variation in use and relevance of the section 8 factors. *Mazurenko* is cited as the precedent for the rule that no priority should be given to any one or more of the section 8 factors.³⁰ However, there are many cases where a judge notes that she only considered two or three of the section 8 factors³¹ and there are cases where the judge is quite clearly swayed by a single factor, most often section 8(l) (dissipation), section 8(m) (other facts) or section 8(f) (property acquired while separate and apart). A look at Figure 1 reveals that subsections 8(l), (f) and the catch-all (m) are the three most frequently discussed section 8 factors and we discuss them in Part IV. L., Q. and F. respectively. In contrast, a review of Figure 2 indicates that the following factors rarely enter into discussion: subsection 8(b) (contribution to business), (h) (gift or transfer to third party), (i) (previous distribution of property) and (j) (prior court order). Section 8(b) tended to be controversial only when one spouse contributed to a business owned by the other spouse, which explains its low frequency. In a few cases, the failure of one party to contribute to a business owned within the family has been used to justify an unequal division of the corporation; see *Walker v. Walker* for a discussion of these cases.³² Gifts and transfers to third parties arise in conjunction with section 10 and there were not many section 10 controversies either, leading us to suggest the *MPA* provisions on this topic are unproblematic. Some prior distributions are the result of agreements between the parties that do not meet the requirements of section 38 and the contentious issues tend to be considered under section 8(g), which is where we will discuss them. Section 8(j) requires the existence of a specific fact that arises infrequently so its

³⁰ See e.g. *S.W. v. J.W.*, 2005 ABQB 728 at para. 113; *R.G. v. M.G.*, 2007 ABQB 273 at para. 14.; *McAdam v. McAdam*, 2009 ABQB 109 at para. 16 (*McAdam*).

³¹ See e.g. *Busenius v. Busenius*, 2006 ABQB 162 at para. 27 (*Busenius*)

³² 2009 ABQB 209 at paras. 66-70 (*Walker*).

low frequency does not seem surprising. As a result, we do not discuss sections 8(b), 8(h), 8(i) or 8(j) in Part IV.

[37] Neither do we discuss section 8(e) (duration of marriage), section 8(a) (contributions to marriage and family), section 8(c) (contributions to property), section 8(d) (income, earning capacity, liabilities, obligations) or section 8(k) (tax liability) in Part IV. Essentially, either the case law on these subsections reveals no commonly argued troublesome issues or the controversial issues are discussed as part of a different topic.

- Section 8(e) (duration of marriage): The main difficulty in application of section 8(e) is that discussed under cohabitation in Part IV.B. and the discretion accorded the courts in determining the length of marriage, combined with the underlying question of whether length should even be a consideration given the fact that ss. 7(2) and 7(4) implicitly but effectively account for length of marriage by their division of property into pre-matrimonial and matrimonial property.
- Section 8(a) (contributions to marriage and family): As one of the primary factors leading to the creation of the *MPA*, this factor continues to serve its purpose within the division of matrimonial property without incident. The factor has been and continues to be used, as it was recently in *Verburg v. Verburg*, as a way of recognizing contributions to the marriage that are not financial in nature.³³
- Section 8(c) (contributions to property): Section 8(c) appears to have been applied as intended, although it is more frequently used to justify unequal distribution than to support the presumption of equal division. Home improvements and mortgage payments are the main focus and the use of section 8(c) will sometimes result in an

³³ 2010 ABQB 201 at para. 27 (*Verburg*).

in specie distribution of property, with the contributing spouse receiving the property which s/he improved.³⁴

- Section 8(d) (income, earning capacity, liabilities, obligations): This section has been interpreted quite narrowly as an opportunity to consider the disparate incomes of the parties. This has a relationship to income and therefore spousal support, a connection that was noted in *Nuttall v. Rea*, and Watson, J. stated that this factor is better considered under spousal support.³⁵ Although this section's potential for use specifically to divide income-producing assets exists, it appears to be unrealized in the case law. As well, disability could fit under this section but appears not to have been considered here to date.
- Section 8(k) (tax liability): We consider tax liability in discussing income-producing assets in Part IV.G. Generally, this section is used to discount certain assets unless the tax claimed is considered to be too speculative.³⁶ There do not appear to be any other controversial issues with respect to this section.

[38] One issue that only appears in Figure 2 but that might be worth considering in any reforms is that of the purpose of the *MPA*. The Court of Appeal appears to have felt the need to state the purpose of the *MPA* rather forcefully in *Jensen* in 2009.³⁷ Unlike matrimonial property legislation in other provinces, there is no preamble to the *MPA* setting out its purpose. It might seem late to add such a statement to the act in order to aid in interpretation of the statute, but a confirmation of the purposes might be considered in any reform package, particularly if issues such as cohabitation are dealt with.

³⁴ See e.g., *G.A.M. v. C.A.M.*, 2008 ABQB 375 (*G.A.M.*).

³⁵ 2005 ABQB 151 at para. 292 (*Nuttall*).

³⁶ See e.g., *Van Oirschot v. Van Oirschot*, 2010 ABQB 211 at para. 74 (*Van Oirschot*).

³⁷ *Jensen*, *supra* note 4 at para. 1.

[39] The last issue our review of the case law suggests is troublesome is the issue of costs. They are an issue in almost ten per cent of the cases we reviewed and costs often seem to be used to punish conduct such as dissipation, non-disclosure and lying. Costs seem to be used as an alternative to an unequal distribution that relies on section 8(I) (dissipation) or, more commonly, as an alternative to demanding that a statement disclosing the particulars of the property of a spouse that is required by section 31 and by the *Matrimonial Property Regulation*³⁸ be complete and accurate. This issue is discussed in Part IV.W.

[40] As can be seen in Figure 2 and by the provisions of the *MPA* that do not appear in Figures 1 or 2, most of the sections of the *MPA* are uncontroversial. One of the more unexpected results is the low frequency of any issues involving possession of the matrimonial home under Part 2 of the *MPA*, other than the frequent and thorny and related issue of occupation rent. Only section 21 concerning the effect of the sale of a home on an order for possession and section 20 factors regarding matrimonial home possession even appear in Figure 2, the list of infrequently arising issues. None of the other matters in Part II of the *MPA* appear in Figure 1. However, it may simply be that orders for possession, as interim measures, are not often reduced to written judgments.

IV. Frequently Raised and Troublesome Issues

[41] We turn now to a more detailed discussion of those issues we identified in Part III as being frequently contentious in the courts or particularly problematic. In this part of the paper we add examples of the issues and identify sub-issues. The issues are not discussed in the same order in which they were raised in Part III. Instead, we have organized Part IV in a more

³⁸ Alta. Reg. 13/1999.

analytically comprehensible manner, beginning with overarching issues such as the purpose of the MPA and the analytical framework used by the courts. The balance of Part IV essentially follows that analytical framework.

A. Purpose of the MPA

[42] The purpose of the MPA has not been a contentious issue in the past ten years, although there was no leading case that set out the purpose in the time period under review until 2009. A consideration of judicial statements of the act's purpose might suggest whether codification or revision is desirable, now that the legislation is less controversial than it was on its introduction.³⁹

[43] The most recent and authoritative statement of the purpose of the *MPA* appears in the 2009 Court of Appeal decision in *Jensen v. Jensen*, where it is said to be to “legally recognize 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.”⁴⁰ The Court of Appeal apparently felt the need to expressly state the purpose of the MPA in response to the lower court's comment the “reality” is that “the contribution of each spouse is not always equal, and matrimonial property should not be divided based on the fiction that it is.”⁴¹ Prior to the Court of Appeal decision in *Jensen*, the most often cited case on the purpose appears to have been the Supreme Court of Canada decision in *LeBlanc v. LeBlanc*⁴² However, the *LeBlanc* decision dealt with the matrimonial property legislation in force in New Brunswick in the 1980s,

³⁹ See Peter J.M. Lown and Frances L. Bendiak, “Matrimonial Property – The New Regime” (1979) 17 Alta. L. Rev. 372 (referring to the “lengthy if not tortuous process” that resulted in the proclamation of the *MPA*).

⁴⁰ *Jensen*, *supra* note 4 at para. 1. In the same case, the Court of Appeal also described the purpose as being to “protect against inequities arising from dissolution of marriage and to recognize a social and economic partnership”: *ibid.* at para. 20.

⁴¹ *D.R.J. v. M.J.*, 2008 ABQB 380 at para. 64.

⁴² [1988] 1 S.C.R. 217 (*LeBlanc*).

legislation with an express interpretative provision in the nature of a preamble that announced the general framework and philosophy of the legislation.⁴³

[44] We note that preambles setting out the purposes of matrimonial property legislation are not uncommon and where they exist they have been used by the courts as guides for rendering their decisions.⁴⁴ Most preambles, including those of the Northwest Territories' *Family Law Act*,⁴⁵ the Ontario *Family Law Act*⁴⁶ and the Nova Scotia *Matrimonial Property Act*,⁴⁷ state the same four purposes: to strengthen the role of the family in society; to improve the position of children by clarifying issues of parental responsibility; to recognize that the contributions of spouses to a marriage are equal regardless of their form; and to provide for the orderly and equitable settlement of the affairs of spouses on marriage termination. The propriety of some of these purposes has been critiqued by the Law Reform Commission of Nova Scotia in its March 1997 *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*.⁴⁸ That report recommended similar legislation express only two goals:

- a) recognize that contributions to domestic relationships should be treated equally regardless of their form, entitling each party to an equal part of the shareable assets; and
- (b) provide for the orderly and equitable settlement of the financial affairs of couples on the ending of a relationship.⁴⁹

⁴³ *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 2.

⁴⁴ See e.g., *Serra v. Serra*, 2009 ONCA 105 at para. 53

⁴⁵ S.N.W.T. 1997, c. 18.

⁴⁶ R.S.O. 1990, c. F.3.

⁴⁷ R.S.N.S. 1989, c. 275. The Preamble states:

WHEREAS it is desirable to encourage and strengthen the role of the family in society; AND WHEREAS for that purpose it is necessary to recognize the contribution made to a marriage by each spouse; AND WHEREAS in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship; AND WHEREAS it is necessary to provide for mutual obligations in family relationships including the responsibility of parents for their children; AND WHEREAS it is desirable to recognize that childcare, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets

⁴⁸ Law Reform Commission of Nova Scotia, *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (Halifax, 1997) at 14-17, online: http://www.lawreform.ns.ca/Downloads/MPA_FIN.pdf (N.S. *Final Report*)

⁴⁹ *Ibid.* at 17.

B. Cohabitation

[45] Who does the *MPA* apply to? Section 3 provides that the person with standing to bring an application for a matrimonial property order is a “spouse.”⁵⁰ The definition of “spouse” in the *MPA* does not extend to non-married parties in common law relationships: see for example *Hughes v. Hughes*,⁵¹ *Panara v. Di Ascenzo*,⁵² and *Desimone v. Straub*.⁵³ An attempt to strike down a Nova Scotia law mandating different treatment of married and common-law spouses for the purposes of property division failed in the Supreme Court of Canada in 2002.⁵⁴ There is therefore no constitutional requirement that cohabiting couples be included in the *MPA*’s property-sharing regime.

[46] Nevertheless, cohabitation is a frequently raised issue within the current *MPA* and the question therefore arises as to whether or not unmarried couples should be including within a statutory regime that mandates an equal sharing of property. Currently in Alberta, when a common-law partner seeks a share in the increase in value of family assets upon separation, he or she must bring an unjust enrichment claim. The application of the equitable doctrine to common law partners follows the fundamental principles established in the jurisprudence relating to unjust enrichment generally: *Peter v. Beblow*.⁵⁵ *Panara v. DiAscenzo* is the leading Alberta precedent on this topic.⁵⁶

⁵⁰ The term “spouse” is defined in section 1(e) as including “a former spouse and a party to a marriage notwithstanding that the marriage is void or voidable.”

⁵¹ *Supra* note 21 at para. 6. .

⁵² *Supra* note 20 at para. 22.

⁵³ 2010 ABQB 462 at paras. 40-41 (*Desimone*).

⁵⁴ In *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325 (*Walsh*), the Supreme Court of Canada dealt with the question of whether the exclusion of unmarried cohabiting opposite sex couples from the definition of “spouse” in the Nova Scotia *Matrimonial Property Act*, *supra* note 47 violated s. 15(1) of the *Charter of Rights and Freedoms* and held that it did not, finding that the distinction between marriage and common law relationships, for purposes of legislation dealing with the division of property, was not discriminatory.

⁵⁵ *Supra* note 17 at para. 2.

⁵⁶ *Supra* note 20.

[47] As can be seen in Figure 12, because of the increase in the incidence of couples cohabitating before marriage, the status of property acquired by a spouse before marriage but while cohabiting is often a problem. The value of such property is exempt from distribution under section 7(2)(c) of the *MPA*. In one notorious case (overturned on appeal), a six year marriage was ruled a short marriage and its length offered as justification for an unequal division of assets, despite the fact that the marriage was preceded by a six year period of cohabitation,⁵⁷ while in another case a six year cohabitation period was included in determining the total length of the couple's marriage.⁵⁸

[48] Other examples of the difficulties resulting from uncertainty as to when a marriage starts for the purposes of section 7(2) are found in the judgments in *T. (J.G.) v. N.(T.)*,⁵⁹ *Underhill v. Underhill*,⁶⁰ *Verburg v. Verburg*⁶¹ and *Behiels v. McCarthy*.⁶² In *T. (J.G.) v. N.(T.)*, the period of cohabitation before marriage was counted for purposes of pension division.⁶³ In *Underhill*, the parties lived common-law in Calgary for eight months in 1993, until Mr. Underhill was transferred to Edmonton. Ms. Underhill followed six months later and the couple reestablished cohabitation. The parties married in 1995. The court included the period of cohabitation in Edmonton (and that following a short period of separation), but not the period of cohabitation in Calgary. In *Verburg*, a four year period of cohabitation before a ten year marriage and a two year separation period prior to trial was summed to make a sixteen year relationship that was the main justification for dividing increases in value of exempt property equally.⁶⁴ In contrast to *Verburg*, in *Behiels v. McCarthy* the court divided the parties' cohabitation and marriage into six

⁵⁷ *Panara v. Di Ascenzo* 2000 CarswellAlta 1814 (Q.B.).

⁵⁸ *N. M. v. C.L.M.*, 2005 ABQB 724.

⁵⁹ 2001 ABQB 949.

⁶⁰ 2005 ABQB 777 (*Underhill*).

⁶¹ *Supra* note 33.

⁶² 2010 ABQB 281 (*Behiels*).

⁶³ "While the parties were married for 10.75 years over this time, they cohabited for 2.75 years prior to marriage. The issue is whether these years of cohabitation should be included." *T. (J.G.) v. N.(T.)*, *supra* note 59 at para. 48.

⁶⁴ *Verburg*, *supra* note 33 at paras. 28-29.

separate periods. Under section 7(3), when it came time to consider how to divide the increase in the value of a house held in joint title and acquired in 2003 from the proceeds of the sale of a house the husband had before they met, the court noted “the marriage was approximately 1.5 years and therefore of short duration . . . In fact, the time span between the Date of Separation 2 and the date of trial is more than three times the duration of the marriage.”⁶⁵ The short duration marriage was used to justify the husband’s receiving over half of the increase in value in the property that occurred after “Separation 2.” If cohabitation and marriage had both been counted, as they were in *Verburg*, the relationship could have been said to have spanned ten or eleven years and could not have been characterized as one of short duration.

[49] As the law currently stands, to make the property acquired during cohabitation prior to marriage eligible for sharing, one party should start a separate action based on unjust enrichment. *Panara v. DiAscenzo* recognized the role unjust enrichment may play in resolving claims by parties who may have cohabitated before marriage.⁶⁶ However, as the Court of Appeal noted in *Jensen v. Jensen*, the problem with using equitable remedies to divide property is the uncertain nature of the results.⁶⁷

[50] Manitoba’s *Family Property Act* suggests one way that assets acquired by a couple while cohabiting before marriage could be dealt with. Section 4(2)(a) of that act provides that it “applies to any asset acquired by a spouse before marriage if . . . the asset was acquired when the spouse was cohabiting in a conjugal relationship with the other spouse immediately before their marriage.” Such a provision would explicitly approve of the practice of many judges under the *MPA*.

⁶⁵ *Ibid*, at para. 87.

⁶⁶ *Supra* note 20.

⁶⁷ *Supra* note 4 at para. 1.

[51] Some provinces have recently amended their matrimonial property statutes to include common law couples. In Manitoba, the *Family Property Act* defines "common-law partner" of a person as someone who either registered a common-law relationship under *The Vital Statistics Act*, or cohabited with him or her in a conjugal relationship for a period of at least three years and provides each spouse and common-law partner has the right to an accounting and an equalization of assets.⁶⁸ In Saskatchewan, the *Family Property Act* defines "spouse" to include two persons who are cohabiting or have cohabited with the other person as spouses continuously for a period of not less than two years.⁶⁹ Other provinces are contemplating their inclusion.⁷⁰ The British Columbia *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act*, released in July 2010, canvasses the issue at length.

C. Analytical framework

[52] One of the major developments in the last ten years has been the authoritative statement of an analytical framework for matrimonial property actions. In *Hodgson v. Hodgson*, the Court of Appeal set out that framework as follows:

Sections 7 and 8 of the *MPA* describe a four-step process of exclusion and qualification that begins at the most inclusive point, as far as available property is concerned, the date of trial. The process begins with a consideration of all of the property owned by both spouses, providing special treatment for certain assets (7(2) and 7(3)) and then applying a presumption of equality to the remaining assets (7(4)).

The first step is to determine all property owned at date of trial. The trial judge then moves on to the second step which is to discern the property that is exempt from distribution under section 7(2), or that can be traced to section 7(2)

⁶⁸ *Supra* note 43, ss. 1 and 13.

