

When 50/50 Doesn't Cut It: A Case Law Review of Section 8 Factors Under the *Matrimonial Property Act* (Alberta)

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Family Law 25

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**WHEN 50/50 DOESN'T CUT IT: A CASE LAW REVIEW OF SECTION 8 FACTORS
UNDER THE MATRIMONIAL PROPERTY ACT (ALBERTA)**

INTRODUCTION

The title to this paper is somewhat misleading. Nine times out of ten, or even nine and a half times out of ten, 50/50 does cut it. It is only in unique circumstances that a Court will grant an unequal division of matrimonial property using s. 8 factors. The Court of Appeal emphatically stated that equal division remains the rule rather than the exception (*Jensen v. Jensen* 2009 ABCA 272).

In reviewing the following cases, certain principles emerged. Simply put:

- The legal presumption is equal distribution of non exempt property
- The party trying to deviate from a 50/50 split bears the onus of proof, on a balance of probabilities, that it is just and equitable to do so
- Equality is the rule in “ordinary” cases; deviation from a 50/50 split is **not** to be lightly reached
- There must be a **significant** imbalance in contributions having regard to the parties’ expectations in order to deviate
- A microscopic analysis of “who did more” is to be avoided; Equal contribution is not a requirement of equal division
- The Trial Justice is afforded significant discretion
- With respect to property acquired when spouses were living separate and apart (s. 8(f)), the Court should review whether or not the spouses separated themselves not only physically but economically. Were they living separate financial lives?
- Dissipation requires an element of bad faith or neglect
- To establish dissipation, there must be actual detriment to the non dissipating spouse
- A party is unlikely to be successful on both a claim for retroactive support and equal division of a payor’s post separation savings. Did the payor acquire the savings because he/she did not pay enough support?

Accordingly, the best advice continues to be assets (non exempt) are equally divisible. Those exceptional situations when an equal division would be grossly unfair tend to be somewhat obvious.

LEGISLATION

Section 7(4) of the *Matrimonial Property Act*, RSA 2000 c M-8 (“MPA”) establishes the general presumption of equal distribution of matrimonial property, unless it would not be just and equitable to do so taking into consideration the factors set out in section 8.

The matrimonial property legislation was put into place to “legally recognize marriages as an economic partnership, founded on the presumption that the parties intend to share the fruits of their labor during, and as a result of it, on an equal basis” (*Jensen v. Jensen*, 2009 ABCA 272, para 1).

In deviating from a 50/50 division of matrimonial property, the Court can consider the following (under section 8 of the MPA):

- (a) The contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
- (b) The contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses, or by one or both spouses and any other person;
- (c) The contribution, whether financial or in some other form, made directly or indirectly by or on behalf of the spouse to the acquisition, conservation or improvement of the property;
- (d) The income, earning capacity, liabilities, obligations, property and other financial resources:
 - (i) That each spouse had at the time of the marriage, and,
 - (ii) That each spouse has at the time of the trial.
- (e) The duration of the marriage;
- (f) Whether the property was acquired when the spouses were living separate and apart;
- (g) The terms of any oral or written agreement between the spouses;
- (h) That the spouse has made:
 - (i) A substantial gift of property to a third party; or,
 - (ii) A transfer of property to a third party other than a bona fide purchaser for value;

- (i) A previous distribution of property between the spouses, by gift, agreement or matrimonial property order;
- (j) A prior order made by a court;
- (k) A tax liability that may be incurred by a spouse as a result of the transfer or sale of property;
- (l) That a spouse has dissipated property to the detriment of the other spouse; and,
- (m) Any fact or circumstance that is relevant.

The MPA does not assign priority or weight to the factors (*Mazurenko v. Mazurenko*, 1981 ABCA 104).

Matrimonial property judgments are highly discretionary. The Court of Appeal will only intervene if the Trial Justice:

- (a) misdirected himself/herself on the facts or significantly misapprehended the evidence; or,
- (b) committed a material error in principle or the decision is so clearly wrong as to amount to an injustice (*Morton v. Morton*, 2008 ABCA 144 and *Ravoy v. Ravoy*, 2002 ABCA 6).

Accordingly, if there is no palpable and overriding error with respect to the Trial Justice's **understanding of the facts**, then there is no basis to appeal the order. Further, if the Trial Justice reasonably exercised his/her discretion resulting in an award that is just, there is also no basis for appellate review. The factors listed in section 8 are best considered by a Trial Justice hearing the evidence, assessing credibility, and determining whether the particular set of circumstances before him/her are so unusual and outside the norm to warrant a property division that unequally favors one spouse.

***Jensen v. Jensen*, 2009 ABCA 272**

The Court of Appeal confirmed in *Jensen* that the equal division of assets in earlier interpretations of the MPA stands. This case was an opportunity for the appellate court to restate its position regarding the division of matrimonial property. **[The language is strongly worded in that equal division is the rule rather than the exception.]**