

Advanced Property Issues: Judicial Discretion in Matrimonial Property Matters

Advanced Matrimonial Property

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For presentation in:

Calgary, Alberta – September 20, 2018

Edmonton, Alberta – September 27, 2018

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INTRODUCTION

When I was a junior lawyer, I often wondered if I would get to the point where I fully understood the law in any given area. Everything seemed new and complicated. Now, many years later I still find myself telling clients about “gray areas”. The issues I am advising on have changed, but there is no less uncertainty regarding outcome.

The older we get, the more complicated the issues become. Instead of trying to figure out how the T2220 gets filled out, we are dealing with optional inventory adjustments and taxes and trusts and such high levels of assets that it makes me wonder why I chose law instead of being a radiologist.

So what are some of the more common issues that arise for me now that create angst? Occupation rent continues to rear its ugly head, long separations are becoming more common especially with shortages in judges, securing payments, double dipping, and of course, the ubiquitous unequal division.

We all know what sections 7 and 8 of the *Matrimonial Property Act* say, and we know that *Mazurenko* tells us we value at date of trial (leaving aside the recommendations to change the valuation date to the date of separation which appears to be going nowhere fast with the government). So why does this continue to be a gray area? The short answer is, as always, how to advise on what is “just and equitable” and the discretion afforded the courts.

Discretion is the bane of every lawyer. It requires us to advise on what we think someone else might consider fair based on their perception of the parties and the facts, despite not knowing who that someone might be when we are giving the advice. I am (almost) convinced that discretion was put in place to prompt settlement.

This paper attempts to give an update on what courts have been doing with that discretion over the past few years. It is by no means an exhaustive review of all cases, but is a reasonable starting point from which to launch further research endeavors for the young and eager in our offices.

OCCUPATION RENT

Occupation rent is one of those hold-overs from the *Law of Property Act*. There is no reference to same in the *MPA*. Oddly, the Rules of Court form for a Statement of Claim for Division of Matrimonial Property has a built in provision for claiming occupation rent, albeit without a provision for pleading the *Law of Property Act*. One might wonder where the court’s jurisdiction arises, but I digress.