⁶⁹ S.S. 1997, c. F-6.3. This amendment followed the release of a Law Reform Commission of Saskatchewan Discussion Paper on *Common Law Relationships under the Matrimonial Property Act* that suggested the legislation include long-term common law partners. Similar recommendations were made by the Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993) and the Nova Scotia *Final Report*, *supra* note 48.

⁷⁰ *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (Victoria, British Columbia: Ministry of Attorney General, July 2010) at 81-82 (*White Paper*).

property. The value of that property, as at date of acquisition, or date of marriage, is then excluded from distribution. This exemption is understandable when one considers the types of property included in section 7(2). These assets, generally, are not connected to the marriage.

The third step requires the trial judge to determine what property falls under section 7(3). This includes the increase in the value of exempt property, from the date of acquisition or marriage, to the date of trial. That property is then distributed between the parties in a manner that is just and equitable. No statutory presumption of equality exists with respect to this property, and the trial judge's discretion is exercised by taking the section 8 factors into consideration. . . .

Finally, the trial judge is obliged to divide the balance of the remaining assets equally, unless it would be unjust and inequitable to do so considering the factors set out in section 8. The courts are properly reluctant to interfere with the principle of equality on section 7(4) property. It is open to the trial judge to do so, however, where equal division would be unjust and inequitable.⁷¹

[53] *Hodgson's* analytical framework has generally been well received. However, there are some odd exceptions. In *Walker v. Walker*, for example, the court held that it “must make an initial determination as to whether there was an ‘oral or written agreement between the spouses’ which, although not determinative of the issue of entitlement, will help this Court make that determination.”⁷² The court thus elevated the factor in section 8(g) — an agreement that did not meet the formal requirements in section 38 — and considered it before even determining what property was owned by the parties as at the date of trial. After determining that there was an agreement, the court then considered only four specific assets, albeit at the invitation of counsel.⁷³ The court relied upon the Court of Appeal decision in *Kazmierczak* in order to do so, as that case had indicated that the *MPA* “does not require a trial judge to value all the assets, or even specific ones.”⁷⁴ However, the Court of Appeal at that point was referring to methods of distribution.

⁷¹ *Hodgson*, *supra* note 22 at paras. 18-21.

⁷² *Walker*, *supra* note 32 at para. 22.

⁷³ *Ibid.* at para. 37.

⁷⁴ *Kazmierczak CA*, *supra* note 18 at para. 13:

[54] The Court of Appeal did miss an opportunity to explicitly reinforce the importance of the *Hodgson* analytical framework and its approach to the MPA in its 2009 decision in *Jensen*. Instead the Court of Appeal described the structure of the Act in the words quoted in paragraph 6 in Part II of this paper.

[55] The database suggests there might be a change from a reliance on *Hodgson* for the proper approach to analyzing an MPA claim to a reliance on *Jensen's* summary of sections 7 and 8,⁷⁵ but because *Jensen* was just decided in 2009 it is difficult to call this a trend. The *Hodgson* framework is more explicit and linear than is the summary in *Jensen*, and therefore likely more helpful to trial courts.

[56] Something similar to *Hodgson's* analytical framework has been incorporated into Manitoba's *Family Property Act* as a direction as to how to perform an accounting and division.⁷⁶ This example, and the reliance on *Hodgson* by Alberta courts, suggests that a method for approaching the analysis of matrimonial property problems might be useful.

D. Strength of the presumption of equal sharing in section 7(4)

⁷⁵ See e.g. *Daved v. Daved*, 2010 ABQB 447 at paras 145-147 (*Daved*); *McIntosh v. McIntosh*, 2010 ABQB 168 at para. 4 (*McIntosh*).

⁷⁶ *Family Property Act*, CCSM c F25, s. 15, which provides:

- 15(1) In an accounting of assets between spouses or common-law partners under this Act, there shall be ascertained
- (a) the value of the total inventory of assets of each spouse or common-law partner, after adding to or deducting from the inventory such amounts as are required under this Act to be added or deducted;
 - (b) the value of the share to which each spouse or common-law partner is entitled upon the division, to be determined by combining the values ascertained under clause (a) and dividing the total into two equal shares or, where the application for an accounting is not under Part IV, such other shares as the court may under section 14 order; and
 - (c) the amount payable by one spouse or common-law partner to the other in order to satisfy the share of each spouse or common-law partner as determined under clause (b).

[57] In *Mazurenko*, the earliest leading decision on the MPA, the Court of Appeal discussed the strength of the presumption of equal sharing in section 7(4) of the MPA, which provides that “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”:

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*.⁷⁷

[58] *Mazurenko*'s interpretation of section 7(4) and the strength it accorded the presumption was recently reaffirmed by the Court of Appeal in 2009 in *Jensen*. *Jensen* considered the division of farm property that had been passed down from parent to child. In the Queen's Bench decision,⁷⁸ the trial judge ignored much of the case law and the established principles in order to keep the property in the husband's family. That decision is also memorable for its statement that “[t]he cases above reflect the reality that the contribution of each spouse is not always equal, and matrimonial property should not be divided based on the fiction that it is.”⁷⁹

[59] In overturning the Queen's Bench decision, the Court of Appeal strongly reaffirmed the strength of the presumption of equal distribution, adding that microscopic analysis of the section 8 factors and each spouse's contribution is unnecessary.⁸⁰ After quoting from *Mazurenko*, the court in *Jensen* adds:

Mazurenko remains the law in Alberta. The presumption of equal distribution is the rule and unequal distribution the exception. The legislation is designed to protect against inequities arising from dissolution of marriage and to recognize a social and economic partnership. The respective contributions of the parties will

⁷⁷ *Mazurenko*, *supra* note 12 at para. 20 (emphasis added).

⁷⁸ *D.R.J. v. M.J.*, *supra* note 41..

⁷⁹ *Ibid.* at para. 64.

⁸⁰ *Jensen*, *supra* note 4 at para. 23.

rarely be identical or measure equally. Partners allocate expectations and responsibilities in a manner satisfactory to them. Those responsibilities may change and evolve over time. Put simply, it is not a requirement (nor is it a realistic view of marriage) that the contributions of each party be equal for there to be an equal division.⁸¹

[60] It remains to be seen if *Jensen's* reaffirmation of the strength of the presumption in section 7(4) results in fewer deviations from 50/50 divisions of property. Quite a number of cases decided after *Jensen* was handed down do order unequal divisions,⁸² but as each case is fact-specific, it is difficult to ascertain whether a stronger presumption of an equal division did make or would make a difference. Nevertheless, an indication of how difficult it should be to find something other than an equal distribution just and equitable might be helpful in constraining the unbridled discretion evident in decisions such as *D.R.J. v. M.J.*

E. Date of valuation

[61] That the date of valuation continues to be a contentious and frequently raised issue will be no surprise. After all, ALRI issued a Background Paper on *Matrimonial Property Legislation: Valuation Dates* in November 2005. What is perhaps clearer now than it was five years ago is the impact of *Hodgson v. Hodgson*,⁸³ the 2005 Court of Appeal decision that, as the ALRI Report notes,⁸⁴ changed the landscape. The 50-page Background Paper is comprehensive on this issue and so our discussion of the recent case law will be brief.

[62] The *MPA* does not expressly describe a date for the valuation and division of matrimonial property, but it is an issue on which a rule has been enunciated by the Court of Appeal to clarify the *MPA*. In *Mazurenko*, Stevenson J.A. (as he then was) held:

⁸¹ *Ibid.* at para. 20 (emphasis in original)..

⁸² See e.g., *Verburg*, *supra* note 33, *McIntosh*, *supra* note 75; *Behiels*, *supra* note 62; *Warwoda v. Warwoda*, 2009 ABQB 582 (*Warwoda*).

⁸³ *Hodgson*, *supra* note 22.

⁸⁴ Alberta Law Reform Institute, *Matrimonial Property Legislation: Valuation Dates* (Edmonton: Alberta Law reform Institute, 2005) at para. 19.

The husband argued that the time for valuation was the time of separation, not trial. In the absence of an express provision to that effect I conclude that the general principle that valuation be made at trial should apply. While not conclusive on this point, ss. 7(3)(c) and 8(f) militate against the husband's argument.⁸⁵

[63] *Mazurenko's* use of the phrase "general principle" appeared to allow for exceptions and that was how the case was interpreted in many of the decisions that followed. That brings us to the most often relied upon case and its most often relied upon rule: the Court of Appeal decision in *Hodgson v. Hodgson*⁸⁶ and the date of trial as the date of valuation. The trial judge had characterized the rule from *Mazurenko* as a presumptive rule only, which could be departed from in special circumstances. The Court of Appeal quoted *Mazurenko* for its "general principle" and added:

The fact that this rule was not stated in absolute terms has led to the suggestion that it is only a "strong presumptive rule" that can be departed from in special circumstances. We do not agree. In our view, other provisions in the statute, as well as the overall statutory scheme, support the view that valuation and division must take place as of the date of trial.⁸⁷

[64] The Court of Appeal added that concerns about using the date of trial could be dealt with by considering whether to apply the factors set out in section 8 of the *MPA* to the property being divided.⁸⁸ The Court of Appeal then restated the rule in their conclusion so there would be no doubt:

In summary, the rule set down by Stevenson J.A. in *Mazurenko* is more than a presumptive rule. The court is obliged to divide the matrimonial property as of the date of trial – given the statutory language, and the legislative scheme, of the *MPA*. *This is not a rebuttable presumption but a rule of division.*⁸⁹

[65] Since *Hodgson*, almost all courts have followed the rule that property is to be valued at date of trial. Problems that may arise from the use of this date are resolved with the use of the

⁸⁵ *Supra* note 12 at para. 15.

⁸⁶ *Hodgson*, *supra* note 22.

⁸⁷ *Ibid.* at para. 10.

⁸⁸ *Ibid.* at paras. 2 and 28

⁸⁹ *Ibid.* at para 32 (emphasis added).

section 8 factors.⁹⁰ However, even after *Hodgson*, courts have chafed at the “one size fits all” approach of its judge-made rule and cases still arise that attempt to value property at dates other than the date of trial. Some find rather creative ways around the rule in *Hodgson*. For example, in *Buckler v. Buckler*, the judge states that the date of interest (valuation) must be distinguished from the date of entitlement and orders matrimonial property divided as of the date of a prior child support order.⁹¹

[66] More typically, the Court of Appeal’s characterization of the rule as a “rule of division,”⁹² not a rule of valuation, has led some courts to distinguish the date of valuation from the date of division. When a court seeks to circumvent the *Hodgson* rule, it will value the assets as of date of trial, per *Hodgson*, then divide the assets as of an earlier date. An example of this may be found in *Hughes v. Hughes*, in which, after making a nod to *Hodgson* and valuing all property as of date of trial, the judge divided property equally as of the date of separation.⁹³ The dates of valuation used by the courts when that date was contested are summarized in Figure 12.

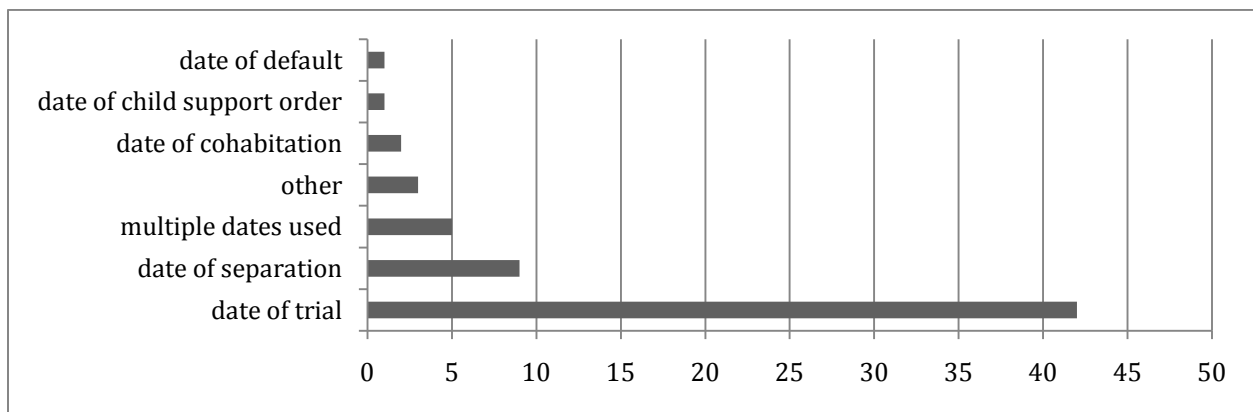


Figure 12: Date of Valuation

⁹⁰ See e.g., *M.A.B. v. R.D.B.*, 2007 ABQB 438 at para. 24.

⁹¹ *Buckler*, *supra* note 13 at para. 6.

⁹² *Hodgson*, *supra* note 22 at para. 32.

⁹³ *Hughes*, *supra* note 21.

[67] The lower courts' resistance to the rule as a rule, rather than a presumption, may indicate a felt need for judges to retain some discretion. This would be in line with the philosophy of the MPA as described 20 years ago by Chief Justice Laycraft in *Dwelle v. Dwelle*:

In Alberta, the legislature has provided a remarkably flexible statute dealing with the division of matrimonial property. Where, in some statutes on this subject in other jurisdictions, the legislature chose to specify firm rules to be followed, the Alberta statute specifies only "that matters to be taken into consideration" (s.8), leaving the interplay of those matters to judicial discretion. Only in s. 7(4), where there is a presumption of equality to be applied in the division of property other than that described in ss. 7(2) and 7(3), did the legislature specify anything approaching a firm rule. *The court must not replace this approach of judicial discretion with the rigid rules which the legislature saw fit to reject.* I would not vary the division of matrimonial property made by the trial judge.⁹⁴

F. What is "property owned by both spouses and by each of them"?

[68] What is "property" for the purposes of the *MPA*? The *MPA* has been touted for the fact that it has not defined property, only specific types of property (s. 1(b) "household goods" and s. 1(c) "matrimonial home").⁹⁵ Otherwise, section 7(1) simply requires that the court "make a distribution between the spouses of *all the property owned* by both spouses and by each of them." As such, it has been said that provision includes real and personal, corporeal and incorporeal, full and partial interests.⁹⁶ The fact of ownership brings the assets within section 7(1).⁹⁷ However, the flexibility inherent in not defining "property" still causes quite a number of disputes about what constitutes property in the context of the *MPA*. The most common problem is that of distinguishing between income and capital. Three examples are employment bonuses, severance packages and stock options

⁹⁴ (1982), 31 R.F.L. 14 (2d) 113 at 127 (Alta.C.A.) (*Dwelle*) (emphasis added). An excellent discussion of the arguments for and against rules in the family law context is that of D.A. Rollie Thompson, "Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative" (2000) 18 Canadian Family Law Quarterly 25.

⁹⁵ See e.g. *Kachur v. Kachur*, 2000 ABQB 709 at para. 24 (*Kachur*).

⁹⁶ *McAlister v. McAlister* (1982), 23 Alta. L. R. (2d) 141, 41 A.R. 277 (Q.B.) at para. 86 (*McAlister*).

⁹⁷ Lown and Bendiak, *supra* note 39 at 388.

[69] The leading case on the characterization of an employment bonus in the context of Alberta's matrimonial property regime is *Gardiner v. Gardiner*,⁹⁸ where it was held that a bonus amounted to income because its amount varied with the performance of the company, because the husband had no control over it, and because the husband had no legally enforceable right to collect it. These three requirements were narrowed in *D.G.M. v. K.M.M.* The bonus in that case, which had not been received but had arguably been partially earned, was one which varied with the performance of the company and the husband has control over it only to the extent that his efforts contributed to company success, but the husband's right to it was legally enforceable.⁹⁹ Nevertheless, the trial judge held the bonus to be income on the basis that payment in exchange for effort is a characteristic of income.¹⁰⁰ This finding was upheld on appeal, but the rule used by the Court of Appeal to resolve the matter was different and much simpler:

Whether or not an employment bonus is income or property depends on whether the bonus has been earned or received prior to separation. Bonuses or unpaid salary earned or received after separation are not family or matrimonial assets that should be shared by both parties. . . .¹⁰¹

If a bonus has been received during marriage and cohabitation, the value of it may be transformed into property if it is used to acquire assets because those assets then become property.¹⁰² However, according to *Miller*, if a bonus is received or earned while the parties are separated, then its value cannot be transformed into property even if it is used to acquire another asset before the date of trial.¹⁰³ This is an oddly inconsistent way to exclude assets from the sharing regime, with its reliance on the date of separation to determine if something is property or income.

⁹⁸ (1996), 191 A.R. 139 (*Gardiner*).

⁹⁹ 2002 ABQB 225.

¹⁰⁰ *Ibid.* at para. 89.

¹⁰¹ *Miller v. Miller*, 2004 ABCA 257 at para. 29 (*Miller*).

¹⁰² *McDonald v. McDonald* (1997), 209 A.R. 178 at para. 15 (C.A.), leave to appeal to S.C.C. denied [1998] S.C.C.A. No. 49.

¹⁰³ *Miller*, *supra* note 101 at para. 30.

[70] As for severance pay, in *MacDonald v. MacDonald*,¹⁰⁴ the Court of Appeal in *obiter* commented that severance packages, bonuses and stock options can be considered matrimonial property, depending on how they are dealt with after they are received. These comments were applied by the Court of Appeal two years later in *Sutton v. Davidson*,¹⁰⁵ when the court addressed the issue of how to treat severance and other payments received by the husband after he was terminated from his employment during the course of the marriage. The husband in *Sutton* had deposited part of his termination payment into a joint account. The Court of Appeal held that, by doing so, he had treated it as joint matrimonial property. The court was satisfied that the trial judge had correctly treated the termination payment as property rather than income, reasoning that: "Income which is saved becomes property. It does not forever remain income. If it is earned and saved within the term of the marriage then it is property subject to distribution."¹⁰⁶ This approach was followed in *Vreim v. Vreim*, where a severance package received one month before separation and rolled into an RRSP was deemed to be property as it was "income saved" and therefore available for distribution.¹⁰⁷ In *Tabata v. Smith*,¹⁰⁸ the judge applied the test set out in *MacDonald* and *Sutton* in also determining that the severance package received by the husband one month before the couple's separation should be dealt with as property. The judge considered how the payment had been treated but also when it had been dealt with by the husband. She held that, when the husband rolled most of the severance payment into an RRSP, it effectively became property for the purposes of matrimonial property distribution.¹⁰⁹ However, in both *Vreim* and *Tabata* the judge divided the severance package unequally in favour of the husbands, based on section 8 factors.

¹⁰⁴ *Supra* note 102 at para. 17.

¹⁰⁵ 1999 ABCA 280, (1999), 244 A.R. 126, 1999 ABCA 280 (*Sutton*).

¹⁰⁶ *Ibid* at para. 30.

¹⁰⁷ *Vreim v. Vreim*, 2000 ABQB 291 at para. 33 (*Vreim*).

¹⁰⁸ 2001 ABQB 776 (*Tabata*).

¹⁰⁹ *Ibid*.

[71] The approach to severance packages seems more consistent with the analytical framework of the *MPA*. According to the case law, employment bonuses are property or not depending on when they are received or earned, and severance packages are property or not depending on how the payment had been dealt with by its recipient. Neither approach is a conceptual one and neither appears to pay much attention to attributes that distinguish property (or capital) from income. These two examples also show the allure of the date of separation as a date for valuation and division of assets.

[72] The treatment of stock options appears to be somewhat similar to that of severance packages. In *R.G. v. M.G.*,¹¹⁰ the husband argued that stock options issued to him after the date of separation should be characterized as income. However, the court noted that stock options, when considered in the context of matrimonial property division, have generally been considered to be property. In *Gardiner v. Gardiner*,¹¹¹ options, both vested and unvested, were held to be property. In *Roberts v. Roberts*,¹¹² options that had been granted prior to separation but which benefited from a stock split after separation were found to be property. In *Roberts*, the test was said to be dependent on the status of the option and the optioned shares at the time an application for support or a matrimonial property order was made and the nature of the relief sought by the applicant. As a result, in *R.G. v. M. G.*, the court held that stock options acquired while the parties were living separate and apart were property:

The options are *choses in action*, giving Mr. G. a contingent right to acquire shares in C. Corporation in the future. While they can be characterized as income in a certain context, as they formed part of Mr. G.'s compensation package and in that sense, may have resulted in lower cash wages, the timing of this determination as to their status ensures that the problem of "double-dipping" can be avoided if and when the options are exercised and the underlying shares sold.¹¹³

¹¹⁰ *R.G. v. M.G.*, *supra* note 30.

¹¹¹ *Supra* note 98.

¹¹² 1999 ABQB 944 (CanLII), [1999] A.J. No. 1445, 1999 ABQB 94 (*Roberts*).

¹¹³ *Supra* note 98 at para 54.

The fact the options were acquired after separation was then considered under section 7(4) and section 8(f) in determining if an equal distribution was just and equitable. The approach in these cases, with reliance on the status of stock options as choses in action and the talk of contingent rights, is more conceptual than was the analysis of employment bonuses and severance packages. There appears to be a great deal of inconsistency in how courts decide whether something is property or not.

[73] None of the Alberta approaches to the “what is property?” issue are as functional or purposeful as that used in Ontario. Ontario’s *Family Law Act* defines property as “any interest, present or future, vested or contingent, in real or personal property.”¹¹⁴ This definition has been considered in the Ontario Court of Appeal decision in *Lowe v. Lowe*.¹¹⁵ Sharpe J.A. agreed with the approach to interpreting the term “property” taken in *Pallister v. Pallister*, where the court acknowledged the all-encompassing nature of the definition of property under the Ontario legislation, but pointed out that because “property in law is simply a right or a collection of rights” identified by “no single criterion, or even a discrete number of criteria,” interpretation is required to appropriately limit the category of property to achieve the purpose and object of the legislation as a whole.¹¹⁶ *Pallister* suggested that if the definition of the right as property either is not consistent with the scheme of the legislation or does not advance its objects, then it should not be defined as property unless the right under consideration falls within a category that previously has been legally recognized as property:¹¹⁷

If the legislature wishes to employ a broad definition of property and at the same time exclude recognized classes of property from that definition, then obviously it must expressly provide for their exclusion. But the legislature cannot be expected to exclude assets from that broad definition if those assets have not been hitherto

¹¹⁴ *Supra* note 46, s. 4. In *Horne*, *supra* note 1 at para. 98, the court relied in part upon the definition of property in the Ontario legislation to hold that a contingent residual interest in a testamentary trust was property under the *MPA*.

¹¹⁵ 2006 CanLII 804 (ON C.A.), (2006) 78 O.R. (3d) 760 at para. 12 (C.A.).

¹¹⁶ (1990) 29 R.F.L. (3d) 395 at 404- 405 (Gen. Div.).

¹¹⁷ *Ibid* at 406.

classified as property. It must rather rely upon the courts to insure that the broad definition employed is kept within the bounds of the scope of the Act.

G. Income producing assets

[74] Income-producing assets, such as interests in corporations, farms and ranches, and pensions and RRSPs appear to cause particular problems. Corporations raise issues as to whether or not they are property to be included in the statutory regime. Corporations, pensions, RRSPs and agricultural enterprises raise issues about how to value them. Corporations, pensions and agricultural operations also raise distribution issues, including questions about the distribution of income-producing assets to one spouse and depreciating assets to the other as part of *in specie* distributions. They can also raise issues of so-called “double-dipping” given the frequent interaction between matrimonial property and support orders. We have therefore separated these three types of assets out for a review of the issues they have raised in the case law.

1. Corporations

[75] Courts evince very little reluctance to “pierce the corporate veil” in *MPA* actions.¹¹⁸ If the corporation is owned and controlled by one spouse only, then the tendency appears to be to take the corporate assets and, to a lesser extent, its liabilities directly into the matrimonial property regime, just as if the corporation did not exist and the business was operated as a sole proprietorship. In most instances it appears that the corporation is not even joined as a party.¹¹⁹ The corporate assets, and not the corporate shares, are treated as though they were the

¹¹⁸ See e.g., *Corbeill*, *supra* note 14; *McKenzie v. McKenzie*, 2005 ABQB 232 (*McKenzie*); *Carmichael v. Carmichael* 2007 ABCA 3 (*Carmichael*); *Carlson v. Carlson*, 2007 ABQB 5 (*Carlson*).

¹¹⁹ One of these exceptions is *Barrett v. Barrett*, 2004 ABQB 508, a case in which inherited farm land was rolled over into a company and that company was joined as a party. The court discussed whether or not to lift the corporate veil and decided to do so because the husband used the company “capriciously and irresponsibly to attempt to defeat the rights of Ms. Barrett and maintain control of family assets”: *ibid.* at para. 45. Another is *L.M.B. v. I.J.B.*, 2002 ABQB 1046, in which the husband’s professional corporation was included as a party, although the asset valued was the husband’s shares in his professional corporation and not assets of the corporation itself.

property of the spouse. This approach has been said to conflate income with capital, but the Court of Appeal has sanctioned this approach as “common sense.”¹²⁰ There is very little use of law in this area; the cases we have referred to in this section rarely cite authority.

[76] As indicated, it is when the corporation is a one man or one woman operation that the courts are most likely to ignore the existence of the legal entity. The fact they are doing so is sometimes not even remarked upon. Sometimes it is said to be factually impossible to distinguish the corporation and the spouse.¹²¹ An example of a case in which some justification was offered is *Carlson v. Carlson*, where the court stated that the corporation in that case was “nothing more than a vehicle whereby Mr. Carlson earned his consulting income and had little in the way of other assets.” In other cases, judges follow more familiar guidelines for lifting the corporate veil. For example, in *Barrett v. Barrett*, the judge stated that when corporate devices are used to defeat claims by other parties, the corporate veil may be lifted.¹²²

[77] There is some resistance to this conflation on the basis of principle. In *Tycholis v. Teem Energy Ltd.*, for example, the Court of Appeal set out “some fundamental legal principles” which it said the *MPA* does not override, including the principles that a corporation is a separate legal person from its shareholders and the shareholders of a corporation do not directly own the assets of the corporation.¹²³ In *Placsko v. Placsko*, a case where there was no other shareholder and the court action had proceeded on the basis the husband and his corporation were one and the same, the court nonetheless refused to treat them as such:

In dealing with the matrimonial property, one cannot take company assets or liabilities and treat them as if they are separate or personal. Company assets and liabilities have to be looked at in the context of a snapshot of the company at one particular time, to ascertain the value of the company.¹²⁴

¹²⁰ *Corbeil supra* note 14 at para. 23.

¹²¹ *Meyer v. Meyer*, 2006 ABQB 112 at para. 18 (*Meyer*).

¹²² *Supra* note 119 at paras. 44-45.

¹²³ 2007 ABCA 219 at para. 26 .

¹²⁴ *Placsko v. Placsko*, 2004 ABQB 410 at para. 23 (*Placsko*).

[78] The valuation and distribution of corporate assets also continues to be a difficult point for the courts. There are many ways to value a business, such as a book value approach, an asset-based approach, a past earnings approach, a capitalization of income approach, a retained earnings approach or some type of market valuation. In general, courts appear to review the different valuation methods offered by each party, then choose between them before determining the valuation of the corporation.

[79] Certain aspects of valuation appear to be particularly troublesome. The main issue is often one of taxes, with the controversy centering on how much to discount the value of corporate assets due to the tax consequences of a future sale.¹²⁵ Goodwill is also a difficult issue. For example, in *Panara*, the restaurant at issue was divided between the parties except for the value attached to goodwill, which had been established before the marriage and which was given solely to the husband.¹²⁶ In *Panara*, the Court of Appeal relied upon two Ontario decisions. *Taylor v. Taylor* distinguished between personal and commercial goodwill:

Personal goodwill is that which is attached to the individual owner and consequently is non-transferable, nor is it shown in the books of a company. It cannot be valued. Commercial goodwill is that goodwill which is found within a business (name identification or brand recognition would be so classified). This goodwill is reflected in the balance of a company.¹²⁷

Clegg v. Clegg further defined personal goodwill:

While the personal goodwill, that is, the goodwill that attaches only to the owner, is of no value to the purchaser because it cannot be transferred, individual goodwill is of value. Individual goodwill consists of such things as the contacts, relationships and know-how put in place by the owner that can be replaced by another individual, given an orderly transition if the owner who is selling is not competing in the same market place at the same time.¹²⁸

¹²⁵ See e.g., *Meyer*, *supra* note 121 at para. 20.

¹²⁶ *Supra* note 20.

¹²⁷ [2001] O.T.C. Uned. 243, O.J. No. 835 at para. 91 (S.C.).

¹²⁸ 2000 CanLII 22636 (ON S.C.), (2000), 188 D.L.R. (4th) 365 at para. 19 (Ont. S.C.J.), *aff'd* 2001 CanLII 32740 (ON C.A.), (2001), 202 D.L.R. (4th) 300 (Ont. C.A.),

Distinguishing between the two types of goodwill and refusing to take personal goodwill into the matrimonial property regime appears to be the Alberta courts' general approach to the issue of goodwill.¹²⁹

[80] So-called "double-dipping" can also be an issue with income-producing assets, as illustrated by the Court of Appeal decision in *Ravoy v. Ravoy*.¹³⁰ In that case it was argued that, because the family business was accounted for in the property division, treating the husband's income from that business as available to pay support amounted to double-dipping. The Court of Appeal noted that it had previously determined that a source of income can be an asset for one purpose and income for another.¹³¹ The problem mainly arises, the court noted, when a future income stream is the basis of valuation of the business.¹³² In any event, a court has an overriding discretion under the *Divorce Act* to "double-dip" if there is need: *Boston v. Boston*.¹³³

[81] Distribution is a third problem with corporate assets, and considerations such as tax consequences and method of distribution are debated in discussions about how to adjust the property or value of property held by each spouse. Judges are often quite creative in their approach, taking full advantage of the variety of powers available to them under section 9. See, for example, *D.B.C. v. R.M.W.*, in which the judge ordered that the husband hold corporate shares in trust for the wife,¹³⁴ and *Gardner v. Gardner*, where the judge ordered both *in specie* distribution and distribution at market value to limit the tax consequences of the transaction.¹³⁵

¹²⁹ See also *Placsko*, *supra* note 124 at para. 24; *McKenzie*, *supra* note 118 at para. 24.

¹³⁰ 2002 ABCA 6 (*Ravoy*).

¹³¹ *Ibid.* at para 14, citing *MacDonald v. MacDonald*, [1998] 6 W.W.R. 86 (Alta. C.A.); leave to appeal dismissed, [1998] S.C.C.A. No. 49 (Q.L.).

¹³² *Ravoy*, *ibid.*

¹³³ 2001 SCC 43, (2001) 201 D.L.R. (4th) 1.

¹³⁴ 2004 ABQB 954 at para. 76.

¹³⁵ 2008 ABQB 527 at para. 11 (*Gardner*).

[82] One of the more serious problems in this area seems to be the one that is also prominent in the distribution of agricultural operations. For example, in *Bodor v. Bodor*, the court ordered an unequal distribution in favour of the husband because it would be inappropriate to liquidate or sell the company because it was the source of the livelihood for the husband and his son who was employed by the company.¹³⁶ The need or desire to ensure the continuation of a financially viable corporate (or agricultural) operation sometimes results in an unequal division of property, although the section 8 factor that is used to justify the unequal division is not always noted.

2. Pensions

[83] The main issues arising in connection with pensions concern their division and method of distribution. It is settled law that pension benefits which accrue to spouses during a marriage are property.¹³⁷ ALRI has twice delved into the issue of pension division on marriage breakdown. In 1986, ALRI issued Report 48, *Matrimonial Property: Division of Pension Benefits upon Marriage Breakdown*. The recommendations in Report 48 were reviewed in ALRI's 1995 Consultation Memorandum, *Division of Pension Benefits upon Marriage Breakdown*. The Manitoba Law Reform Commission is currently carrying out research with respect to the division of pension benefits between divorced spouses in Manitoba.¹³⁸ The Commission is considering the method currently used for the division of pension benefits in a defined benefit plan and whether other methods of pension division may be more equitable. The Commission is also examining issues related to survivor's benefit entitlements following divorce. Perhaps the most important thing to note here is that our case law review confirms that pensions are still contentious

¹³⁶ 1988] A.J. No. 147 (Alta Q.B.) (*Bodor*).

¹³⁷ See e.g. *Burns Estate*, 2007 ABQB 730;

¹³⁸ Manitoba Law Reform Commission, *supra* note 25.

[84] After the ruling in *McAlister v. McAlister*,¹³⁹ the division of pensions has generally followed what is now known as the *McAlister* formula or *McAlister* order.¹⁴⁰ In a *McAlister* order, each party receives out of pension benefits when realized an amount equal to half the value of the pension multiplied by the ratio represented by years of service during marriage divided by total years of service.¹⁴¹ This is a type of *in specie* distribution. However, within this “formula,” the thorniest problem is the valuation of the pension, including issues such as whether or not to include post-distribution changes in the valuation.

[85] The appropriate amount of time to include as years of service during marriage has also been subject to some debate, although generally the date of valuation and division is the date of trial, per *Hodgson*.¹⁴² There are exceptions, however. For example, in *Buckler v. Buckler*, both parties requested an earlier division date, and the judge distinguished date of valuation, using the rule in *Hodgson*, from date of division in awarding the wife a share in her former husband’s pension.¹⁴³

[86] The issue of the inclusion of pension accrued before the date of marriage by a cohabitating couple has arisen quite often, again affecting the length of time element. This may be a common issue because some pensions are shared by cohabiting spouses under the rules of different legislative regimes. Although earlier cases exempted the amount accrued before marriage,¹⁴⁴ the trend more recently has been to include this time period for purposes of division.¹⁴⁵

¹³⁹ *Supra* note 96.

¹⁴⁰ See e.g., *Johnston v. Johnston*, 2005 ABQB 320 (*Johnston*).

¹⁴¹ See e.g., *Tabata*, *supra* note 108 at para. 33; *Hornby v. Hornby*, 2007 ABQB 464 at para 95 (*Hornby*).

¹⁴² *Supra* note 22.

¹⁴³ *Buckler*, *supra* note 13 at para. 6.

¹⁴⁴ See e.g., *Bzdziuch v. Bzdziuch* 2001 ABQB 306 at para. 63 (*Bzdziuch*).

¹⁴⁵ See e.g., *Hughes*, *supra* note 21 at para. 25.

[87] There are a number of different ways that distribution of a pension can be achieved and they have been canvassed in ALRI's 1995 Consultation Memorandum, *Division of Pension Benefits upon Marriage Breakdown*. Most of these methods — valuation and accounting, valuation and division, the provision of a separate pension and the division of proceeds by the pension administrator — have been used in the past ten years. Payment of an appropriate share of the member's pension by the pension plan administrator to the non-member spouse as and when the pension is paid to the member spouse appears to be the most popular method of distribution.

3. RRSPs

[88] The most common issues related to Registered Retirement Savings Plans (RRSPs) are valuation issues and there are two.¹⁴⁶ The first has to do with discounting the value of RRSPs for the tax liability attached to their withdrawal. The second has to do with the date of their valuation.

[89] The value of RRSPs is typically adjusted for taxes. As was noted in *Beaudry v. Beaudry*, for example, it is common practice to adjust RRSP amounts in matrimonial cases by a factor of 25 percent.¹⁴⁷ RRSPs were reduced by a notional tax of only 20% in *S.I.B. v. M.D.B.*¹⁴⁸ Tax is not always deducted from the value of RRSPs. In reviewing a lower court decision that did not deduct taxes, the Court of Appeal in *Corbeil v. Corbeil* stated:

¹⁴⁶ RRSPs are also often cashed to pay for living expenses after separation and attract charges of dissipation, but the issues are discussed under dissipation because dissipation of RRSPs is dealt with the same as dissipation of other assets.

¹⁴⁷ 2010 ABQB 119 at para. 98 (*Beaudry*).

¹⁴⁸ 2006 ABQB 557 at para. 13.

Regarding the RRSPs, the husband argues that the trial judge erred in failing to discount the value of funds held as RRSPs to adjust for tax implications. . . . He argues that RRSP assets should be significantly discounted to a reduced after-tax cash value as at the date of division. This method of valuing RRSP funds at trial on their after tax value is not uncommon.

The valuation of an RRSP is a difficult issue. For instance, if the holder of the fund is young, and there is no need, or plan, to cash the fund early, the ability to appreciate assets within an RRSP has its own value. That is because an RRSP can earn income for many years without attracting tax on that income. In such a case, the taxable nature of the asset upon receipt may be outweighed by the benefit of deferring tax. On the other hand, where conversion of the fund is anticipated in the near future, discount for tax is important for valuation purposes.

No evidence indicated conversion of the fund to cash in the near future. Nor was there expert evidence as to the value of funds within the RRSP if retained for several years. Moreover, the wife received part of her share of the assets by way of her business, which could also attract tax at some point. Again, there was no expert evidence on these issues. Thus, I cannot say that, in all of the circumstances, the trial judge erred by failing to discount the RRSP funds. Viewing the distribution, the refusal of spousal support, and the whole of the decision on a global basis, I would not interfere.¹⁴⁹

[90] With respect to date of valuation, the date is sometimes moved up to the date of separation to avoid the effects of dissipation after separation.¹⁵⁰ In *Metz v. Metz*, for example, the RRSPs were valued as of a specific date in order to avoid adjusting for heavy spending personal expenses, especially legal fees to pay for the trial which had occurred after that date.¹⁵¹

4. Agricultural operations

[91] A third area of difficulty for the court is with farming and ranching enterprises. Agricultural property does not fit easily within the *MPA* and its analytical framework because it often involves property gifted from parents to children and property that has been held in a family for more than a generation. The approach taken by the analytical framework, which is to sum assets and divide based on a percentage, assumes that all property is commensurable and

¹⁴⁹ *Supra* note 14 at paras. 24-26.

¹⁵⁰ See e.g., *Kowalski v. Kowlaski*, 2002 ABQB 921 (*Kowalski*).

¹⁵¹ 2004 ABQB 528 at para. 49 (*Metz*).

fungible. Agricultural operations can be an essential component of personal and family identity (as can many matrimonial homes and businesses) and valued for more than economic reasons.¹⁵² While a corporate valuation can include a separate valuation for goodwill — which is usually distributed exclusively to the owner — no similar type of valuation exists for farm or ranch land. These types of issues were in the forefront in two recent Court of Appeal decision: *Jensen*,¹⁵³ which reversed the lower court's decision in *D.R.J. v. M.J.*,¹⁵⁴ and *Klinck v. Klinck*.¹⁵⁵

[92] In contrast to corporate assets, because farm and ranch land tends to be both income-producing and homes, it creates even more distribution difficulties for the courts.¹⁵⁶ The size of the agricultural operation can affect its ability to produce income and arguments are therefore sometimes made about farm or ranch viability. Even if a division of the agricultural property does not adversely affect the survival of the enterprise, it will most likely result in decreased revenue.

[93] The desire to keep agricultural land together to promote its viability typically leads to either an unequal distribution of the matrimonial property or delayed distributions.¹⁵⁷ Farm viability was often used as a factor under section 8(m) to justify an unequal distribution of matrimonial property in the early years of the MPA. For example, in *Millhaem v. Millhaem*, the court held:

The continued financial well-being of both parties obviously requires on-going financial capability on the part of the husband. I do not believe that it would be in the best interests of either party for me to impose a property division which would

¹⁵² See e.g. *Klinck*, *supra* note 27 at para. 11 where the husband appealed the distribution order granted at trial by arguing that the farm lands had been in his family for over 100 years.

¹⁵³ *Supra* note 4.

¹⁵⁴ *Supra* note 41.

¹⁵⁵ *Supra* note 27.

¹⁵⁶ See e.g. *Allaster-Hunsperger v. Hunsperger*, 2001 ABQB 296 at para. 20; *K.L.S. v. T.E.S.*, 2004 ABQB 728 at para. 10.

¹⁵⁷ See M. Jean Torrens, "Farm Viability in the Context of Matrimonial Property Disputes" (1993) 57 Saskatchewan Law Review 493. For an Alberta example of delayed distribution, see *Allaster-Hunsperger v. Hunsperger*, *ibid.* at para. 20.

have the effect of ending or at least seriously affecting the viability of the ranching operation.¹⁵⁸

[94] We note that Ontario's *Family Law Act* takes account of business and farm viability by providing that:

An order made under section 9 or 10 shall not be made so as to require or result in the sale of an operating business or farm so as to seriously impair its operation, unless there is no reasonable alternative method of satisfying the award.¹⁵⁹

[95] The division of agricultural property also continues to raise gender issues, much as it did in the (in)famous *Murdoch v. Murdoch* case which served as an impetus for matrimonial property legislation.¹⁶⁰ According to Statistics Canada, the percentage of Alberta farms where the primary operator was a man was 70% in 2006, compared to 30% where the primary operator was a woman.¹⁶¹ In almost all of the cases involving agricultural land that was gifted to a spouse by a parent, the spouse who inherited or was gifted the farm or ranch was the husband.¹⁶² Arguments about agricultural viability therefore tend to be arguments in favour of husbands retaining income-producing assets at the expense of their wives, who tend to be awarded depreciating assets.

¹⁵⁸ (1981), 32 A.R. 157 • 24 R.F.L. (2d) 44 • 16 Alta. L.R. (2d) 355. See also *McCulloch v. McCulloch*, 1997 CarswellAlta. 360 (Alta. Q.B.) at para 55.

¹⁵⁹ *Supra* note 46, s. 11(1).

¹⁶⁰ *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423. While *Murdoch* has been credited with galvanizing the movement for family law reform, a recent article argues that it did not rise to the level of agency credited to it: see Mysty S. Clapton, "Murdoch v. Murdoch: The Organizing Narrative of Matrimonial Property Law Reform" (2008) 20 Canadian Journal of Women and Law 197 at 198.

¹⁶¹ Statistics Canada, *Farm Operators by Sex and Age, by Province (2001 and 2006 Census)*, online: <http://www40.statcan.gc.ca/cst01/AGRC18A-eng.htm>. The most extensive datasets and analyses of gender in agriculture in the developed country world are for Canada: see Mary Clare Ahearn and Diana Tempelman, Gender Issues in Agricultural and Rural Household Well-Being, Presentation at the Third Global Conference on Agricultural and Rural Household Statistics, 24-25 May 2010, Washington, D.C. , at 7, online: http://typo3.fao.org/fileadmin/templates/ess/pages/rural/wye_city_group/2010/May/WYE_2010.4.2_Ahearn_Tempelman_rev.pdf.

¹⁶² *Jensen*, *supra* note 4; *Barnett*, *supra* note 119; *Allaster-Hunsperger v. Hunsperger*, *supra* note 156; and *Klinck*, *supra* note 27. The wife was gifted a portion of farm land because of the donee's relationship to her parents in *Milne v. Milne*, 2009 ABQB 361 (*Milne*).

H. Debts

[96] It is often said that debt is not mentioned in the *MPA*.¹⁶³ Lawyers have therefore argued, even quite recently, that debt should be excluded from consideration in the division of assets.¹⁶⁴ Nevertheless, the inclusion of debt — or at least some debts — seems to have been settled by the 2003 Court of Appeal decision in *Kazmierczak*, when the court defined unpaid debt as “assets lost”¹⁶⁵ and used them to determine the net value of the assets. However, even in *Kazmierczak*, not all debt is “matrimonial debt,” i.e., debt that is included in the matrimonial property regime. Although its approach to debt was expressly fact-specific in *Kazmierczak v. Kazmierczak*, the Court of Appeal decision does set out its approach:

We treat a debt charged against an asset and incurred to acquire or improve that same asset as a deduction from that asset’s value. And had there been any debts shown to have been incurred during marriage before separation for family purposes and still existing, we would have apportioned them between the parties.¹⁶⁶

[97] The Court of Appeal considered these points from *Kazmierczak v. Kazmierczak* in its 2006 decision in *Abbott v. Abbott*.¹⁶⁷ The latter case summarized matrimonial debt and its treatment by stating:

Matrimonial debt is generally understood to be that debt which is incurred during a marriage. To the extent that the debt relates to s. 7(4) property, acquired during the marriage, the presumption is a 50 per cent division of the net equity of the property. However, the apportionment of non-exempt s. 7(2) property contains no such presumptions, and is a matter of judicial discretion, factoring in those items outlined in s. 8.

[98] Despite these Court of Appeal statements (or perhaps because of them), the lower courts have referred to a variety of “rules” for dealing with post-separation debt. In a passage

¹⁶³ See e.g. *Busenius*, *supra* note 31 at para. 26.

¹⁶⁴ See e.g., *Dhala v. Dhala* 2008 ABCA 259 at para. 18 (*Dhala*).

¹⁶⁵ *Supra* note 18 at para. 61

¹⁶⁶ *Ibid.* at para. 58.

¹⁶⁷ 2006 ABCA 204 (*Abbott*).

that has been cited several times, the Court of Queen's Bench in *Busenius v. Busenius* summarizes what is "usual" and "common practice" in this area:

The *Matrimonial Property Act* speaks in terms of assets in ss. 7 and 8. There is no mention of debt. However, there is no doubt that matrimonial property in actions invariably focus not just upon assets but also upon debts incurred in relation to those assets. As well, it is usual for a matrimonial property award to account for any debt that the parties expressly or implicitly agreed to incur while married. Finally, it is common place for courts to make matrimonial property orders that encompass debts incurred after separation where appropriate.¹⁶⁸

As another example, in *McAdam v. McAdam*, it was said that "[d]ebt incurred by the parties, or either of them, during the course of the marriage creates a rebuttable presumption that it is a marital debt and must be factored into the division of property."¹⁶⁹ In *E.S. v. J.S.S.*, it was said that matrimonial debts must be valued at the date of trial because it was a rule that matrimonial property must be valued at the date of trial, thus including those debts incurred post-separation.¹⁷⁰

[99] The Court of Appeal in *Kazmierczak* also discussed this particularly problematic type of debt, that is, debt incurred while the spouses are living separate and apart:

But we otherwise leave debts on the shoulders of the party who now owes them. In no case did the other spouse have any fault or say in incurring the debt, nor any enjoyment of the accompanying consumption or loan advance. . . .

We have been shown no authority which compels a different treatment of post-separation debts on this record.¹⁷¹

In *Abbott v. Abbott*,¹⁷² the wife argued that *Kazmierczak v. Kazmierczak* stood for the proposition that debt incurred after separation of the parties is not to be distributed between spouses when a distribution of property is made under the *MPA*. The Court of Appeal disagreed, stating the "*Kazmierczak* does not stand for such a broad proposition and is largely

¹⁶⁸ *Supra* note 31 at para. 26, relied upon by *Marler v. Marler*, 2007 ABQB 429 at para. 160 (*Marler*).

¹⁶⁹ *Supra* note 30 at para. 57.

¹⁷⁰ 2007 ABQB 321 at para. 26. See also, to the same effect, *Horne*, *supra* note 1 at para. 30.

¹⁷¹ *Supra* note 18 at paras. 59-60.

¹⁷² *Supra* note 167.

fact driven.”¹⁷³ They reaffirmed that the distribution of matrimonial property remains in the discretion of the trial judge under section 8, including section 8(d) which mentions the liabilities of the parties. Nevertheless, courts often state that post-separation debts are the responsibility of those who incur them. It is said, for example, that these debts reflect the parties’ individual lifestyle choices since the separation.¹⁷⁴

[100] No other type of debt is as controversial as that incurred while the parties were living separate and apart, but some types of debts attract their own set of rules. The deduction of legal fees, for example, has been recognized as inappropriate since the 1993 Court of Appeal decision *Rosario v. Rosario*.¹⁷⁵ It is thought that to allow deduction of legal fees would invite disproportionate legal expenditures and maneuvering.¹⁷⁶

[101] In summary, the area of debt is notable for the number and variety of rules and presumptions that have been fashioned by the courts.

I. Relationship of the *MPA* to other legislation

1. The *Bankruptcy and Insolvency Act*

[102] The most problematic interaction between the *MPA* and another statute appears to be the *MPA*’s relationship with the federal *Bankruptcy and Insolvency Act*.¹⁷⁷ The interest that raises the difficult issues is the claim of one spouse under the *MPA*. Is it “property” under the

¹⁷³ *Ibid.* at para. 12.

¹⁷⁴ See e.g. *Bezuko v. Supruniuk*, 2007 ABQB 204 at para. 82 (*Bezuko*).

¹⁷⁵ 1993 ABCA 14715 (*Rosario*). See also *Rooney v. Wingham*, 2007 ABCA at para 40.

¹⁷⁶ *D.B.C. v. R.M.W.*, *supra* note 134 at para. 107.

¹⁷⁷ R.S.A. 1985, c. B-3 (*BIA*). The *BIA* defines property in s. 2:

“Property” means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incidental to property.

BIA? The 2003 decision of Ritter J.A. in *Tinant v. Tinant* appears to have answered this question by stating that “pursuit or defence of an order, even though discretionary, which relates to property, is a legal proceeding relating to property and is, by virtue of s. 30(1)(d) of the *BIA*, within the exclusive capacity of the trustee.”¹⁷⁸ The fact there was an assignment by the trustee of the right to appeal was irrelevant.

[103] Ritter J.A. discussed whether or not matrimonial property litigation enjoys a special exemption which permits a bankrupt to commence or carry on with litigation in his or her own name in some detail because two Court of Queen’s Bench decisions had come to exactly that conclusion: *Deloitte, Haskins & Sells Ltd. v. Graham*¹⁷⁹ and *Dinapoli v. Yeung*.¹⁸⁰ In the former case, McDonald J. concluded that the definition of property in the *BIA* did not include a claim under the *MPA* because a claim for division of matrimonial property was merely an application to the Court, asking the Court to exercise its discretion in dividing the property. Ritter J.A. acknowledged that the court enjoys a discretion under the *MPA* as to how it distributes the property, but noted that courts often enjoy discretions relating to remedies, especially where equitable principles are factors to be applied. Nonetheless, he concluded “[t]hat does not mean, however, that wherever equitable principles come into play that which is being sought or granted no longer relates to property but to an equitable order.”¹⁸¹

[104] *LeCerf v. LeCerf* followed *Tinant* in holding that a claim for division of matrimonial property is indeed “property.”¹⁸² In *Kopr v. Kopr*, Slatter J. (as he then was) distinguished between the right to a division of matrimonial property while the couple is still cohabiting, which he categorized as an inchoate right that does not form “property” and the claim for division of

¹⁷⁸ 2003 ABCA 211 at para. 21 (*Tinant*). *Tinant* involved an application by a husband to restore his appeal of the Court of Queen’s Bench decision in his matrimonial property action to the general appeal list.

¹⁷⁹ (1983), 42 A.R. 76, 144 D.L.R. (3d) 539 (Q.B.) (*Graham*).

¹⁸⁰ 2002 ABQB 714 (CanLII), [2003] 3 W.W.R. 714, 2002 ABQB 714 (*Dinapoli*).

¹⁸¹ *Tinant*, *supra* note 178 at para. 18.

¹⁸² 2004 ABQB 50, 33 Alta. L.R. (4th) 151, 378 A.R. 69 (*LeCerf*).

matrimonial property once a couple separates, which he classified as a contingent right that did form “property.”¹⁸³

[105] Despite the change in direction after *Tinant*, issues remain. In *Lecerf*, the trial judge concluded that a property settlement did not fit under the definition of settlement under the *BIA* because it had been entered into after the bankruptcy.¹⁸⁴ As well, the creditor status of the non-bankrupt spouse remains controversial. In *Re Coulthard (Bankrupt)*, the spouse was given the status of secured creditor even though the *MPA* court order did not state that she enjoyed that status, but one gets the impression that the issue could easily have been decided the other way.¹⁸⁵ In *Breidfjord v. Breidfjord*, a husband was not able to enforce a settlement order following the discharge of his ex-wife from bankruptcy. The judge ruled that the settlement order did not fit under the exceptions to an order of discharge under the *BIA*.¹⁸⁶

2. The Civil Enforcement Act

[106] The issue in the relationship of the *MPA* to the *CEA* is one of priority and timing. In *Maroukis*,¹⁸⁷ the leading case, the question concerned when specific property vests in the spouse to whom it is allocated by a matrimonial property order. The Supreme Court held that specific matrimonial property does not vest until the court order is made and there is no authority for an order that retroactively vests property in a spouse. Thus an execution creditor of the husband, who filed a writ of execution after the separation of the couple who were joint tenants in the matrimonial home but before the court order distributing the matrimonial home to the wife, took priority.

¹⁸³ 2006 ABQB 405 at para. 11 (*Kopr*).

¹⁸⁴ *Lecerf*, *supra* note 182 at para. 58.

¹⁸⁵ 2003 ABQB 976 at para. 30 (*Re Coulthard*).

¹⁸⁶ 2004 ABQB 295 at para. 10.

¹⁸⁷ *Supra* note 17.

