

Building a Case for Property Division – Matrimonial and Common Law Property Cases

Prepared For: Legal Education Society of Alberta

Family Law Boot Camp

Prepared By:

Krista L. Frohlich

Wendy C. Rollins

Frohlich Rollins Frohlich

Edmonton, Alberta

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I. INTRODUCTION

Building a property case requires knowledge of the relevant law, discerning the relevant facts of your client's case, collecting the relevant disclosure and evidence from your own client and from his / her estranged spouse to prove those facts, analysis of the client's circumstances and evidence, and ultimately an evaluation of how the law affects and is applied to the client's circumstances. An important part of case preparation also involves educating the client as to what the law says, how it applies to him/her, and working to promote realistic client expectations early in the process.

What information does one need to build a case for property division? What information is relevant? How does one obtain needed information? Is there a difference between property cases in a cohabitation context¹ as opposed to in the context where parties who have made the decision to marry and who have actually married? How do you organize all of the information and documents you are collecting?

Alberta's **Matrimonial Property Act**² provides a legal framework for division of matrimonial property upon marriage breakdown. Most lawyers are familiar with the disclosure protocol of a Notice to Disclose for matrimonial property cases. But what is the framework and what is required for a common law property case? It is common for clients to attend their first meeting with a lawyer assuming that they have the same rights for all purposes as do legal married couples, after they have cohabited for one or two years. It is important to recognize that there is no standardized time period after which a couple is considered to be "common law". It depends upon the context in which that status is determined. In some contexts, such as some private healthcare plans, one need only cohabit with another adult for a matter of months before being considered a "spouse" for the purposes of coverage under the plan. For the ability to share in Canada Pension Plan benefits, the period of time is one year. The **Income Tax Act** deems spouses to be common law spouses if they have been living together in a conjugal relationship for at least twelve continuous months or if they are cohabiting parents of their child (or one of the parents has custody and control of the other partner's child and the child is wholly dependent on that person for support)³.

Alberta does not have legislation governing the division of property upon the dissolution of a cohabitation or common law union. While there are some guidelines for status as a common law partner for spousal support purposes⁴ and in the federal and provincial regimes for certain social and tax benefit eligibility, there is no statutory guidance for property division for cohabitating partners. A quick review of other Canadian jurisdictions reveals this is the

¹ For this paper cohabitating parties/partners will mean parties who have not legally married

² R.S.A. 2000, c.M-8.

³ Canada Revenue Agency's website re marital status at: <http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/ncm-tx/rtrn/cmpltng/prsnl-nf/mrtl-eng.html>.

⁴ See **Family Law Act**, S.A. 2003, p. c.F-4.5, Part 3, Division 2, sections 56-63.

case nationwide⁵. Some provinces allow parties to contract into a civil union, (such as civil unions in Quebec in 2002, domestic partnerships in Nova Scotia in 2001, common-law relationships in Manitoba in 2002, and finally Adult Interdependent Relationships in Alberta in 2003⁶).

These materials will provide some guidance and checklists that can be used when:

- Determining what you must prove in matrimonial property and common law property cases;
- Determining what information to collect;
- How to collect the information with a **brief** review of the new Alberta Rules of Court;
- How to organize your file during the collection process; and
- Analyzing information and disclosure.

II. ONE OF THESE THINGS IS NOT LIKE THE OTHERS

In his letter to the editor of *The Lawyers Weekly*, Issue September 3, 2010, Robert M. Curtis, QC of Edmonton responds to a debate about closing the legislative gap with respect to division of property for unmarried cohabitants (in response to a July 2, 2010 article written by Professor Emily Carasco). Mr. Curtis writes:

“Carasco argues that, because many unmarried parties find themselves without property after years of cohabitation, the law should presume that their rights should be identical to those who have chosen to marry.

This is like saying that because it looks like a duck and walks like a duck, it must be a duck, but without recognizing that if the duck would talk, she would loudly proclaim, “I am not a duck, and do not wish to be!”

The Supreme Court of Canada’s decision in ***Nova Scotia (Attorney General) v. Walsh***¹⁷ put to rest the ongoing debate of whether the same proprietary legal protections afforded to married spouses should be extended to cohabiting partners. The Honourable Justice Bastarache, writing for the majority, opined that people who marry have chosen to accept mutual rights and obligations. Similarly, a couple’s decision not to marry should be respected because that choice stems from a conscious choice.⁸ The Court states that the differences between the two types of relationships cannot be ignored:

“ 43 Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount. The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious, and financial considerations by the individual. While it remains true that unmarried spouses have suffered from historical disadvantage and stereotyping, it simultaneously cannot be ignored that many persons in circumstances similar to those of the parties, that is, opposite sex individuals in conjugal relationships of some

⁵ Wikipedia: http://en.wikipedia.org/wiki/Common-law_marriage#Canada.

⁶ S.A. 2002, c. A-4.5.

⁷ [2002] 4 S.C.R. 325, also referred to as ***Walsh v. Bona***.

⁸ *Ibid.* at paragraph 55.