

Family Law Update

Prepared For: Legal Education Society of Alberta
Law and Practice Update

Presented by:

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MODULE 1: COMMON-LAW RELATIONSHIPS

Contrary to what many members of the general public believe, there is a difference in the law governing common-law relationships vs. marriage. It is important for a lawyer to understand these differences for obvious reasons.

There are actually two types of common-law relationships. If two people move into the same residence and pledge their undying love they will be considered to be in a common-law relationship after a very short period of time. This actually creates property rights between the parties for there is no time period before such rights begin to accumulate. Obviously any claim for a division of property may very well begin to accumulate quickly depending on the situation.

The other type of common-law relationship is one that fits within the definition contained in the *Adult Interdependent Relationships Act*, specifically paragraph 3(1) (**TAB 1**):

- Subject to subsection (2), a person is the adult interdependent partner of another person if
- (a) the person has lived with the other person in a relationship of interdependence
 - (i) for a continuous period of not less than 3 years, or
 - (ii) of some permanence, if there is a child of the relationship by birth or adoption

Take note that having a child by either birth or adoption, but not loco parentis eliminates the three year period.

Section 1(1)(f) of the *Adult Interdependent Relationships Act*, states:

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

This section, in a nut shell defines a common-law relationship whether under the *Adult Interdependent Relationship Act* or the other one mentioned above.

An Alberta decision which looked carefully at whether or not a couple was in a common-law relationship is *Burgess v. Ulley* (**TAB 2**). This case was decided under the *Domestic Relationships Act*, but the reasoning would apply to an action under the *Adult Interdependent Relationships Act*.

Once a person is able to establish that they are an adult interdependent partner, then they are granted rights identical to the rights of a married person under *The Dependants Relief Act*, *The Intestate Succession Act*, and *The Family Law Act*. There are other pieces

of legislation, such as *The Wills Act* which mention an adult interdependent partner but they are outside the scope of this paper.

Pursuant to the terms of the *Family Law Act*, section 57, the court may award support to an adult interdependent partner.

It is obvious that the factors that the court has to look to in assessing support are very similar to those set out pursuant to the terms of the *Divorce Act*.

It is to be noted in paragraph 62, that *The Family Law Act* specifically authorizes an agreement whereby an adult interdependent partner gives up the right to support.

Pursuant to the terms of the *Canada Pension Act*, a common-law partner is defined

“common-law partner”, in a relation to a contributor,
means a person who is cohabiting with the contributor in
a conjugal relationship at the relevant time, having so
cohabited with the contributor for a continuous period of
at least one year. For greater certainty, in the case of a
contributor’s death, the “relevant time” means the time of
the contributor’s death.”

Note that a common-law partner must have been actually cohabitating with the deceased spouse at the date of death. Later in the legislation it is explained that a common-law spouse who is not living with the deceased, is not entitled to benefits pursuant to the *Canada Pension Act*.

Supreme Court of Canada in Minister of Human Resources Development v. Betty Hodge (TAB 3) indicates that the section is to be interpreted exactly as it is written.

It is to be noted that a married spouse, may apply for benefits even if the parties were not cohabitating at the date of the deceased’s death.

A potentially significant difference between a marriage relationship and a common-law relationship is that the *Dower Act* only applies to married people; it does not apply to people in a common-law relationship.

An important decision to remember with regards to property rights is *The Attorney General of Nova Scotia v. Susan Walsh (TAB 4)*, The Supreme Court of Canada had occasion to decide if matrimonial property legislation, limited to married people, contravenes the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada held that it does not and accordingly *Matrimonial Property Act* legislation only applies to married people.

Property rights in a common-law relationship are treated different than such rights between a married couple. There is no legislation giving common-law partners any rights in the property of their partner and they must rely upon the common-law.

The Rules of Court (One Year Later)

Presented by Miguel F. Martinez

Introduction

It has been a little more than one year since the new Rules of Court came into force in Alberta. One year seems to be an appropriate time to look back at how Alberta judges are dealing with the new Rules.

This paper is not intended to be a review of all of the relevant cases in the past year. What I attempted to do was highlight some Rules that I think every litigator will deal with at some point and to look at the trends, if any, that one can glean from the judicial interpretation of the new Rules.

