

Top 7 Property Issues

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Issues in Matrimonial Property

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PROBLEMATIC MATRIMONIAL PROPERTY ISSUES

INTRODUCTION

In preparing for this paper I invited many Alberta family law lawyers to share some of the more difficult issues that tend to arise on property matters on their files. The following is discussion around a number of these issues with an emphasis on practical approaches to settlement inasmuch as the great majority of our property cases are settled, not litigated. I have attempted to place the problems into the context of what I submit is a major underlying theme in the property sharing provisions of Alberta's Matrimonial Property Act (MPA), namely, "marriage product" or "fruit of the marriage tree". I have also summarized some of the principles recently applied by the Supreme Court of Canada in Kerr v Baranow; Vanasse v Seguin [2011] SCC 10 to the property division of unmarried couples following the breakdown of their relationships as it contains some obiter that ties in with the "marriage product" idea and family law practitioners are finding an increasing number of their property division cases must address periods of unmarried cohabitation.

In 2007 I wrote a paper for the Legal Education Society of Alberta ("Section 8 Factors, Fairness and Fruit of the Marriage Tree") upon which this paper will draw as a general framework for addressing the specific difficult issues we face in practice.

Marriage Product/Fruit of the Marriage Tree

My intent in 2007 was to search for a basic principle(s) in the Matrimonial Property Act (MPA) that might assist lawyers and judges in addressing unequal divisions of assets and debts in a principled way as opposed to the usual cherry picking of Section 8 factor(s) in support of the pre-determined conclusions we want to reach. Applying this principle(s), I hoped, would make highly subjective and amorphous concepts like "just and equitable" capable of some clearer definition by placing them in a broader conceptual context and framework.

In a moment of Gingrichian grandiosity (for those who have not doggedly followed the 2011/12 Republican presidential nomination process these past few months, Newt Gingrich is a candidate who is unapologetically the big picture, grand idea guy, proposing, in the midst of the worst economic crisis since the Great Depression, we should pursue colonizing the moon) I actually found myself comparing my quest for a larger theory of property division to Stephen Hawking's quest for a unified general theory of physics. In a more sober moment I was reminded one of my favourite fictional characters, John Mortimer's Rumpole of the Bailey, and his unending quest to apply the "golden thread" of criminal law – the presumption of innocence – to the benefit of his numerous

petty criminal clients. If there can be a golden thread in criminal law, I reasoned, why not a golden, or at least a silver, thread in matrimonial property law? That thread, I propose, is the concept of product of the marriage partnership, a.k.a., fruit of the marriage tree.

I submit that the existence of the underlying concept of marriage product becomes apparent upon an examination of the structure of the MPA. In condensed terms, the MPA directs judges to apply a presumption of equal sharing to property acquired during the marriage partnership (section 7(4)), to entirely exclude property acquired outside of the partnership from sharing (section 7(2), e.g., property acquired before marriage) and to share certain other categories of property (e.g., increase in value of exempt property) as may be “just and equitable” (section 7(3)). If “just and equitable” are to be concepts of any assistance to parties attempting to resolve their own affairs, or to be to some degree capable of defining for a judge, they must be addressed in a context of the statutory goals and objectives.

The MPA provides for three basic categories of matrimonial property.

Section 7(4) 50/50 Property:

Section 7(4) 50/50 property is property acquired *during* the marriage, not before or after. 50/50 property is fundamentally a *product of the marriage* and exempt property is not. Exempt property is often acquired before or after the marriage, or inserted into it from the outside – clearly not a product of it. An analogy may be made to the work product of a traditional form of law partnership – the product or earnings of each partner in the practice of law is the property of the partnership, despite the fact that it may flow from a particular individual’s efforts and labour. The idea is that partners in this kind of law practice will have different strengths and weaknesses and contribute to the generation of revenue and to the reputation of the firm in varying, but equally important ways. The idea that a partner might take on a client, draft a separation agreement and be paid outside of the partnership, keeping all for himself, is contrary to the operation of this kind of partnership. The product of the partnership is owned by all and divided as per their partnership agreement. Similarly, the wealth product of a marriage will be created by the partners (spouses) individually and jointly, and the presumption is that while the partnership lasts, that product is to be shared equally. As in a law partnership where a partner’s inheritance is not considered partnership product since it was not due to his efforts or role in the partnership, but injected in from the outside, a domestic partner’s inheritance is similarly excluded from sharing as not a financial product of the domestic partnership. Domestic partnership product is property (wealth and sometimes income) that is created by the