[107] *Maroukis* was applied in *Nelson v. Nelson*,¹⁸⁸ a case quoting liberally from Robert A. Klotz's *Bankruptcy, Insolvency and Family Law*.¹⁸⁹ Klotz writes that timing is crucial because the matrimonial property remedies only apply to the spouses' property at the time of making the order. Once a spouse is bankrupt or an unsecured creditor's remedy attaches, the property is no longer the debtor's and it can no longer be distributed to the other spouse. Klotz goes on to note, however, that there is an exception to this general rule because equitable doctrines allow the solvent spouse to establish "supervening equities over the property."¹⁹⁰ Klotz reviews the fundamental incompatibility between the separation of property scheme that governs prior to marriage breakdown, which third party creditors rely upon, and the deferred sharing scheme of matrimonial property legislation and he reviews the considerations favouring spousal priority and those favouring creditor priority.

[108] Klotz's notion that equitable doctrines might allow the solvent spouse to establish "supervening equities over the encumbered property" was applied in *Nelson v. Nelson* to the extent that the court invited a renewed application on the basis of constructive trust as a possible exception to the court's inability to retroactively vest property in the name of the solvent spouse.¹⁹¹ Another application of the idea of this exception is found in *Bjornson v. Schacher*,¹⁹² where the wife sought a declaration of resulting or constructive trust so that the Canada Revenue Agency's enforcement proceedings against the husband would only attach a one-half interest in the matrimonial home. The court did not decide whether a trust in these circumstances can or should be declared to take retroactive effect so as to defeat the rights of

¹⁸⁸ 2001 ABQB 732 (*Nelson*).

¹⁸⁹ Robert A. Klotz, *Bankruptcy, Insolvency and Family Law*, 2nd ed. (Toronto: Carswell, 2001) at 4-18 to 4-25.

¹⁹⁰ *Ibid.* at 4-18.

¹⁹¹ *Supra* note 188 at paras. 37, 40, 47.

¹⁹² 2009 ABQB 84

creditors having registered writs because there was not enough evidence to support either trust, but it did indicate some skepticism.¹⁹³

[109] Finally, and as was remarked upon in *Nelson v. Nelson*,¹⁹⁴ section 35 of the MPA allows a spouse to register a certificate of *lis pendens* against the other spouse's title and interest in real property, allowing the spouse to have priority over subsequently filed interests, but there is no similar provision for registering a potential matrimonial property interest against the personal property of the other spouse.

3. The *Divorce Act* and other support orders

[110] Although the relationship between the *MPA* and the *Divorce Act* in general, and spousal and child support in particular, is uncontroversial, retroactive lump sum support for a spouse or children is still an issue, as is the question of setting off arrears against adjusting or equalizing payments ordered under the *MPA*. The first sub-issue does not concern the non-payment of arrears; instead it is about the enforceability and quantification of support that was not claimed when it was supposedly due. Awards of support in such circumstances are termed "retroactive awards" because they involve enforcing past obligations, not ensuring prospective support. As Slatter J. (as he then was) put it in the lower court decision in *Kazmierczak*, "the question is whether, and to what extent, the inchoate right to child and spousal support can be "banked" or "capitalized" and then brought into the matrimonial property equation"¹⁹⁵

[111] As mentioned in Part III, the Court of Appeal decision in *Corbeil v. Corbeil* dealt with the issue of retroactive spousal support. The parties were married in 1973 and separated in 1992 and the wife's claim for a divorce, spousal support and a matrimonial property order were heard

¹⁹³ *Ibid* at 20 and 29.

¹⁹⁴ *Supra* note 188 at para. 36.

¹⁹⁵ *Supra* note 10 at para. 76.

in 1999. The Court of Appeal noted that spousal support orders made after or contemporaneously with an order dividing matrimonial can be problematic. Why that is so was explained in detail:

It is very important for a court to consider the impact of a retroactive spousal support order on the property division. That is because a payment of lump sum retroactive support impacts the property that would or should have been available for division.

For example, suppose an order for retroactive support of \$30,000 was made and paid prior to trial. The payor spouse would obviously have not been able to save that money and he would have \$30,000 less property in his or her hands to divide as at the date of trial. Thus, the total property for division would be reduced by \$30,000, meaning that each party would receive \$15,000 less assuming an equal division. Complicating the matter further, the payee may have been able to save \$30,000 which would be available to divide. In such a case, the total property would be the same, and each party would end up with equal amounts. The net effect of the maintenance order would be zero. The total assets would be the same, the maintenance would be paid and each party would share equally in the remaining assets. The parties would end up in exactly the same position as they did here but the maintenance would have been paid.

Since that would be the result if the payment were made the day before the property division, the result should not change simply because the order is made at the same time as the division. In other words, *any obligation for retroactive support would be an obligation of the husband and an asset of the wife that should be included in the calculation of property and its division.*

In simple terms, had the payor been ordered to pay and had paid support prior to trial, he would not have been able to save that money so it would not be available for distribution at trial. Thus, if there is to be a retroactive order, *the payor's assets must be reduced by the amount of that order.*

The treatment of the payment in the hands of a payee spouse is more complicated and, of course, subject to the factors listed in s. 8 of the *Matrimonial Property Act* R.S.A. 1980, c. M-9. In a case where a payee had other assets which she lived on, the payment of retroactive support would simply replace those assets and it should then be available for distribution (with a net effect of zero). If, however, the payee had no assets, it may be reasonable to assume that she would have spent the money had it been received, and not saved the money resulting in its unavailability for distribution. Or, if the payor lived the life of a high roller while the wife barely eked out a subsistence, it may be inequitable to add the retroactive order to the payee's assets. Similarly, where it appears that a spouse has simply ignored a past order of support, a court may refuse to add the payment back into the total assets for distribution to discourage payors from avoiding a court order in hopes of gaining an advantage¹⁹⁶

¹⁹⁶ *Corbeil*, *supra* note 14 at paras. 60-64 (emphasis added). Subsequent to the *Corbeil* decision, the Supreme Court of Canada decision in *S. (D.B.) v. G. (S.R.)*; *W. (L.J.) v. R. (T.A.)*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC

[112] In summary, while the total of the property available for division should be reduced by the amount of a lump sum retroactive order, it is an open question in each case whether the assets should be increased by that or any amount. The effect of any payment of retroactive support on the matrimonial property positions of both parties must be calculated in each case.

[113] On the second sub-issue, that of the set off of arrears in support against a matrimonial property equalizing payment, the Alberta Court of Appeal in *Hunt v. Smolis-Hunt* cautioned that an order allowing set off is only appropriate where there are unusual circumstances, such as where there is a real concern that the payor spouse will not comply with his or her support obligations.¹⁹⁷ These “unusual circumstances” seem to arise quite often. In *D.C.B. v. R.L.B.*,¹⁹⁸ the wife sought to set off the arrears in child support against the equalization payment she was required to pay her husband and the judge did allow the set off on the basis of the husband’s history of failing to disclose financial information, his disorganization and incapacity to manage his financial affairs, and his failure to discharge his financial responsibility to the child in the past. A set off of support against matrimonial property was also ordered in *Wallat v. Marshall* due to the payor’s history of financial irresponsibility.¹⁹⁹ In other cases, the payment of lump sums for arrears are secured against the payor spouse’s share of matrimonial property.²⁰⁰ Such awards are based on the provisions in section 15 of the *Divorce Act*, which gives the Court jurisdiction to make a variety of awards to secure the payment of child support.

37 (CanLII), (2006), 270 D.L.R. (4th) 297, 2006 SCC 37, considered the issue of when retroactive awards of child support may appropriately be made and sets out the factors that are relevant to an exercise of discretion to order such support. The Supreme Court decision in *Hartshorne v. Hartshorne* (2004), 236 D.L.R. (4th) 194 at 218, also decided after *Corbeil*, dealt with the relationship between spousal support and property division and the proper sequence in which those two issues should be determined and the court’s inability to consider support claims before matrimonial property claims has caused problems: see *Friesen v. Friesen*, 2005 ABQB 211 at para. 21 (*Friesen*).

¹⁹⁷ 2001 ABCA 229 at para. 142 (*Hunt*).

¹⁹⁸ 2007 ABQB 93.

¹⁹⁹ 2005 ABQB 426 (CanLII), 2005 ABQB 426 at paras. 132 to 138.

²⁰⁰ *Baker v. Baker*, 2003 ABQB 533; *Nugent v. Nugent*, 2004 ABQB 741; *White v. White*, 2004 ABQB 775.

[114] The court's power to allow a set off against the amount of an equalization payment is not explicitly dealt with in section 9 of the *MPA* and might be. Otherwise, the set off of child support arrears against a matrimonial property equalization payment seems routinely done, and even prospective child maintenance is set off if the circumstances are such that a lump sum child support order is appropriate.²⁰¹

J. Tracing and section 7(3)

[115] Section 7(3) must be read with section 7(2). The latter section exempts the market value of certain types of property from distribution and there are few problems with the interpretation and application of this section and its category of exempt property. The part of section 7(3) that we are interested in builds on section 7(2) by telling the court to distribute the difference between the exempt value of the section 7(2) property and the value as at the date of trial of that property — called the “original property” — or property traceable back to the original property. It is the notion of tracing that has caused some problems.

[116] These statutory provisions and the case law interpreting the tracing provision were recently summarized by the Court of Appeal in *Miller v. Miller*:

Property that a party owns at the time of marriage will be considered exempt from matrimonial property under s. 7(2)(c) of the Act only if the exempt property is “still owned or traceable into other still owned property” at the time of the order for division of matrimonial property: *Jackson v. Jackson* (1989), 97 A.R. 153 at para. 11, 68 Alta. L.R. (2d) 118 (C.A.). “If the property is dissipated without being converted into some other asset owned by the parties, it is no longer traceable, or exempt”: *Brokopp v. Brokopp*, (1996), 181 A.R. 91, 19 R.F.L. (4th) 1 (C.A.) at para. 6.

“[T]he onus of proof of the continued existence of exempt property, or its substitute, rests with the person making the assertion”: *Roenisch v. Roenisch*, (1991), 115 A.R. 255, 32 R.F.L. (3d) 233 (C.A.) at para. 12. However, in some

²⁰¹ *D.C.B. v. R.L.B.*, *supra* note 198 at paras. 76-77.

cases, the Court can infer, imply or presume that property is traceable: *Harrower v. Harrower* (1989), 97 A.R. 141, 68 Alta. L.R. (2d) 97 (C.A.) at para. 14. The Court in *Roensch* stated that drawing an inference that the source of an existing asset is an exempt asset is not limited to situations where the source is clear and established: *Roensch* at para. 16. *Roensch* was later reviewed by this Court in *Hughes v. Hughes* 1998 ABCA 409 (CanLII), (1998), 232 A.R. 224, 1998 ABCA 409 at para. 33. In *Hughes*, the Court interpreted *Roensch* to mean that “while in appropriate cases, tracing might not be necessary because it could be inferred from the evidence, tracing is necessary where on the facts, an issue was raised as to the source of the replacement assets”: *Hughes* at para. 33.²⁰²

[117] This quotation makes it clear that it is the inferring, implying or presuming that property is traceable that is controversial. Tracing is not used as a special term of art as when it is used by courts of equity, but merely to describe the effect of identifying property by its source, but the connection between property and its source can be very tenuous when it is inferred, implied or presumed. Following the Court of Appeal decision in *Harrower v. Harrower*,²⁰³ the courts are usually quite generous in their willingness to trace exempt assets into subsequent property, and the failure to trace at times appears to have a punitive aspect to it.²⁰⁴

K. The use of section 8 factors in distributing section 7(3) property

[118] There is no presumption of equal sharing for the section 7(3) category of property, the increase in value of exempt property. Instead, the court is to distribute the property in a manner it considers just and equitable after taking the factors in section 8 into account. Section 8 therefore has a different role in connection with section 7(3) property than it has with respect to section 7(4) property, a difference consistently recognized by the courts.

[119] Some rules have been created to assist the judges in the exercise of their discretion to distribute section 7(3) property in a just and equitable manner. For example, where a gift, inheritance, or other section 7(2) property is acquired after separation, *Mazurenko* has been

²⁰² *Miller*, *supra* note 101 at paras. 12-13.

²⁰³ *Supra* note 29.

²⁰⁴ See e.g., *Brown v. Silvera*, 2009 ABQB 523 (*Brown*)

said to provide that any increase in the value of that property is also exempt.²⁰⁵ That rule was cited with approval by the Court of Appeal in *Hodgson*.²⁰⁶ The factor in section 8(f) has therefore been elevated in importance above all other factors for the purposes of section 7(3) property.

[120] *Mazurenko* is also cited for the idea that the test for equal sharing is whether the increases in value were employed for the couple's mutual benefit and account. If they were so used, then the increase came into the matrimonial regime.²⁰⁷ Indeed, there are cases where the failure to share exempt assets while married has a punitive effect on the ruling.²⁰⁸

[121] One interesting but little discussed case is *Mallette v. Robertson*.²⁰⁹ The wife's large exemption — a \$2 million inheritance from her father — generated a \$1.3 million increase in value from the date of acquisition to the date of trial. The court found that neither the gift nor the gain were ever introduced into the matrimonial regime, nor used for the parties' mutual benefit and account, applying *Mazurenko*. Because it was a long term marriage, both parties were retired, and neither had made any contributions to the increase in value of the gift, the judge awarded the husband one-quarter of the gain in value.

L. Section 8(l) dissipation

[122] Without question, the most frequently considered section 8 factor is section 8(l), dissipation. Discussed in at least 60 cases, dissipation is one sanctioned way for judges to consider conduct in justifying an unequal distribution of assets.

²⁰⁵ *Supra* note 12.

²⁰⁶ *Supra* note 22 at para. 20.

²⁰⁷ *Mazurenko*, *supra* note 12 at para 23.

²⁰⁸ See e.g., *Panara*, *supra* note 20 at para. 61.

²⁰⁹ 2004 ABQB 696.

[123] Dissipation is understood as waste, so that merely disposing of property is not enough.²¹⁰ In general, most cases have followed the requirement for two factors in order to find dissipation that was set out by Paperny J.A. in the leading decision, *Cox v. Cox*: first, actual financial detriment; and second, intent to dissipate.²¹¹ Detriment to the other spouse is required by section 8(l) itself, but the refinement requiring actual financial detriment is key as it links the misconduct to property loss.²¹² *Metz* is also frequently cited as a precedent for requiring an element of bad faith or neglect.²¹³ This type of misconduct is, for the most part, limited to misconduct that results in economic loss, as was intended.²¹⁴

[124] The requirement for negative intent also important. In most cases, an element of bad faith or neglect is required.²¹⁵ When Leonard Pollock reviewed section 8(l) in 2004, his examples included foolish economic decisions, reckless or spiteful spending, pursuit of an illusory financial objective or squandering money on additions.²¹⁶

[125] Not all cases follow *Cox* and require negative intent. Some cases have used the word "dissipation" to describe a broader concept, i.e., the idea of one spouse using matrimonial

²¹⁰ *Metz*, *supra* note 151 at para. 37.

²¹¹ *Cox v. Cox*, *supra* note 11 at para. 46. In *Ross v. Ross*, 2007 ABQB 167 at para. 137, Lee J. set out three factors after a review of the case law:

My own review of the law on point has uncovered a number of important overarching principles regarding the application of s. 8(l). First, dissipation requires an element of negative intention on the part of the dissipating spouse and evidence of actual mala fides will play an important role in determining whether a spouse has dissipated matrimonial property: *Hauck v. Hauck*, [1991] A.J. No. 1117; *Cox v. Cox*, [1998] A.J. No. 1282. Second, the spouse alleging dissipation must have suffered an actual detriment: *Cox*, *supra*. Third, a spouse's failure to sufficiently account for fluctuations in the value of matrimonial assets is a factor to consider under ss. 8(l) and 8(m), and that in those circumstances, the court may have no reasonable alternative but to consider the unaccounted for assets as dissipated: *Bzdziuch v. Bzdziuch*, [2001] A.J. No. 471; *Baskett v. Baskett*, [1996] A.J. No. 695.

²¹² See e.g. *LaCroix v. LaCroix*, 2008 ABQB 534 at para. 37; *Potter v. Potter* 2001 ABQB 810 at para. 93.

²¹³ *Metz*, *supra* note 151 at para. 37. This statement was said to conflict slightly with the description of dissipation by Paperny, J.A. in *Cox v. Cox* in *Hill v. Ilnicki*, 2000 CarswellAlta 1153 at para. 71.

²¹⁴ Institute of Law Research and Reform, *Report No. 18: Matrimonial Property* (Edmonton: University of Alberta, 1975) at 404 (*Report No. 18*).

²¹⁵ See e.g. *R.G. v. M.G.*, *supra* note 30 at para. 26; *McCulloch*, *supra* note 158 at para. 142.

²¹⁶ Leonard Pollock, Q.C., "The Factors in Section 8(l)", in James G. McLeod and Alfred A. Mamo, *Matrimonial Property Law in Canada* (Toronto: Thomson-Carswell, 2004)

assets for their private and personal expenses, such as legal fees, holidays or entertainment, where the other spouse receives no benefit.²¹⁷ For example, in *Hennesey v. Hennesey*, the court admitted there was no evidence that the wife intentionally dissipated the matrimonial property and no evidence that she acted in bad faith, by spending it on gambling or luxury services, for example.²¹⁸ After reviewing over 20 years of case law, the court concluded that negligent or careless use of matrimonial property — as distinguished from deliberate waste — constitutes dissipation.²¹⁹ The court held that a spouse investing matrimonial property has a duty to do so with reasonable care, so as to preserve and increase the matrimonial property,²²⁰ and the applicable standard of care is that of a “prudent manager.”²²¹ The court justified the departure from *Cox* by distinguishing assets acquired before separation and assets acquired after separation:

The few Alberta cases which appear to indicate the contrary are, on closer inspection, examples of the caveat “based on evidence of activity prior to separation”. That is, the retention of previously profitable investments which are, or become, unprofitable after separation does not necessarily constitute dissipation. See the “sinking ship” cases: *Jigolyk v. Jigolyk*, 1999 CarswellAlta 1024 (Alta. Q.B. 1999); *Metz v Metz*, 2004 ABQB 528 (CanLII), 34 Alta. L.R. (4th) 252, 2004 ABQB 528.²²²

[126] Most cases do consider activity after and not before separation. Behavior that existed prior to separation may not result in a finding of dissipation, as *Hennesey* noted, because a spouse may be deemed either to have condoned the behavior by failing to stop it²²³ or the behavior may be ruled to have been within the normal spending habits of the couple.²²⁴

However, increased spending post separation may not necessarily lead to a finding of

²¹⁷ See e.g., *Bakken v. Bakken* (1992), 132 A.R. 356 (Q.B.); *W.P.B. v. D.M.B.*, 2006 ABQB 333 at para. 66.

²¹⁸ 2005 ABQB 883 at para. 65 (*Hennesey*).

²¹⁹ *Ibid.* at para. 24.

²²⁰ *Ibid.* at para 81.

²²¹ *Ibid.* at para. 82. The court found dissipation because the wife, after separation, made significant business investments without taking reasonable steps to ascertain whether those investments had good prospects for increasing her net worth and without first taking reasonable steps to ascertain her options for achieving her goal of economic self-sufficiency despite her chronic health problem: *ibid.* at paras. 66-67.

²²² *Ibid.* at para. 84.

²²³ See e.g. *McAdam*, *supra* note 30 at para. 34.

²²⁴ See e.g., *Compton v. Compton*, 2004 ABQB 354 at para. 23.

dissipation. In *S.I.B. v. M.D.B.*, the judge stated that two households require more money than one and did not find dissipation based on the increased spending of one party.²²⁵

[127] A requirement for negative intent may be especially important in cases where the dissipation is a result of an addiction or other disease. Disease is not mentioned in section 8 but section 8(d) does tell the court to factor in the income, earning capacity, liabilities, obligations, property and other financial resources that each spouse had at the time of marriage and again at the time of trial. In *Hauck v. Hauck*, the Court of Appeal considered the losses to matrimonial property caused by a manic-depressive husband's improvident bargains after separation, during his manic phases.²²⁶ The trial judge had concluded there was no dissipation because the husband was not morally responsible for his actions, but the appeal court disagreed and ordered an unequal division in favor of the wife. There was intent enough, the Court of Appeal ruled, because during his non-manic phases, the husband could have decided to become a patient or otherwise deal with the disease through taking medication.²²⁷ One of the oddest findings of dissipation is in *M. (J.J.) v. M. (C.D.) Estate*, where the judge found the dissipation by the wife, who had a drug addiction, because the husband had spent a great deal of money to care for her.²²⁸ The opinion uses the section 8 factors to justify a radically unequal distribution that can only be called punitive towards the wife's estate, and the wife's addiction plays an important role for the judge in justifying a unequal division of assets. *M. (J.J.) v. M. (C.D.) Estate* is an extreme case, but concern remains that the section 8(l) defined as loosely as it is becomes a vehicle for the reintroduction of arguments regarding conduct that the MPA sought to eliminate.

²²⁵ *Supra* note 148 at para. 29.

²²⁶ (1991), 120 A.R. 120 (Alta. C.A.).

²²⁷ See also *Walker*, *supra* note 32 at para. 40 (drug use) and *M.A.B. v. R.D.B.*, *supra* note 90 at para. 50 (drinking).

²²⁸ 2008 ABQB 116 at para. 68.

M. Section 8(f) and assets and debts acquired post-separation

[128] As should have been evident in our discussion of the date of valuation, section 8(f) and the ability of the court to consider “whether the property was acquired when the spouses were living separate and apart” is often a contentious issue. This is the second most commonly argued s. 8 factor (ignoring s. 8(m), which is a catchall for other factors considered and will be discussed later). Indeed, the decision in *Hodgson* that reaffirmed that the date of valuation is the date of trial pushes all contentious matters about post-separation assets and debts into this subsection, because the Court of Appeal stated that concerns about using the date of trial could be dealt with by considering whether to apply the factors set out in section 8 of the *MPA* to the property being divided.²²⁹

[129] The issue of post separation debt briefly appeared to be resolved in *Kazmierczak* where the Court of Appeal declined to include these debts in the division of assets.²³⁰ However, this approach has not been followed consistently by the lower courts, and there now seems to be no uniform approach to the inclusion or division of post separation debt. In some rulings, post separation debts are said to reflect “individual lifestyle choices” and therefore are excluded, as in *Bezuko v. Supruniuk*.²³¹ In others, post separation debt is seen as part of the matrimonial regime and valued at date of trial.²³²

[130] Assets acquired post separation have received similar treatment. Generally speaking, assets that have been brought into the matrimonial regime following separation are divided

²²⁹ *Hodgson*, *supra* note 22 at paras. 2 and 28

²³⁰ *Kazmierczak CA*, *supra* note 18 at para. 59 (post separation debts are “on the shoulders of those who now owe them”).

²³¹ *Supra* note 174 at para. 82.

²³² *Busenius*, *supra* note 31 at para. 26; *Horne*, *supra* note 1 at para. 30.

equally,²³³ but assets that are ascribed to the industry, efforts or expenditure of one party only may be subject to unequal division.²³⁴

[131] One also sees *in specie* distribution justified on the basis of this section, especially where the asset is a piece of property that has been exclusively under the control of one party.²³⁵ Similarly, even when these assets are not distributed *in specie*, post separation increases in assets may be credited to the party who has control of these assets, although this approach can fail to recognize the fortuitousness of post separation increases in value and can appear to violate the division of assets as of date of trial.²³⁶

N. Section 8(g) oral and written agreements

[132] As might be expected, discussion of this frequently litigated section usually, although not always, arises following a finding of non-compliance with section 38 with respect to a purported agreement under section 37. The leading case for this factor remains the Court of Appeal decision in *Corbeil v. Berbis*.²³⁷ The court noted that where section 38 has not been complied with, this does not mean that an agreement between the parties becomes wholly irrelevant:

In my view, the judge cannot simply adopt and apply the agreement in the face of non-compliance with the statutory formalities of execution. To do that would be to flout the statute. But neither does the judge pretend the agreement never happened. The judge, rather, assesses the impact of the agreement on the parties, as one of the facts in their lives and thus one of the circumstances made relevant by s. 8. That impact may be minimal or it may be significant. Difficulties may arise in applying that distinction. It is no reason to obliterate the distinction, because that too will present difficulties and raise the spectre of unjust results.²³⁸

²³³ See e.g., *Boyd v. Boyd*, 2008 ABQB 781 at para. 41.

²³⁴ *Walker*, *supra* note 32.

²³⁵ See e.g., *Beaudry*, *supra* note 147 at para. 60.

²³⁶ See e.g., *Friesen*, *supra* note 196 at para. 19.

²³⁷ *Supra* note 5.

²³⁸ *Ibid.* at para. 29.

[133] One of the reasons a property division made in a section 8(f) agreement cannot be ignored is that the terms of the agreement have often been executed. As the Court of Appeal stated in *Corbeil*: “Property passed. As a result, issues about justice arise.”²³⁹

[134] The case law is fairly straightforward, with judges usually interpreting section 8(g) as allowing them to consider and give effect to these non-compliant agreements.²⁴⁰ Courts have also recognized that they are not bound by non-compliant agreements and may vary them according to their discretion.²⁴¹ Thus the courts have shown flexibility in applying this factor, with an eye to the presumption of equal division. In the words of Paperny, J.A. in *Hill v. Ilnicki*: “A court must be careful not to give too much weight to an agreement given the purpose of the legislation, to promote the equal division of property.”²⁴²

[135] There are two sub-issues. First, agreements do not have to be all encompassing. They may relate to merely one asset, such as the proceeds of the sale of the matrimonial home.²⁴³ In *Vriem v. Vriem*, the agreement apparently had only one term, an agreement to reject the date of trial as the date of valuation — and the court held that was the kind of circumstance which justified a departure from the date of trial and gave effect to the parties’ informal agreement.²⁴⁴

[136] Second, it appears that more than agreements are considered under section 8(g). In *M. (J.J.) v. M. (C.D.) Estate*, the court took into account a proposal of settlement made by the wife’s lawyer.²⁴⁵ Although the proposal was acceptable to the husband, counsel for the wife could not

²³⁹ *Corbeil*, *supra* note 14 at para. 22.

²⁴⁰ See e.g., *Crosby v. Crosby*, 2007 ABQB 31 at para. 29 (*Crosby*).

²⁴¹ See e.g. *Miller*, *supra* note 101 at para. 24.

²⁴² *Supra* note 213 at para. 38.

²⁴³ *Troppmann v. Troppmann*, 2000 ABQB 61 at para. 31.

²⁴⁴ *Vriem*, *supra* note 107 at para. 14. The date of trial in *Vriem* was ten years after the separation of the parties and eight and one-half years after the death of the husband. The husband’s executor and the wife agreed that the date of trial was not an appropriate date for valuation but could not agree on what date was.

²⁴⁵ *Supra* note 228 at para. 60.

get proper instructions from his client in order to conclude the settlement. In *Kazmierczak*, a case in which there was no agreement of any kind between the spouses, the Court of Appeal recognized the parties “own or *de facto* assignments of assets between themselves” as a relevant factor entitled to some weight.²⁴⁶

O. Section 8(m) any relevant fact or circumstance

[137] Section 8(m) is a catch-all for factors the courts wish to consider but which do not fit within the other categories. Three factors are discussed frequently under this section: disclosure, credibility and conduct. Together with costs, this section therefore has become the primary repository for discussions about conduct. If one party has engaged in negative conduct that has affected the court proceedings themselves, as with a failure to disclose property²⁴⁷ or with lack of credibility,²⁴⁸ this section has been used to punish that party. We discuss disclosure in Part IV.Q. and lack of credibility as part of our discussion of conduct more generally in Part IV.R.

[138] Four other circumstances have been mentioned by the courts and could be considered for inclusion as independent factors. First, inflationary increases and market upswings, and their converse, have figured in quite a few cases.²⁴⁹ Second, in *Kazmierczak*, the wife was concerned that most income-producing assets had been distributed to her husband and she received depreciating assets, an argument that the court rejected on the facts but acknowledged might be a relevant factor.²⁵⁰ This concern could be addressed under subsection 8(d), but it has not been and that subsection has been interpreted very narrowly. Third, disability

²⁴⁶ *Supra* note 18 at para. 75.

²⁴⁷ *Cunningham v. Cunningham*, 2009 ABQB 40 at para. 34.

²⁴⁸ *S.A.T. v. A.A.T.*, (2004 ABQB 36 at paras. 111, 121.

²⁴⁹ See e.g. *Sparrow*, *supra* note 9; *Klinck*, *supra* note 27; *Behiels*, *supra* note 62; *McIntosh v. McIntosh*, 2010 ABQB 168; *S.W. v. J.W.*, 2005 ABQB 728.

²⁵⁰ *Supra* note 10 at para. 97.

has been noted as a factor in a very small number of cases,²⁵¹ noted but not considered as a factor in a few cases,²⁵² and has been considered negatively in others in connection with dissipation.²⁵³ Given today's revised understanding of the meaning of "disability" and current human rights legislation and case law, the courts' treatment of disability in the matrimonial property context may need revision. Finally, non-economic values of property were argued in *Klinck v. Klinck*²⁵⁴ and considered unfavourably in the distribution order in *Allaster-Hunsperger v. Hunsperger*,²⁵⁵ but we would expect this approach to value will continue to be asserted in the coming years

[139] Other facts and circumstances that have been expressly considered as section 8(m) factors include: assets acquired on the basis of family relationship,²⁵⁶ children as beneficial owners of property,²⁵⁷ a long period of separation before trial,²⁵⁸ future debt,²⁵⁹ future employment,²⁶⁰ testamentary gifts,²⁶¹ gifts from parents,²⁶² health,²⁶³ parental assistance,²⁶⁴ independence of the parties,²⁶⁵ interdependence of the parties,²⁶⁶ an unexpected move by one party,²⁶⁷ the proximity of receipt of an asset to termination of marriage,²⁶⁸ viability of ranching operation,²⁶⁹ and work ethic (an area related to conduct).²⁷⁰

²⁵¹ *Souder v. Wereschuk*, 2004 ABCA 339 (*Souder*).

²⁵² See e.g. *Vreim*, *supra* note 107; *Nuttall*, *supra* note 35.

²⁵³ See e.g. *M. (J.J.) v. M. (C.D.) Estate*, *supra* note 228.

²⁵⁴ *Supra* note 27 at para. 11.

²⁵⁵ *Supra* note 156 at para. 20.

²⁵⁶ *D.R.J. v. M.J.*, *supra* note 41.

²⁵⁷ *Bzdiuch*, *supra* note 144.

²⁵⁸ *Hughes*, *supra* note 21.

²⁵⁹ *Crosby*, *supra* note 240.

²⁶⁰ *Loates v. Loates* 2001 CarswellAlta 350.

²⁶¹ *Sparrow v. Sparrow*, 2006 ABCA 155.

²⁶² *Klinck v. Klinck*, 2008 ABQB 526.

²⁶³ *Law v. Law*, 2005 ABQB 723.

²⁶⁴ *Crosby*, *supra* note 240.

²⁶⁵ *Friesen*, *supra* note 196; *Nordholt v. Nordholt*, 2009 ABQB 600/

²⁶⁶ *Hornby*, *supra* note 141.

²⁶⁷ *Lecerf*, *supra* note 182.

²⁶⁸ *Tabata*, *supra* note 108.

²⁶⁹ *D.R.J. v. M.J.*, *supra* note 41.

²⁷⁰ *Walker*, *supra* note 32; *Warwoda v. Warwoda*, 2009 ABQB 582; *Oddan v. Oddan*, 2005 ABQB 786.

P. Occupation rent

[140] Argued and discussed in at least 26 reported cases in the past ten years, occupation rent in its capitalized form is a frequently occurring and apparently problematic issue.²⁷¹ If a court grants an order for exclusive possession of the matrimonial home to one spouse under section 19 *MPA*, it may make that order subject to any conditions the court considers necessary (s. 19(3)).²⁷² However, in cases where occupation rent was an issue, exclusive possession was not granted by court order.²⁷³ Neither was the claim for occupation rent made coextensively with the assumption of *de facto* exclusive possession. It is a claim that tends to be made in response to a claim for retroactive support or a claim for a contribution to the expenses of the matrimonial home.

[141] The leading case is the Court of Queen's Bench decision in *Kazmierczak*, where Slatter J. (as he then was) discusses occupation rent extensively,²⁷⁴ and includes a summary of the factors to be considered in deciding whether to grant occupation rent.²⁷⁵ Although his review may have been intended to settle the issue, what followed was an increase in claims for occupation rent, despite his conclusion that "[r]arely, if ever, should one spouse be able to bank a claim for occupation rent, and present that claim in capitalized form years later as part of a matrimonial property action."²⁷⁶

²⁷¹ We note that occupation rent was the topic of LESA seminars in both 2000 and 2004.

²⁷² The 1995 ALRI Report for Discussion No. 14, *The Matrimonial Home*, mentions occupation rent in connection with its discussion of conditions attached to orders for exclusive possession of the matrimonial home. Although the focus is on conditions related to ongoing expenses associated with the home, the Report also mentions that an order may also be made requiring the party in possession to make a compensatory payment to the excluded spouse and recommending that that option be included in the statute. Alberta Law Reform Institute, Report for Discussion No. 14, *The Matrimonial Home* (March 1995) at 37-38.

²⁷³ The cases are not always clear on this point and there are two cases where an order may have been made under s. 19. Although not stated directly, in *Barnett v. Barnett*, 2006 ABQB 920, the fact that there is a previous order for a \$500 credit for "occupational rent" implies that there may have been a s. 19 order in this case: *ibid.* at paras. 22 and 60). In *Hotton v. Hotton*, 2006 ABQB 10, there is an implication of an interim possession order at para. 1 ("given in exclusive possession to the Plaintiff"). The claim made by the party not in possession is for "a positive post-separation return on the equity that he had in the home at the date of separation." The judge analogizes this to occupation rent and declines to grant: *ibid.* at para. 20.

²⁷⁴ *Supra* note 10 at paras. 85-96

²⁷⁵ *Ibid.* at para. 95.

²⁷⁶ *Ibid.*

[142] As Slatter J. noted in *Kazmierczak*, the concept of “occupation rent” is a common-law attribute of the joint ownership of property:

At common law, all joint tenants have an equal right to the occupation of the whole of the premises, and neither had the right to exclude the other. In limited circumstances the Courts would recognize a right to occupation rent in favour of the joint tenant who was out of possession. In his book *Principles of Property Law* (Scarborough: Carswell, 1993) Professor B. Ziff summarizes the law with respect to occupation rent at p. 266:

. . . If a party is locked out or forced to leave by the expulsive conduct of the other, the remaining owner may be charged with an occupation rent. *No occupation rent is normally payable simply because one owner has enjoyed exclusive possession. However, where, on partition, the party in possession makes a claim for reimbursement for the payment of current expenses, a counterclaim for occupation rent may be entertained. . .*²⁷⁷

[143] It has been said that the traditional analysis of occupation rent as a property right arising between co-tenants gives way in the matrimonial property context to the idea of occupation rent as a discretionary remedy between joint tenants with mutual obligations of support.²⁷⁸ Slatter J.’s list of factors to be considered focuses on this context:

- a) The spouse who is not in possession generally should not be entitled to occupation rent if the other spouse is occupying the premises with the children of the marriage, and is not making a claim for support or a contribution towards the expenses of the house.
- (b) Where the spouse in possession does make a claim for contribution towards the expenses of the house, that claim, the cross-claim for occupation rent, and any claim for spousal or child support should be considered together. The occupation rent would be a potential expense item in one party’s budget, and a revenue item in the other party’s budget.
- (c) In many cases it would be simpler just to eliminate the claim for occupation rent from the equation, and deal with child support and spousal support at large. However, given that the Federal Child Support Guidelines now mandate certain levels of support for children, it may be unfair not to include a notional occupation rent in the guideline income and budgets of the parties, at least when considering spousal support.
- (d) The spouse in occupation will generally not be entitled in the matrimonial property proceedings for any credit for the mortgage payments and taxes paid by

²⁷⁷ *Ibid.* at para. 88 (footnotes omitted, emphasis added in *Kazmierczak*).