For a comprehensive summary of all of the cases dealing with the new Rules I recommend that you take advantage of the excellent work done by Jensen Shawa Solomon Duguid Hawkes LLP who produce a quarterly online newsletter that reviews recent judicial decisions interpreting the new Rules of Court (<http://www.jssbarristers.ca/jss/rules.php>).

Foundational Rules

The 2010 Rules of Court introduced something that none of us had ever seen before: Foundational Rules. The Foundational Rules created a framework or guide for how the Rules of Court should be interpreted and applied. These Foundational Rules describe the “purpose and intention” of all of the rest of the Rules of Court, they delineate the Court’s authority, and give guidance about how the Rules should be interpreted.

How has the Court interpreted and applied the Foundational Rules? As you will see in the following review, the Court is using them just as they were intended to be used: as a guide to interpreting the rest of the Rules of Court.

Rule 1.2 – The Purpose and Intention Rule

In two cases, *Envision*¹ and *Nowicki*², Madam Justice Moen went through a careful and detailed analysis of Rule 1.2³ (the purpose and intent rule), when assessing whether to sever issues in an action under Rule 7.1⁴.

In *Envision*, the City of Edmonton applied to sever one of two questions in a judicial review of the City’s decision to reject a petition presented to it. The two questions as described by Justice Moen were:

1. Was the Petition out of time? Does the limitation period set out in the *Municipal Government Act* even apply in the circumstances of this case? (“The First Question.”)

¹ *Envision Edmonton Opportunities Society v. Edmonton (City)*, 2011 ABQB 29

² *Nowicki v. Price*, 2011 ABQB 133

³ See Appendix

⁴ *Ibid.*

2. Was the Petition sufficient in meeting the requirements of sections 222 to 226 of the *Municipal Government Act* with respect to the numbers of petitioners, the form and content of the Petition and the other legal requirements that are set out therein? (“The Second Question.”)⁵

The City of Edmonton wanted the limitations question answered first and independently of the question about the sufficiency of the signatures on the petition.

Madam Justice Moen first considered whether the test for severance had changed under the new Rules, or whether the test remained the “exceptional case” test applicable under Rule 221 of the previous Rules. Madam Justice Moen found that Rule 7.1 was more than merely a codification of the common law test interpreting former Rule 221.

Before conducting her analysis under the “purpose and intention” rule, Justice Moen set the stage by referring to three broad rules of statutory interpretation arising from two Supreme Court of Canada cases. Those rules of interpretation can be summarized as follows:

1. purpose statements, like preambles, are interpretative aids which establish the context and purpose of the statute to which they apply,
2. a substantive enactment must be interpreted in such a way as to give effect to a purpose statement, and
3. the difference in the purpose statements between old and new versions of a statute are legislatively meaningful.⁶

Justice Moen found that when analyzing Rule 7.1 through the lens of Rule 1.2, the “exceptional case” test no longer applied in Alberta:

Rule 7.1(1)(a) lays out three grounds for severance. These are: 1) disposing of all or part of a claim; 2) substantially shortening a trial; and 3) saving expense. A judge has discretion to grant severance based on any *one* or more of the grounds.

Rule 7.1(1)(a) should also be interpreted in light of the purposes of the New Rules set out in Rule 1.2. Those purposes include: 1) under Rule 1.2(1), to provide a means by which the claim can be resolved fairly, justly and in a timely and cost-effective way; and 2) under Rule 1.2(2)(b) and (c), to facilitate the quickest means of resolving the claim and encourage the parties to resolve the claims by themselves.

The Court must also keep in mind the requirement of proportionality in granting a remedy under Rule 1.2(4). This requires the Court to balance all of the interests in each case.

⁵ Supra, Para. 6

⁶ Ibid. Paras. 18 and 19

Real Estate

Top Ten Challenges Faced by a Sole Real Estate Practitioner

Prepared For: Legal Education Society of Alberta

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TOP TEN CHALLENGES FACED BY A SOLE REAL ESTATE PRACTITIONER

Earlier this year, I was approached by the Chair of this conference to see if I had some thoughts to share with a planned Legal Education Society of Alberta (“LESA”) seminar. Further, it was asked, might I have any interest in preparing a short paper and, possibly, making a presentation along the general theme of challenges faced by the sole practitioner? Though my law practice is quite narrow, I was flattered by the invitation and I was indeed interested. The result is this paper and the writer’s presentation.

My appreciation goes firstly to Ms. Brenda Edwards, Conference Chair, for her encouragement for this particular project and for her professional counsel in general. Secondly, I wish to express my appreciation to LESA for this opportunity. Finally, my thanks go to a number of my colleagues for taking time to provide feedback and comment on my topic. With those acknowledgements having been made, I alone am responsible for the final content (error included).

To the seminar participants and/or readers, you will not confuse his work with any type of academic treatise. There are no case citations and no brilliant comments on a recent Supreme Court of Canada decision or some other legal development. The comments are those of the writer alone and, again while the writer’s practice is primarily focused upon residential conveyancing and mortgages, it is hoped that there may be an occasional point to interest or relevance to the law practice of other sole practitioners.

With apologies to TV’s David Letterman’s well-known “Top Ten Lists,” herewith are my Top Ten Challenges faced by a sole real estate practitioner.

1. The “Where-Do-I-Get-My-Work?” Challenge

Having been called to the Alberta Bar in 1992, this challenge is happily one that is behind me, but I thought it might be worth a mention- especially for the newer members of the Bar.

When a sole practitioner first “hangs out his or her shingle,” as the expression goes, it can be a daunting prospect. As I set-up my first office, I took advantage of a program offered by the Practice Advisor’s Office of Law Society of Alberta to have a visitation to my office and review and comment on my file set-up procedures, trust accounting, general accounting procedures, and the like. (I believe that this service is still available upon request). One of the comments made to me during the visitation was that, in the first five years or so of practice, I would likely have few repeat clients and few referrals from past clients. But, from that magical 5-year mark forward, I should notice that increasing amounts of my work should come from referrals from past clients and clients who would return for new files. Either that advice was sound or I have done something

right (or maybe both) because I have been fortunate not to have looked very hard for client work in the past few years.

It has been my experience (and it sometimes easier to say than to do) that a practice should not be about acquiring more clients and more file volume (though I am aware that some firms operate on this model). Rather, it should be about thoroughly servicing each client. Look after every client and this challenge (of numbers of clients and the consequential billings from your practice) will take care of itself.

In terms of “shaking the bushes” for work, if you are looking for real estate conveyancing work, I would suggest that you get to know some of the realty brokerages in your area. There may well be interest to have you attend a Monday-morning sales meeting to speak of developments and trends in the real estate field. As well, there are lots not-for-profit organizations around that would be happy to have you volunteer or act as volunteer counsel. Also, there may be networking clubs in your vicinity, as well as a plethora of local service groups and even political organizations in your locale. Find a group or organization that fits your personality and your available time and “plug yourself in.” You should find that there will be a potential client or more in whatever group you choose to join.

At the point where a sole practitioner can turn away a client (or sometimes refer that client to other counsel (possibly counsel with more experience in a particular area), you know that you have turned a corner.

2. The Land Titles Challenge

If like me, you are (or aspire to be) a sole real estate practitioner, some familiarity with key provincial statutes such as *The Land Titles Act* and *The Real EstateAct* is a given. Beyond that, I recommend that you do not limit your contact to just submitting and receiving documents via your court runner. Make a pilgrimage to your local Land Titles office and put a face to a name on a Document Registration Request (“DRR”) or to the voice of a Land Titles Examiner you may have spoken with. The first time I did this I had attended the Land Titles counter with a question about a document. The particular examiner looked at the document, then looked at my name on the document, and then looked up and smiled at me saying “I know your name from your documents and I always look forward to working on them.” Now stunned, I quickly came to realize that a lawyer’s reputation at Land Titles will precede you by the thoroughness and quality of documents submitted and the like.

