

Section 8 Factors and the Concept of Marriage Product

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Matrimonial Property Division

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SECTION 8 FACTORS AND THE CONCEPT OF MARRIAGE PRODUCT

GENERAL PRINCIPLES

Although the *Matrimonial Property Act* RSA 2000, c M-6 does not specifically deal with the issue of matrimonial debt, the common law has clearly developed such that liabilities are taken into account in the division of marital property upon separation. The Alberta Court of Appeal has confirmed that the obvious intention of the Act is that net matrimonial property is to be divided, which by definition includes a consideration of debt.¹ The objective of the *Matrimonial Property Act* obviously cannot be achieved by dividing assets and ignoring liabilities. A trial judge must determine the matrimonial assets, subtract the matrimonial debts, and identify the net amount that is available for distribution.²

In *Busenius v. Busenius*³, Clackson J. explained the manner in which matrimonial debt is typically dealt with under the *Matrimonial Property Act*.

The *Matrimonial Property Act* speaks in terms of assets in ss. 7 and 8. There is no mention of debt. However, there is no doubt that matrimonial property actions invariably focus not just upon assets but also upon debts incurred in relation to those assets. As well, it is usual for a matrimonial property award to account for any debt that the parties expressly or implicitly agreed to incur while married. Finally, it is common place for courts to make matrimonial property orders that encompass debts incurred after separation where appropriate. ...⁴

In my view, the *Matrimonial Property Act* encompasses all property of both spouses. In keeping with that interpretation and to ensure efficacy of the policy decision to value all matrimonial property at the date of trial, it is necessary not only to embrace all assets but all debts. ...

I recognize that the more common approach to this issue is the categorization approach. I also recognize that most of the factors which are relevant to determining whether the debt is matrimonial property are relevant to determining how to divide the debt as property. However, treating such debt as property allows a more nuanced treatment of such debts where there might be some small increase in the couple's assets or some minor justification for the debt based upon the consequences of the marriage's breakdown.⁵

Similarly, in *Mancini v. Phelan*⁶, the Honourable Justice Poelman made the following observation:

¹ *Carmichael v. Carmichael*, 2007 ABCA 3, 404 A.R. 144 (CA), QL at para. 21; *Dhala v. Dhala*, 2008 ABCA 259, [2008] A.J. No. 745 (CA), QL at para. 18-19

² *Ibid*

³ *Busenius v. Busenius*³, 2006 ABQB 162, [2006] A.J. No. 238 (QB)

⁵ *Ibid.*, QL at para. 26-28

⁶ *Mancini v. Phelan*, 2012 ABQB 536, 555 A.R. 245 (QB)

The *Matrimonial Property Act* does not specifically provide for the distribution of debt. It is often a part of the distribution process because debt charged to an asset affects the net value available for distribution, and section 8 specifically provides that each spouse's liability at the time of marriage and at the time of trial are matters to be taken into account in making a distribution under section 7. However, in my view, there is no presumption that one party's debt, not specifically incurred in respect to a matrimonial asset for which there is a presumed equal distribution, should be divided equally.⁷

In *Kretschmer v. Terrigno*⁸ Justice Paperny, with Justice Hunt concurring, offered one of case law's most instructive judicial discussions regarding the manner in which matrimonial debts should be characterized and divided.

The purpose of the *Matrimonial Property Act*, RSA 2000, c M-6 [sic] is to recognize "marriage as an economic partnership, founded on the presumption that the parties intend to share the fruits of their labour during and as a result of it, on an equal basis." *J.(D.) v. J.(M.)*, 2009 ABCA 272 (Alta. C.A.) at para 1. Later in the same decision, the Court elaborated that the *Act* is designed to "protect against inequities arising from the dissolution of marriage". This is accomplished, in part, by the equitable division of matrimonial property. The exercise, put simply, is to ascertain what matrimonial property is available for distribution, its value, what exemptions are available, their value, and how the property should be divided: see *Hodgson v. Hodgson*, 2005 ABCA 13 (Alta. C.A.).

In undertaking that exercise, a trial judge is necessarily involved in ascertaining and distributing the net assets of the parties. While s. 7 of the *Act* does not expressly refer to debts, this Court has held that the obvious intention of the regime is to divide "net matrimonial property", which by definition includes a consideration of debt: *Carmichael v. Carmichael*, 2007 ABCA 3 (Alta. C.A.) at para 21; *A. (D.L.) v. A. (R.T.)*, 2006 ABCA 204 (Alta. C.A.). The goal of the *Act* could not be achieved by dividing assets and ignoring the liabilities that may be associated with them, either with specific assets or with the value of the matrimonial property generally. Thus, it is generally accepted that debts brought into the marriage, and unrelated to the marriage, should be considered in the division of matrimonial property.⁹

As a result of the judicial interpretation of the *Matrimonial Property Act* it is now clearly established that liabilities are to be taken into account when dividing matrimonial property upon marriage breakdown. The question then becomes one of determining what liabilities are taken into account, how they are taken into account and when they are taken into account.

The underlying structure of the *Matrimonial Property Act* supports the concepts of property being divided pursuant to the concept of marriage product and fairness. As discussed in the Legal Education Society of Alberta papers, *Section 8 Factors, Fairness and Fruit of the Marriage Tree* and

⁷ *Ibid.*, QL at para. 89

⁸ *Kretschmer v. Terrigno*, 2012 ABCA 345, 539 A.R. 212 (CA)

⁹ *Ibid.*, QL at para. 19-20