²⁷⁸ See *Hantel v. Hilscher*, 2000 ABCA 84 at para. 26; *Timms v. Timms*, 1997 CanLII 14801 (ABQB), (1997), 29 R.F.L. (4th) 392 at paras. 56-57; *Kazmierczak, ibid.* at para. 90.

him or her. Those payments should be a part of the support equation. The only possible exception is with respect to the portion of the mortgage payment that actually goes to reduce principal, as notionally one-half of that payment is made on behalf of the non-occupying spouse. See *Balzar v. Balzar*. However, if the party in occupation has not adequately maintained the property, and has essentially eroded its capital value, a set-off for the excessive wear and tear might be called for.

(e) There will be cases, such as *Scott v. Scott*, where the family unit can no longer afford to maintain the previous matrimonial home. If one spouse insists in staying in occupation of the house, and is prepared to make the necessary financial sacrifices, then fairness may require that occupation rent be included in the overall equation.

(f) Rarely, if ever, should one spouse be able to bank a claim for occupation rent, and present that claim in capitalized form years later as part of a matrimonial property action.²⁷⁹

[144] Not all claims for occupation rent are denied however. In *Verberg v. Verberg*, Binder J. awarded \$10,000 in occupation rent based on the conduct of the husband following separation, although he characterized the sum as “occupation rent or additional spousal support.”²⁸⁰ However, most claims for occupation rent are denied, with the reasoning varying from case to case. The only factor which appears to operate consistently to deny occupation rent is the fact of children occupying the matrimonial home. This factor has been determinative in several cases.²⁸¹

[145] *Busenius*²⁸² is a second often cited precedent on this issue. In that case, Clackson, J. discussed occupation rent in situations where there were no support obligations.²⁸³ He stated that in such cases, the common law rules would be applicable and the claim for occupation rent would only apply as a response to a claim for contribution to matrimonial home expenses.²⁸⁴ This case has been used irregularly to state the principle that occupation rent can only be

²⁷⁹ *Ibid.* at para. 95.

²⁸⁰ *Supra* note 33 at para. 39.

²⁸¹ See e.g. *N.M. v. C.L.M.* 2005 ABQB 724, *McKee v. McKee* 2006 ABQB 196.

²⁸² *Supra* note 31.

²⁸³ *Ibid.* at para. 46.

²⁸⁴ *Ibid.*

counterclaimed in response to a claim for mortgage payments.²⁸⁵ Another echo of the common law principles concerning occupation rent can be seen in *McAdam*.²⁸⁶ In that case, Mahoney, J. refused the claim based on the determination that the husband was not “driven from the home.”²⁸⁷

[146] Occupation rent has been characterized in many different ways in the case law. It has been said to be a response to the necessary dissipation of assets incurred by one party following separation;²⁸⁸ a retroactive claim that might be covered under a spousal support order;²⁸⁹ a frivolous or irrelevant claim already accounted for in the increased equity of the home from paying down the mortgage,²⁹⁰ and as a defence in response to a claim for contribution to a mortgage.²⁹¹

Q. Disclosure

[147] Although disclosure and non-disclosure has not been frequently discussed in the case law, it bears consideration as a matter related to sections 37 and 38, particularly in light of the recent Supreme Court of Canada decision in *Rick v. Brandsema*.²⁹² In addition, the failure to disclose has been called “the cancer of matrimonial property litigation” and the recent British Columbia’s *White Paper* characterized it as a “barrier to fair and effective out-of-court dispute resolution”²⁹³ and has recommended amending that province’s matrimonial property legislation to require full disclosure.²⁹⁴ In Alberta, disclosure is mandated by section 31(1) of the *MPA*²⁹⁵

²⁸⁵ See e.g. see *Behiels*, *supra* note 62 at para. 96.

²⁸⁶ *Supra* note 30.

²⁸⁷ *Ibid.* at para. 42.

²⁸⁸ *D.L.C. v. S.J.C.*, 2003 ABQB 480.

²⁸⁹ *Braglin v. Braglin*, 2002 ABQB 816

²⁹⁰ *K.M.R. v. S.R.*, 2005 ABQB 441.

²⁹¹ *Busenius v. Busenius* 2006 ABQB 162.

²⁹² 2009 SCC 10, [2009] 1 S.C.R. 295 (*Brandsema*)

²⁹³ *White Paper*, *supra* note 70 at 12

²⁹⁴ *Ibid.* at 134.

and the Matrimonial Property Regulation²⁹⁶ and by the overall objectives of the *MPA*.²⁹⁷

However, there is little, if any, reliance on section 31 or the regulation by the courts and there is no provision for enforcement in the *MPA*.

[148] In *Brown v. Silvera*,²⁹⁸ a recent Queen's Bench decision, the wife claimed that the husband did not disclose the real value of corporate property when Minutes of Settlement were entered into following their separation. She sought to have the Minutes of Settlement vacated with respect to the corporate assets. The Minutes met the formal requirements for a binding matrimonial property division agreement under the *MPA*. They included a provision which required full disclosure and provided they would be vacated to the extent necessary to effect a proper distribution if there was no full disclosure. The court discusses the duty to disclose on the part of both parties to matrimonial property settlement agreements even without such a clause, relying on the recent Supreme Court of Canada decision in *Brandsema*.²⁹⁹ On the question of disclosure, *Brandsema* reiterates that under the common-law, each spouse has "a duty to make full and honest disclosure all relevant financial information" when negotiating separation agreements."³⁰⁰ Deliberate failure to disclose matrimonial property may make an agreement unconscionable, being contrary to the objectives of the legislation.³⁰¹

[149] Not all agreements dealing with matrimonial property have been subject to the requirement of full disclosure. An exception has been made for pre-nuptial agreements, where

²⁹⁵ Section 31(1) requires that "[i]f an application has been commenced under Part 1, each spouse shall file with the Court and serve on the other spouse a statement, *verified by oath*, disclosing particulars of *all the property* of that spouse, whether it is situated in Alberta or elsewhere" (emphasis added).

²⁹⁶ Alta. Reg. 13/1999, s. 1: "For the purposes of section 31 of the *Matrimonial Property Act*, a statement disclosing the particulars of the property of a spouse must (a) show the full particulars and a true appraisal of all real and personal property of that spouse, and (b) be in the form set out in the Schedule."

²⁹⁷ See e.g. *Fercho v. Dos Santos*, 2006 ABQB 879 at paras. 34-38; *Schultz v. Schultz*, 2000 ABQB 866 at paras. 9-11.

²⁹⁸ *Supra* note 204.

²⁹⁹ *Supra* note 292.

³⁰⁰ *Ibid.* at para. 47. See also *ibid.* paras. 5, 48-49.

³⁰¹ *Ibid.* at para. 47.

full disclosure has not usually been found to be a requirement for enforcing such agreements. Following the SCC's decision in *Hartshorne v. Hartshorne*,³⁰² the courts in Alberta have generally been unwilling to strike down prenuptial agreements concerning property in which rights have not yet vested or entitlements arisen. Thus in *Hinton*, for example, the court found there was no duty on the husband which would compel complete, detailed disclosure of his assets.³⁰³

[150] Even if there seems to be general agreement on a duty to disclose in the context of section 37 agreements, subject to an exception for pre-nuptial agreements, there is less accord on how much disclosure is enough and on the consequences of non-disclosure.

[151] On the question of how much disclosure, a distinction has been drawn between general and specific disclosure. It has been said that the common law does not require more than a general awareness of the assets of the other and the absence of concealment, when there is a failure to request specific disclosure.³⁰⁴ It seems likely that *Brandsema* will put to rest any notion that the reliant party has any duty to enquire.³⁰⁵ In any event, the contractual duty to disclose — but not a statutory duty under section 31(1)) — has been said to require specific disclosure, that is, more than the common law.³⁰⁶ In *Fercho v. Dos Santos*, the production of specific disclosure was said to be fundamental to an agreement and such disclosure required information in a clear, non-cryptic and complete form.³⁰⁷ In *Brown v. Silvera*, the court found that the husband had a duty to disclose completely all the corporations in which he had an interest and the value of that interest, and if he was not aware of the value of the interest, he had a duty to determine

³⁰² 2004 SCC 22 at paras. 39-40. See also *Miglin v. Miglin*, [2003] 1 S.C.R. 303 at para. 46.

³⁰³ See e.g., *Hinton v. Hinton*, 2008 ABQB 189 at para. 36.

³⁰⁴ *Moore v. Moore*, 2000 ABCA 102 at para.9 (*Moore*); *Murray v. Murray* (1994), 157 A.R. 224

³⁰⁵ *Brown v. Silvera*, *supra* note 204 at para. 40. Contra, *Wolbeck v. Wolbeck*, [1985] A.J. No. 437 (QL) at paras. 9-11 (Q.B.)

³⁰⁶ *Moore*, *supra* note 304 at para. 9.

³⁰⁷ *Supra* note 297 at paras. 42 and 45, relying on *Moore*, *ibid.* at para. 10.

the value of the corporations or ensure that his wife had a fair opportunity to determine the value, and if the husband was aware of uncertainty in the value of the corporations, he had a positive obligation to disclose that fact.³⁰⁸

[152] The fact that the *MPA* does not provide for fraudulent concealment was noted long ago.³⁰⁹ Ontario's *Family Law Act* allows a court, on application, to set aside a domestic contract or a provision if a party failed to disclose significant assets or liabilities, if a party did not understand the nature or consequences of the contract, or otherwise in accordance with the law of contract.³¹⁰

R. Conduct of the parties

[153] Dissipation is the one type of misconduct that may be taken into account in determining whether an equal division of matrimonial property is just and equitable. Other types of misconduct were expressly excluded from consideration in section 8,³¹¹ but as has already been noted, parties frequently raise what they see as other types of misconduct.

[154] Disposing of household goods appears to be a recurring problem, despite the requirements of section 33 and its prohibition on the disposal of household goods without a court order or consent of the spouse. Such dispositions are quasi-criminal offences under section 33(2), but offences that only attract a fine of \$1,000 or less. No prosecutions for this *MPA* offence were found in our review of the cases.

³⁰⁸ *Ibid.* at para. 43.

³⁰⁹ Lown and. Bendiak, *supra* note 39 at 385 ("There appears to be a lacuna in the Act . . . that no general provision is made for the possibility of fraud or the concealment of property with respect to claims under the Act.")

³¹⁰ *Supra* note 46, s. 56(4).

³¹¹ *Report No. 18, supra* note 214 at 404.

[155] Although the household goods issue is a major issue for the parties, the courts appear to deal rather casually with failures to comply with section 33. See, for example, *S.A-T. v. A.A-T.*, where the husband stressed that the wife had sold some of their furniture and sent the money to her mother in Saudi Arabia as an example of her bad conduct and lack of credibility. Ignoring section 33, the court merely noted that “the sale of the furniture occurred prior to an order to prevent her from selling any further furniture, and that there is no evidence provided that she had sold any furniture after the order was issued.”³¹²

[156] Lack of credibility is the most difficult of the common types of misconduct for the court to deal with in the context of the *MPA* as lack of credibility does not necessary result in the loss of property or a detriment to the other spouse. Nevertheless, it is sometimes used by judges to justify a move away from an equal division of section 7(4) property.³¹³ The most egregious example of conduct being used to justify an unequal division of assets is probably *D.R.J. v. M.J.*,³¹⁴ the lower court decision in *Jensen*. The wife in that case took a computer used in the family farm business and lied about doing so to the police before she returned it. The section 7(3) and 7(4) assets were divided unequally in favour of the husband and the husband was awarded double costs at trial. In contrast, in other cases judges have stated that such misconduct, in the absence of a financial detriment, must be discounted under the *MPA*.³¹⁵

[157] Manitoba’s *Family Property Act* expressly provides, in its equivalent to Alberta’s section 8, that when the court exercises its discretion under that section, “no court shall have regard to conduct on the part of a spouse or common-law partner unless that conduct amounts to dissipation.”³¹⁶ Others have advocated keeping conduct out of consideration under section 8.³¹⁷

³¹² *Supra* note 248 at para. 143. .

³¹³ See e.g., *Sittler v. Sittler*, 2003 ABQB 945; *Bzdziuch*, *supra* note 144.

³¹⁴ *Supra* note 41.

³¹⁵ See e.g., *Low v. Robinson*, 2000 ABQB 60 at para. 109; *D.G.M. v. K.M.M.*, *supra* note 99 at para. 42.

³¹⁶ *Supra* note 76, s. 14(3).

³¹⁷ See e.g. Margaret A. Shone, “Principles of Matrimonial Property Sharing: Alberta’s New Act” (1979) 17 *Alberta Law Review* 143 at 179.

In *Low v. Robinson*, however, Johnstone J. urged that misconduct having negative economic consequences, and only misconduct having negative economic consequences, be considered in the division of matrimonial property.³¹⁸

S. Method of Distribution

[158] We have already discussed issues in the method of distribution of income-producing assets in Part IV.G. In order to effect a distribution of matrimonial property, section 9(2) of the *MPA* provides:

- (2) The Court, in order to effect a distribution under section 7, may do any one or more of the following:
- (a) order a spouse to pay money or transfer an interest in property to the other spouse;
 - (b) order that property be sold and that the proceeds be divided between the spouses as the Court directs;
 - (c) by order declare that a spouse has an interest in property notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property.

[159] One of the issue arising under the division of assets is the method of distribution, whether an adjusting payment or transfer to equalize the value of property held by each spouse or an *in specie* division. In *Kazmierczak*, the trial judge divided matrimonial property, asset by asset, an approach he acknowledged as “exceptional.”³¹⁹ Each asset was allocated to one of the parties or was itself divided. The judge did not value all of the assets and then calculate an adjusting payment. The need for evidence of value is minimized in this *in species* approach. The Court of Appeal in *Kazmierczak* found nothing wrong with the trial judge’s approach:

The *Matrimonial Property Act* does not require a trial judge to value all the assets, or even specific ones. Judges often value each asset, total all the assets, use a percentage to divide the total, and then order one party to pay or transfer money or some asset to reach that percentage. The trial judge noted that practice. But the Act does not require that, and that is often not done for all

³¹⁸ *Low v. Robinson*, *supra* note 315 at para. 109.

³¹⁹ *Kazmierczak*, *supra* note 10 at para. 97.

assets. In particular, pensions are more often divided *in specie* than valued. And there are usually directions as to who should get particular houses, pieces of land, or businesses.³²⁰

[160] Furnishings, jewelry and similar items of personal property are usually distributed *in specie*. Most commonly, the court will allow each party to keep whatever personal property is currently in each party's possession, treating such a division almost as a *de facto* "agreement." A recent comment on how to divide these items was made by Mahoney, J. in *G. (W.D.) v. G. (D.L)*, in which he stated that such items are best divided in kind in recognition of the difficulty of valuing these items.³²¹ However, in cases of proven inequality, the court has been willing to divide these goods as necessary to achieve an equitable distribution.³²²

[161] The weakness of the predominate method of distribution — totaling the value of all assets, using a percentage to divide that total, and then ordering an adjusting payment or transfer — becomes apparent in its treatment of assets that do not fit neatly for division, either because they produce income, such as corporate assets or farmland, or because they depreciate, as with equipment or furnishings.

[162] Depreciating assets, like income-producing assets, are another area of some divergence in approach. Depreciated assets include not only household goods but also depreciated equipment. The courts' current approach to section 7(2) depreciated assets is described in *Lovich v. Lovich*, whereby the party claiming the exemption is allowed a pro rata exemption of the depreciated asset based on the original asset's trade-in value.³²³

³²⁰ *Kazmierczak CA*, *supra* note 18 at para. 13.

³²¹ 2009 ABQB 340 at para. 57.

³²² See e.g., *Nasin*, *supra* note 13 at para. 51.

³²³ 2006 ABQB 736 at para. 46.

T. Section 38 and the statutory formalities of execution

[163] Section 38 and its formal requirements for valid section 37 agreements is important, in part, because an agreement under section 37 is binding and ousts the jurisdiction of the courts to divide matrimonial property. As Leonard Pollock wrote:

An agreement under s. 37 is binding. It cannot be touched or varied by the court subject to its being invalid by ordinary contract law. There is no power to ... change the agreement because of unfairness. Most other jurisdictions have clothed the court with a supervisory power to oversee very bad bargains. The Alberta Act does not have this, and thus, if there is an agreement, done in accordance with ss. 37 and 38, there is no way of challenging it.³²⁴

[164] As noted by Pollock, Alberta's matrimonial property legislation is unusual in not providing for judicial oversight of the provisions of agreements made under section 37. In Saskatchewan a court may reappportion property where an interspousal contract was unconscionable or grossly unfair at the time it was entered into.³²⁵ Ontario's *Family Law Act* allows a court to set aside a domestic contract or a provision if a party failed to disclose significant assets or liabilities, if a party did not understand the nature or consequences of the contract, or otherwise in accordance with the law of contract.³²⁶ In New Brunswick, a court may disregard a provision of a domestic contract where a spouse did not receive independent legal advice and application of the provision would be inequitable.³²⁷ British Columbia courts have been empowered to reappportion assets upon merely finding that the division of property in the agreement is "unfair,"³²⁸ but Nova Scotia courts must find that a term is "unconscionable, unduly harsh on one party or fraudulent" before they can intervene.³²⁹

³²⁴ Pollock, *supra* note 216 at A-63:

³²⁵ *Supra* note 69, s. 24(2).