As some of you will know, the staff at Land Titles is extremely meticulous in what they do and they are quite proud of the job they do. Treat them with the proper respect and you will be rewarded with the same professional courtesy. When you are faced with something you’ve never seen before, do not hesitate to make an inquiry at Land Titles. But, if you play the “hey-I’m-an-important-lawyer...” superiority card with Land Titles, do

Lyin' n' Cheatin' 'n Thievin' 'm Drinkin' 'n Scappin': Just Another Day Down in Criminal Court

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1. PRACTICE AND PROCEDURE

The Court Case Management (CCM) and Case Management Office (CMO) projects initiated nearly two years ago in Calgary and Edmonton continue to expand into new phases. Remote (i.e. “online”) trial booking, 8:15 am to 2:00 pm “docket court” hours, and circuit court trial booking through the two major cities’ respective Regional Court offices are some of the initial and newly added changes. One useful aspect of the remote booking tool is the ability of defence counsel registered with the program to access all ongoing criminal charge information of any accused before the courts in Calgary or Edmonton. Counsel outside those centres may wish to register so as to more easily access information on clients facing charges in those two cities. The long-promised online electronic provision of Crown disclosure is said to be part of the next phase but no timeline has been announced. However, police and Crown reliance on the “Livelink” database of electronically stored police documents is growing and seems to be replacing the best evidence rule.

For many years the general rule in Alberta respecting the ability of defence lawyers to withdraw as counsel of record for non-payment of fees has required that the application be brought at least one month prior to trial. Now, the Supreme Court of Canada in *R. v. Cunningham* [2010] S.C.J. No. 10 has set out the conditions by which the court will assess such an application. The issue on appeal was whether, in a criminal matter, a court had the authority to refuse to grant defence counsel’s request to withdraw because the accused had not complied with the financial terms of the retainer. The Supreme Court held that a court has the authority to require counsel to continue to represent the accused, though it has to be exercised sparingly, and only when necessary to prevent serious harm to the administration of justice. Counsel does not have an unfettered right to withdraw.

In addition, a court’s jurisdiction to control its own process imposes a further constraint on counsel’s ability to withdraw. The disclosure of non-payment of fees in cases where it is unrelated to the merits and would not cause prejudice to the accused is not an exception to privilege. Forcing unwilling counsel to continue would not create a conflict between the client’s and lawyer’s interests. Where the court requires counsel to continue to represent an accused, counsel has to do so competently and diligently. Refusing to allow counsel to withdraw should be a remedy of last resort and should only be relied upon where it is necessary to prevent serious harm to the administration of justice. If counsel sought to withdraw far enough in advance of any scheduled proceedings and an adjournment would not be necessary, then the court should allow the withdrawal. If withdrawal is sought for an ethical reason, then the court has to grant withdrawal. If withdrawal is sought because of non-payment of legal fees, the court can exercise its discretion to refuse counsel’s request.

Earlier in 2011, Alberta courts were abuzz with the fallout from the decision in *R. v. Trites* [2011] N.B.J. No. 12 (NBCA), where a guilty plea in mid-trial and the resulting conviction were quashed on appeal because the accused had not personally or in writing made a formal election for mode of trial, nor had he explicitly authorized his counsel (or any agent appearing for counsel) to make his election for him in the filed Designation of Counsel.

After a brief flurry of courts ordering the personal attendance of accused persons to enter their election directly, defence lawyers (at least in Calgary) quickly re-drafted their Designation of Counsel forms, and created a new Notice of Election by Accused form, to expressly incorporate the required information in writing so as to satisfy the conditions in *Trites* (see Addenda).

2. RIGHT TO COUNSEL/RIGHT TO SILENCE

The Charter s. 10(b) right to counsel and s. 7 right to silence continue to be narrowed by recent decisions from all levels of courts. In *R. v. Sinclair* [2010] S.C.J. No. 35, a deeply divided (5:4) Supreme Court recently held that a detainee does not have the right to further consultation with counsel once s. 10(b) has initially been satisfied (even in the course of a lengthy interrogation), absent any changed circumstances resulting from (but not limited to) (a) new procedures involving the detainee; (b) a change in jeopardy; (c) reason to believe that the detainee did not understand his/her 10(b) right upon initial advisement of such by the police. Most significantly, the court ruled that the police conducting the interrogation would be the initial arbiter of whether such a material change in circumstances had occurred. This decision culminates the so-called “interrogation trilogy” of Supreme Court cases that began with *R. v. Oickle* 2000 SCC 38 and continued with *R. v. Singh* 2007 SCC 48.

