

# **Divorce and the Pre-Nuptial “What-If”**

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*Family Farm Issues*

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## INTRODUCTION

In Canada, divorce is becoming ubiquitous in our social culture, with more and more families divorcing, and blended families becoming more prevalent. Welcome to the era of the *Modern Family*. In our divorce practices, there are many intricacies of the law that we need to stay on top of in order to remain competent as lawyers. In Alberta especially, where the rural population is still abundant, and many farms are thriving, lawyers need to consider particular circumstances unique to farm families when they are advising these families facing separation and divorce. In addition, there are families who are becoming more pro-active in ensuring that their intentions going into a conjugal relationship are carried out in the event of a separation or divorce.

This paper will discuss practical issues regarding divorce and pre-nuptial planning particular to farming families. Although a brief overview of the legislation regarding division of property is provided, it is intended that the reader will have a basic knowledge of divorce and division of matrimonial property law in Alberta.

## DIVORCE

### STATISTICS

According to publications by the Vanier Institute of The Family ([www.vanierinstitute.ca](http://www.vanierinstitute.ca)), the following are some of the recent statistics about Canadian families and divorce: ([www.tinyurl.com/kgfp2a4](http://www.tinyurl.com/kgfp2a4))

- 19% of Canadians reported that their parents had separated or divorced, according to the most recent Statistics Canada census (2011)
- 11.5% of Canadians aged 15 or older have separated or divorced in their lifetime, according to the most recent Statistics Canada census (2011) – compared with 5.1% in the 1981 census
- Of those who finalized their divorce in 2008, the average duration of marriage was 13.7 years (this is the most recent statistic available, as Statistics Canada stopped tracking national divorce rates in 2008)
- In 2008, Statistics Canada estimated that 41% of marriages in Canada will end by the 30<sup>th</sup> year of marriage – in that same year, 19% of divorces were finalized for marriages of less than 5 years, and 16% were for marriages of 25 years or more
- On the 2011 census, of those who reported themselves as separated or divorced:
  - 70% of mothers and only 15% of fathers reported that their home was the primary residence of their children – 9% reported that time was divided equally
  - Of the parents who responded that only one parent was the primary decision-maker regarding their child(ren)'s health, religion and/or education, 85% said mom makes

the decisions, whereas only 15% said dad does – 35% of respondents claimed that the decisions were made together

## **RURAL FAMILIES AND DIVORCE**

A divorce and subsequent division of matrimonial property can have devastating effects for a family into the future – it can result in homes being sold, businesses being lost, or retirement dreams being shattered. In farm families, divorce may have particularly damaging effects – it can cause the farm to collapse – an end to a business, a way of life, generations of hard work, and possibly the only source of income for the family. When divorce looms over a farming family, the end of the tunnel can either be light or dark. This paper suggests that if parties can commit to working together to find mutually acceptable solutions through agreement rather than imposed by a third party Judge, there is more opportunity to ensure that the farm can be maintained for generations to come.

In order to find these solutions, sometimes it will be necessary to look beyond the strict interpretation of the *Matrimonial Property Act* or the *Divorce Act*. For instance, if the *Matrimonial Property Act* were to be applied to the division of property, the parties may be required to sell the farm to raise enough cash to equalize property under the Act. Similarly, with farms often being asset-rich and cash-poor, there may be insufficient monies to pay spousal support to one spouse despite entitlement.

In many cases, it is important to the divorcing farm family to ensure that the farm continue to operate into the future. If not a concern for the non-farming spouse, it is often of importance to the farming spouse. As practitioners, with this interest/goal as the starting point, it is incumbent upon us to assist the family to find outside-the-box solutions to such topics as division of property and spousal support. This paper explores some creative solutions, which could be available.

## **THE LEGISLATION**

### **Married Spouses – Matrimonial Property Act**

Issues relating to the division of property for married spouses in Alberta are contained in the *Matrimonial Property Act (Alberta)* (the “MPA”). In order to be considered “spouses”, parties must be legally married.

Section 7 of the MPA states how property is to be distributed on separation. Subsection (2) states that the fair market value of the property at the later of either the date of marriage or at the date the property was acquired is exempt from distribution if it falls in the following categories: