Unequal Division of Matrimonial Property: Post-Hodgson

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A. INTRODUCTION

The Matrimonial Property Act of Alberta was proclaimed in January, 1979. The Act provides for a deferred sharing of property acquired during the course of the marriage. It does not create community property during the marriage itself. The Act only comes into play when the parties have separated and have commenced an action under *The Matrimonial Property Act of Alberta.*

Prior to *The Matrimonial Property Act* being passed married women were only entitled to a share of property if they were on legal title to that property or if they could establish a resulting or constructive trust. *Murdoch v. Murdoch* (1973) S.C.J. 150 was the decision which made the public aware of the injustice of the property regime, particularly to women who generally did not hold title to property. Taken from a summary of the evidence which was led at trial:

> "The evidence showed that, in addition to doing the usual work of a farm wife, the wife worked in the fields, operated farm machinery and contributed to the fund realized from the sale of grain and livestock, which was used to pay for the property. She helped to build the house. Because of her work on the farm, no hired man was employed. The husband was frequently ill, and she performed the extra duties required."

Again, taken from the trial decision in:

> "I find no evidence in the holding of any of the properties, nor in the way that cattle were sold or purchased, that would indicate that the parties intended to operate as a partnership, or that anything else by agreement was intended other that what, in fact, did take place. The land was held in the name of Mr. Murdoch at all times. The cattle and the equipment were also held in his name; income tax returns were filed in his name; no declaration of partnership was ever filed under *The Partnership Act*, that I know of; and I, therefore, do not form the conclusion that the Plaintiff and the Defendant were partners, or that a relationship existed that would give the Plaintiff the right to claim as joint owner in equity in any of the farm assets."

Essentially, in *Murdoch*, the wife created the household structure within which framework she maintained the family: fed and watered the household, planted, weeded and harvested a garden, canned and put down produce and preserves, raised and kept chickens, and other animals, made clothing, bedding, linens, and draperies, laundered and mended. She contributed to the funds from the sale of produce and livestock. In relation to the farm operation, when the husband was well, she worked by his side, and when he was ill she assumed his role. Her participation obviated the need for a hired hand. All of this earned her zero interest in the farm. The reasoning of the trial judge was upheld by the Supreme Court of Canada, but with a very strong decent from Justice Laskin. As a result of the *Murdoch* decision it became very apparent that there was a need for legislation to protect non-owner spouses from exploitation at the hands of owner-spouses who were effectively aided and supported by the Courts. It should be noted that the decision of *Rathwell v. Rathwell* came out of the Supreme Court of Canada in 1977 and this decision essentially confirmed Mr. Justice Laskin's decent. As a result Mrs. Rathwell was able to prove a constructive trust and was able to make a claim to the farm property which had been accumulated during the course of the marriage. The problem, of course, was that constructive trust principles still do require, for a successful judgment, very specific evidence in terms of contribution.

The Matrimonial Property Act which was proclaimed in 1979 delineated the rights of spouses upon marriage break-down to share in property acquired during the marriage regardless of which spouse was named as the registered owner. Although this legislation is a vast improvement, it is still does not provide for the sharing of assets while the parties are together.

Since 1979 there have been no substantive amendments to *The Matrimonial Property Act*.

One of the very first decisions on *The Matrimonial Property Act* from our Court of Appeal was *Mazurenko v. Mazurenko* (1981) A.J. 23. The *Mazurenko* decision was the first decision to review whether or not property should be valued at the date of separation or at the date of trial. At paragraph 15 Justice Stevenson stated:

> "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 of valuation be made at trial should apply. While not conclusive on this point, s.s.7(3)(c) and 8(f) militate against the husband's argument."

The issue of whether or not valuation of property should be made as at the date of trial and/or the date of separation has been reviewed by a number of cases since

Mazurenko. Certainly there have been cases where the Courts have valued property as at the date of separation. Prior to the *Hodgson v. Hodgson* decision of our Court of Appeal, 2005 A.B.C.A. 13, the issue whether or not property should be divided as at the date of trial or the date of separation was thoroughly canvassed in Mr. Justice Slatter's decision of *Kazmierczak v. Kazmierczak* (2001) A.B.Q.C. 610. Commencing at paragraph 49, Mr. Justice Slatter reviews all of the significant cases to that point regarding valuation date. He concludes at paragraph 70 by stating the following:

> "Notwithstanding the strong presumption in favour of division at the date of trial, the cases do permit that in exceptional circumstances some other date of division might be used. If ever there was a case calling for division as of the date of separation, this would perhaps be the case. However, I have concluded that it is impractical to use a date other than the date of trial, without doing violence to the wording of the Act. If one uses the date of separation for the property division, how does one factor in "the market value at the time of trial" as called for by s.7(3)? If division is made at the time of separation, how does one factor in the financial resources at the time of trial as called for by s.8(d)(ii)? If division is at the time of separation, how does one deal with property acquired during separation under s.(8)(f)? In my view, a more just and equitable result can be achieved in this case by dividing the property at the time of trial, using a property-by-property division. In other words, rather than dividing the net matrimonial property on a percentage basis, as is usually done, it is more appropriate here to deal with each asset separately, while still having regard to the over-all division that results from that process."

Although that case was appealed to the Court of Appeal, the Court of Appeal did not deal directly with the issue of date of valuation.

In 2005 the Court of Appeal dealt with the issue in *Hodgson v. Hodgson*, and, after a review of the statutory scheme, the Court said at paragraph 32:

> "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 Matrimonial Property Act.* This is not a rebuttal presumption, but a rule of division."

Since that time there have been a number of cases which have, in a round-about way, allowed for unequal divisions of property based on various factors set out in the Act, but particularly separation factors. This paper will look at cases of unequal division, both under 7(3) and 7(4).