³²⁶ *Supra* note 46, s. 56(4). See also *Family Law Act*, R.S.N.L. 1990, c. F-2, s. 66(4), and in Prince Edward Island's *Family Law Act*, S.P.E.I. 1995, c. 12, s. 55(4) to the same effect.

³²⁷ *Marital Property Act*, *supra* note 43, s. 41.

³²⁸ *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 65.

³²⁹ *Matrimonial Property Act*, *supra* note 47, s. 29.

[165] Just what is required by section 37? Much like the *Dower Act*³³⁰ or the *Guarantees Acknowledgment Act*,³³¹ section 37 requires each spouse to acknowledge, in writing, apart from the other spouse, that they are aware of the nature and the effect of the agreement, that they are aware of the possible future claims to property they may have and that they intend to give up these claims to the extent necessary to give effect to the agreement, and that they are executing the agreement freely and voluntarily without any compulsion on the part of the other spouse. That acknowledgment must be made before a lawyer who is not acting for the other spouse. These are what the Court of Appeal has called the “statutory formalities of execution.”³³²

[166] As the Court of Appeal determined in *Corbeil v. Bebris*, the statutory formalities of execution do not require the lawyer to give independent legal advice; attendance on execution is required but advice on the wisdom of entering into the agreement is not.³³³ The section 38 formalities only oblige the lawyer to make enquiries and be satisfied about certain facts (namely that the party is acting freely and with full awareness of the presumption of equal distribution for open category of assets), which entails a limited form of advice. As recently as 2009, failure to receive legal advice has been ruled not to be a reason to void a section 37 agreement.³³⁴

[167] In addition to some controversy about what section 37 requires of lawyers, there has also been a problem with the consequences of failing to comply with the provision. In the 2003 decision in *Smith v. Haworth*, it was said that the failure to follow formalities does not, without

³³⁰ R.S.A. 2000, c. D-15, s. 5.

³³¹ R.S.A. 2000, c. G-11. *Jang v. Jang*, 2000 ABQB 607 (CanLII), [2001] 2 W.W.R. 388, compares the requirements of section 38 to those in the *Guarantees Acknowledgment Act*, where the intent of the Legislature in enacting s. 38 was to ensure that a party executing a matrimonial property agreement understood its meaning, the effect on that party's rights and the possible consequences of execution.

³³² *Corbeil v. Bebris*, *supra* note 5 at para. 5.

³³³ *Ibid.* at paras. 11-12.

³³⁴ *Sporring v. Collins*, 2009 ABQB 141.

more, void a section 37 agreement.³³⁵ This decision was sharply criticized in *Rarog v. Rarog*, which stated that the failure to follow formalities renders an agreement legally unenforceable.³³⁶ This uncertainty is obviously tied to the issue of the scope of section 8(g), discussed in Part IV.N.

U. Costs

[168] It appears to be well settled that substantial success rather than absolute success is the test for awarding costs in matrimonial matters.³³⁷ In this way, costs in family matters are handled differently than costs in other civil matters, where divided success usually means that each party will bear its own costs.

[169] In addition to rewarding success, costs have traditionally been a way to penalize misconduct in court proceedings,³³⁸ and matrimonial property matters offer many examples of these types of cost awards. The most common awards in the cases where costs were a contentious issue involved party-party cost awards against unrepresented and obstructionist or deceitful spouses, regardless of the other party's success at trial.³³⁹

[170] Failure to disclose as required by section 31 of the *MPA*, or failure to disclose in a timely manner, is punished also by costs orders. One example is *L.M.B. v. I.J.B.*³⁴⁰ Extensive pre-trial applications for disclosure made by the wife resulted in two separate findings of contempt against the unrepresented husband. Even at trial, the husband failed to fulfill his duty to

³³⁵ 2003 ABQB 477.

³³⁶ 2007 ABQB 98 at para. 21.

³³⁷ See e.g. *Broda v. Broda*, 2003 ABQB 257 (CanLII), 2003 ABQB 257; *Metz v. Weisgerber*, [2004] A.J. No. 510 (ABCA); *Gardner*, *supra* note 135.

³³⁸ *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 at para 25.

³³⁹ See e.g. *W.P.B. v. D.M.B.*, 2006 ABQB 333 (costs awarded against unrepresented husband who was uncooperative and non-responsive and who failed to obey court orders).

³⁴⁰ 2002 ABQB 1046.

disclose, and he sought to enter into evidence a substantial amount of undisclosed documentation, thereby prejudicing the wife and prolonging the trial.

[171] Quite common, especially when unrepresented litigants are involved, are costs awarded as a lump sum plus disbursements.³⁴¹ Lump sum awards are seen practical when the parties' conduct or their relationship suggests that Schedule C costs will only invite more legal expense before a Taxing Officer. They are also preferred when the amount of time and the steps taken to deal with matrimonial property as opposed to corollary relief can only be estimated.³⁴² Lump sum amounts added to part-party costs are not unusual.³⁴³ Occasionally those awards involved double costs, as in *Potter v. Potter*, where the husband failed to cooperate or abide by undertaking not to dispose of property.³⁴⁴

[172] Less often, solicitor-client costs have been awarded. These awards have been for more extreme misconduct, including the deliberate hiding of millions of dollars in assets,³⁴⁵ perjury in the swearing of the Statement of Property,³⁴⁶ and the transfer of matrimonial property to a third party in an attempt to defeat the claim of the spouse (a matter covered by section 10 of the *MPA*).³⁴⁷ As the Manitoba Law Reform Commission noted recently, "solicitor and client costs are awarded in rare and exceptional circumstances when a party's conduct is reprehensible or

³⁴¹ See e.g. *N. M. v. C.L.M.*, *supra* note 58 at paras. 86-89 (\$20,000 in costs awarded against unrepresented husband for his "arrogant, confrontational and sarcastic" demeanor towards the wife's counsel which prolonged trial); *Taferner v. Taferner*, 2005 ABQB 475 at para. 30 (\$13,500 in costs awarded against uncooperative, unrepresented husband whose failure to disclose in a timely fashion caused delay)

³⁴² See e.g. *Gardner*, *supra* note 135 at paras 14-15.

³⁴³ See e.g. *C.S. v. T.L.*, 2003 ABQB 1013 at 90-94 (\$5,000 in additional costs awarded against unrepresented wife who faxed voluminous documents to the husband's counsel for the sole purpose of driving up the husband's legal fees and who claimed solicitor-client privilege when refusing to produce documents); *Gulewicz v. Gulewicz*, 2005 ABQB 166 at para. 27 (\$40,000 in costs awarded against husband due to his "systemic contempt for the process and his steadfast refusal to cooperate and act reasonably").

³⁴⁴ 2001 ABQB 810 at para 104.

³⁴⁵ *Brown*, *supra* note 204 at para. 101.

³⁴⁶ *Souder*, *supra* note 251 at para. 33.

³⁴⁷ *Zacharuk v. Zacharuk*, 2004 ABQB 384.

outrageous. Concerns over over-indemnification properly give way to the principle of punishing wrong-doing.”³⁴⁸

[173] Failure to disclose or other deceptive behaviour is punished with costs orders even when the deceptive spouse had greater success at trial. For example, in *Unser v. Unser*, the husband doctored a bill of sale for a vehicle to hide his equity in the vehicle and his wife was awarded costs even though the husband prevailed on three of the five issues before the court.³⁴⁹

[174] Double costs from the date of an offer of judgment have occasionally been awarded based on Rule 174(2) of the *Rules of Court*.³⁵⁰ It is difficult to apply the double cost rules in matrimonial property and support cases as it can be impossible to anticipate the manner in which the issues will be determined, especially when issues of child custody and access are also before the court.³⁵¹ Just as a policy of only awarding costs where one party wins on all the issues would deny costs in nearly all matrimonial cases, it has been held to be unwise to require that an offer be bettered on all points before awarding double costs.³⁵² It is said that such a policy would remove the motivation to settle that is created by the Rule.

[175] In summary, there do seem to be a number of costs issues that are specific to matrimonial property actions, or matrimonial property and corollary relief actions, that might be addressed. The issues involving unrepresented litigants, however, appear to be the type of issues that are well discussed in the literature on this topic.³⁵³

³⁴⁸ Report 111: *Cost Awards in Civil Litigation* (2005) at 49.

³⁴⁹ 2002 ABQB 634 at para. 93.

³⁵⁰ See e.g., *Ravoy v. Ravoy*, *supra* note 130; *MacDonald v. Galley*, 2005 ABQB 287. The purpose of Rule 174(2) is to promote reasonable settlements and punish the party who refuses a reasonable offer: see *Shillingford v. Dalbridge Group Inc.* 2000 ABQB 28, (2000), 76 Alta. L.R. (3d) 361 at page 369

³⁵¹ *Shipka v. Shipka*, 2001 ABQB 667 at para. 5; *Broda v. Broda*, *supra* note 337 at para. 78.

³⁵² *Gardner*, *supra* note 135 at para. 30; *Broda v. Broda*, *ibid.* at paras. 62-63.

³⁵³ See e.g. Mary Stratton. Alberta Self-Represented Litigants Mapping Project, [Final Report](#) (Canadian Forum on Civil Justice, 2007).

Part V. Conclusion

[176] In this part we briefly set out our personal opinions concerning which of the twenty-six issues discussed in Part IV need to be dealt with most urgently as a matter of law reform. We have prioritized what we see as the six major issues, but we also mention seven other issues. Issues are classified as “major” when they arise frequently, have multiple sub-issues, and have no obvious or easy solutions. We put the other issues in a separate category when their resolution appears to be easier, or a matter for the federal government, or already under investigation by a law reform organization, or fewer people appear to be affected.

A. Major Issues

[177] In our opinion, the date of valuation continues to be the most pressing issue. The hard and fast rule that the date of valuation must be the date of trial has been resisted since the *MPA* was enacted. It continues to be resisted despite the Court of Appeal’s affirmation of both the rule and its status as a rule in 2005 in *Hodgson*.³⁵⁴ The courts and counsel have shown ingenuity in getting around the rule, usually in order to use the date of separation as the date of valuation. This ingenuity has, however, caused problems in other areas. Four examples will suffice:

- (a) Employment bonuses are classified as either income or property based upon their receipt before or after the date of separation.
- (b) Debts incurred after separation are often, but inconsistently, not valued and not divided.
- (c) Not only are gifts, inheritances and other section 7(2) property acquired after separation exempt from distribution, but so are any increases in their value.
- (d) *De facto* divisions of assets on separation have been treated as agreements under section 8(g).

³⁵⁴ *Supra* note 22.

[178] There are many ways that the date of valuation issue could be addressed both directly and indirectly. For example, the date of valuation could be changed to the date of separation (as it is in many other provinces), or the date of trial could become a presumption instead of a rule, or the date of separation could be given greater weight than other factors in section 8.

[179] We see the exclusion of cohabiting partners from the MPA as the second thorniest issue, and one that causes much uncertainty and inefficiency.³⁵⁵ A broad spectrum of relationships fall within the cohabitation category, ranging from young couples who marry after a year or two of cohabiting, to couples in long-term relationships with children where one of the partners refuses to marry, to senior citizens who resist entanglement in each other's property out of concern for their respective children's inheritances, with many variations in between. In the case of cohabiting couples who go on to marry, the exclusion results in a multiplicity of actions and inconsistency in the courts' categorization of a "marriage" as long or short. In the case of cohabiting partners who do not marry, there is much more uncertainty involved in unjust enrichment actions than in *MPA* law suits, and thus more difficulty in settling the former claims.

[180] Other provinces now include common law partners within their family property legislation and it may be that the time has come to do so in Alberta too. There may be some resistance to this solution, however, as the inclusion of opposite-sex common law partners in a property splitting regime will necessitate, as a matter of constitutional law, the inclusion of same-sex partners. However, even partial measures such as Manitoba's inclusion of assets from the period of cohabitation if the parties later marry would solve some of the current problems.³⁵⁶

³⁵⁵ The issue could also be seen as an issue of excluding property divisions on relationship breakdown from Alberta's *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5.

³⁵⁶ *Family Property Act*, C.C.S.M. c. F25 s. 4(2)(a). Cohabitation before marriage is related to the date of valuation issue. If cohabitation before marriage is included and if the date of separation becomes the date of valuation, then the relevant time for acquiring property subject to the presumption of an equal division would shift from the time

[181] Dissipation is another major issue. Most dissipation appears to happen post-separation. Therefore, changing the date of valuation to the date of separation would resolve most dissipation issues. If the date of separation is not made the date of valuation, however, legislative reform should clarify whether negative intent is required for actions to amount to dissipation, as was held in *Cox*,³⁵⁷ or whether dissipation is a broader concept. The role of disease (especially addictions) and disability in dissipation needs to be considered as well and the *Charter of Rights and Freedoms* must be considered on these points.

[182] Disclosure, the “cancer of matrimonial property litigation,”³⁵⁸ is our fourth choice as a major issue. While section 31 requires complete disclosure, there are no consequences for non-disclosure in the *MPA*. Usually nothing happens if one party lies in his or her sworn affidavit, but occasionally non-disclosure is considered under section 8(m) and occasionally the prevaricating spouse faces cost penalties. Disclosure is also relevant to contracting out of the *MPA* under section 37. There are different standards of disclosure required for pre- and post-nuptial agreements, and multiple questions surround the issue of whether general or specific disclosure is required.

[183] Debt is an area fraught with uncertainty and inconsistent treatment by the courts. It is not clear in the *MPA* that the relevant value of assets is their net value. The word “debt” is absent from the statute and the liabilities of each individual spouse are mentioned only as one of many considerations in section 8(d). The courts fairly consistently do not include post-separation

period during which a couple is legally married to the time period in which they cohabited., a shift in focus from the *de jure* to the *de facto*.

³⁵⁷ *Supra* note 11.

³⁵⁸ *Rick v. Brandsema*, *supra* note 292.

debts or legal fees, but the treatment of taxes is particularly problematic. The question also arises as to whether debts need to be tied to assets to be included.

[184] Our final major issue is that of agreements, both agreements under section 8(g) and the more formal contracting-out agreements under section 37. There are multiple sub-issues in these areas. For example, the relationship between sections 8(g) and 37 continues to be an uneasy one. Also, should section 8(g) include only failed section 37 agreements, or should it include offers to settle and the *de facto* splitting of assets? In addition, the role of independent legal advice for section 37 agreements is still unclear. And Alberta appears to be the only province that does not allow judicial oversight of section 37 agreements.

B. Other Issues

[185] A preamble setting out the purposes of the MPA would be a relatively simple thing to add. The need for such a statement to guide courts in interpreting the statute was revealed in the *Jensen* decision in 2009.³⁵⁹

[186] The valuation and distribution of pensions continues to be a problem in many cases. The area has been the subject of previous law reform recommendations and is currently being studied anew by the Manitoba Law Reform Commission. Reform in this area is difficult, in part, because of the variety of legislation that governs particular pensions and its frequent amendment.

[187] There are numerous issues connected with corporations as matrimonial property. These include the ease with which the corporate veil is usually lifted in this context, tax issues

³⁵⁹ *Supra* note 4.

(particularly on valuation), and financial viability concerns. All of these issues, and others, could be addressed explicitly.

[188] Occupation rent is a more circumscribed issue than the others on our list. Nevertheless, ever since the Queen's Bench decision in *Kazmierczak*,³⁶⁰ the issue has arisen frequently. Changing the date of valuation to the date of separation would also help resolve this issue, but otherwise consideration might be given to tying receipt of occupation rent to orders for exclusive possession or to adopting the factors set out in *Kazmierczak*.

[189] Without a definition of property in the *MPA*, there has been quite a bit of controversy over what is and what is not property in this context, including debt (discussed separately above). Employment bonuses, stock options and severance packages have all been treated both as property and as income. Retroactive support is sometimes treated as an asset. There is no consistent approach to the issue of whether something is property in the cases. A definition might be helpful, particularly if it spelled out whether the approach should be a conceptual or functional one.

[190] Misconduct is another issue on which explicit direction would be helpful. Is dissipation the only misconduct that is a factor in the division of property (and perhaps non-disclosure, as noted above) or should other types of misconduct be factored in? If other types of misconduct are relevant, is it only those types that have negative economic consequences, or is the category broader?

[191] The relationship between the *MPA* and federal bankruptcy legislation does not arise frequently but it has posed numerous problems. Most of these problems — such as the

³⁶⁰ *Supra* note 10.

definition of property for bankruptcy purposes and the effect of bankruptcy on an order requiring a payment to equalize distribution — can only be dealt with federally.³⁶¹ However, the need for reform might be championed by the provinces and some amendments to the *MPA* may be useful.

[192] Some minor issues appear very easy to resolve. We mention them here only because they should be included in any more encompassing amending statute. For example, the *MPA* allows a spouse to register a certificate of *lis pendens* against real property, but there is no equivalent provision dealing with personal property. As another example, the rules regarding costs need to be amended in the *MPA* context. Substantial, rather than absolute, success should warrant a costs order, and the double costs rule that follows offers of judgment needs to be more flexible in the *MPA* context, as it is usually impossible to predict each clause in an *MPA* order, especially when distribution is *in species*.

[193] One final point might bear repeating after this discussion of the issues raised by *MPA* litigation, which is that, from the perspective of the reported cases, much of the *MPA* appears to work as intended and without any significant or persistent problems. We would include the categories of exempt property, the factors defining what types of contributions count, matrimonial home possession orders, conditions precedent to applications under the act, orders for the returns of gifts from third parties, and many other provisions in that assessment.

³⁶¹ The Supreme Court of Canada will be hearing an appeal from *Schreyer v. Schreyer*, 2009 MBCA 84 in November 2010. The issue in that appeal is whether or not the bankrupt husband's debt to the wife, an equalization payment ordered in a matrimonial property action, was extinguished by his bankruptcy. While orders for alimony and spousal and child support are not extinguished by bankruptcy, the Manitoba Court of Appeal held the equalization payment was.