The majority judgment (per McLachlin C.J.C. and Charron J.) took pains to discount the minority views, as follows:

48 The general idea that underlies the cases where the Court has upheld a second right to consult with counsel is that changed circumstances suggest that reconsultation is necessary in order for the detainee to have the information relevant to choosing whether to cooperate with the police investigation or not. The concern is that in the new or newly revealed circumstances, the initial advice may no longer be adequate.

....

60 The better approach is to continue to deal with claims of subjective incapacity or intimidation under the confessions rule. For example, in *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, at para. 61, the Court recognized that using non-existent evidence to elicit a confession

Wills Update

Wills and Succession Act: Updating Alberta's Succession Laws

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Wills and Succession Act: Updating Alberta's Succession Laws

Wills and Succession Act, SA 2010, c W-12.2 ("Wills and Succession Act") was passed in 2011 by the Alberta Legislature with a view to reforming and updating Alberta's succession laws. The government is targeting February 1, 2012, for proclamation, giving the government time for "housekeeping" changes.

The second phase of succession law reform in Alberta will be a review of the law in relation to the estate administration. The ALRI has put out a discussion paper (Report for Discussion 22 at <http://www.law.ualberta.ca/alri/docs/rfd022.pdf>).

Principals Guiding Succession Law Reform

According to the information on the AG website (<http://justice.alberta.ca/initiatives/Initiatives%20Library/AlbertaSuccessionLawReform.aspx/DispForm.aspx?ID=12>), the fundamental principles guiding succession law reform in Alberta are:

1. a person is free to transfer his or her property to others upon death and any interference with a person's wishes in this regard must be justified;
2. if a person does not formally indicate how they want his or her property distributed upon death, it is presumed that the person wants it to go to family members; and
3. a person's freedom to transfer property on death is subject to satisfying the person's legal and family support obligations.

Consequential and Related Amendments

The *Wills and Succession Act* repeals and consolidates the following Acts:

The Dependants Relief Act, RSA 2000 cD-10.5;

The Intestate Succession Act, RSA 2000 cl-10;

The Survivorship Act, RSA 2000 cS-28; and

The Wills Act, RSA 2000 cW-12.

The *Wills and Succession Act* also makes significant amendments to the *Matrimonial Property Act, RSA 2000, c M-8.*

The *Wills and Succession Act* makes minor amendments the following Acts:

The Administration of Estates Act, RSA 2000, c A-2;

The Employment Pension Plans Act, RSA 2000, c E-8;

The Insurance Act, RSA 2000, c I-3;
The Interpretation Act, RSA 2000, c I-8;
The Members of the Legislative Assembly Pension Plan Act, RSA 2000, c M-12;
The Metis Settlements Act, RSA 2000, c M-14;
The Mobile Home Sites Tenancies Act, RSA 2000, c M-20;
The Personal Directives Act, RSA 2000, c P-6;
The Residential Tenancies Act, RSA 2000, c R-17;
The Trustee Act, RSA 2000, c T-8; and
The Unclaimed Personal Property and Vested Property Act, SA 2007, c U-1.5.

New definitions

“Descendant(s)” replaces the term “issue”.

“Child” includes all children of a person including children who are in the womb at the time of the death, and the status of illegitimacy is abolished.

The parent-child relationship is now established by the criteria in Part 1 of the *Family Law Act* (“Establishing Parentage”).

Duty of lawyer

The *Wills and Succession Act* creates a duty for a lawyer who acts on behalf of a party in an Application to the Court

1. to discuss with the party alternative methods of resolving the matters that are the subject of the application, and
2. to inform the party of collaborative processes, mediation facilities and other justice services known to the lawyer that might assist the parties in resolving those matters.

Survivorship Rules

Currently, the *Survivorship Act*, R.S.A. 2000, c. S-28, (“Survivorship Act”) provides that if a couple die at the same time the deaths are “presumed to have occurred in the order of seniority” and the younger is deemed to have survived the older. The *Wills and Succession Act* repeals the *Survivorship Act* and provides that if a couple dies at the same time (or in circumstances rendering it uncertain which of them survived the other),