

**Advanced Property Issues II – The Impact of Dissipation,
Severance Benefits, Contingent Interest and Liabilities,
Gifts, and Family Debt on Matrimonial Property Division**

Advanced Matrimonial Property

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ADVANCED PROPERTY ISSUES II -
THE IMPACT OF DISSIPATION, SEVERANCE BENEFITS, CONTINGENT INTEREST AND LIABILITIES,
GIFTS, AND FAMILY DEBT ON MATRIMONIAL PROPERTY DIVISION

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INTRODUCTION

The following paper looks at cases within the last few years dealing with the topics as referenced in the title. This paper does not purport to be an exhaustive look at the caselaw but focuses on specific cases and findings by the Courts therein. Specifically, consideration was given to how specific types of property interests impact the equal division of matrimonial property in Alberta.

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GIFTS – IS IT BETTER TO GIVE THAN TO RECEIVE?

There are two ways in which gifts may become an issue in matrimonial property proceedings.

- (a) The first is under section 7(2)(a) of the *Matrimonial Property Act*, RSA 2000, c M-8, s 7(2)(a) [MPA]. Specifically, if property is acquired by a spouse by gift from a third party, the market value of that property at the time of the marriage or on the date on which it was acquired, whichever is later, is exempt from a distribution. Accordingly, if there is a gift received during the marriage by one spouse, the market value of that gift at the time of the marriage, or when it was acquired, can be exempt from distribution under s. 7(4) of the *MPA*.
- (b) The other manner in which “gifts” become relevant in matrimonial property proceedings is pursuant to s.8(h). There is a presumption of equality in the distribution of non-exempt matrimonial property (*MPA*, s7(4)). However, that presumption can be rebutted if it is not “just and equitable” to equally divide the required property, when considering the factors outlined in s. 8. One of those factors is whether or not a spouse has made a substantial gift or transfer of property to a third party, other than a bona fide purchaser for value.

This is a specific form of dissipation. If a spouse has reduced the matrimonial assets by an improper gift/transfer, then the value of that gift can be one of the factors the Court considers in dividing matrimonial property; it will likely operate as an asset in the “giving” party’s column.

Gift – What’s Required

In order to establish a “gift”, there are certain requirements that must be established, specifically:

- (a) There must be an intention to donate;
- (b) A sufficient act of delivery; and,
- (c) Acceptance (Bruce H. Ziff, *Principals of Property Law*, 5th ed (Toronto: Carswell, 2010) at 157).

The question arises as to whether or not a resulting trust was created. This arises when:

- (a) property is in one party's name;
- (b) there is an obligation to return the property to the original title owner; and,
- (c) the obligation arises due to a fiduciary duty or because the party now holding the property did not give any value for it. It applies to gratuitous transfers.

The presumption is rebuttable. Accordingly, when a transfer is challenged (i.e. because property was transferred for no consideration), the onus is on the transferee to demonstrate that a gift was intended (Donovan Waters, Mark Gillen, & Lionel Smith, *Waters' Law of Trusts* 4th ed (Toronto: Carswell, 2012) at 375; Eileen Gillese & Martha Milczynski, *The Law of Trusts*, 2d ed (Toronto: Irwin Law, 2005) at 110).

Equity presumes bargains not gifts. The transferee is deemed to be in a better position to bring evidence as to the circumstances surrounding the transfer. Accordingly, in a divorce, if there is a gift of land from the husband's parents to the husband, the onus is on the husband to establish that it was intended as a gift. If the wife challenges that transfer, the husband has to satisfy, on a balance of probabilities, that a gift was intended.

Such evidence may include the following:

- (a) The degree of dependency between the adult child and his parent;
- (b) Previous gifts that establish a pattern of giving;
- (c) Documentation (i.e. letters, cards, etc.) that establish a gift was intended; and,
- (d) Whether or not siblings received similar advances/gifts.

Is it a Gift or a Debt to be Repaid

In matrimonial property matters, a situation often arises where repayment of a "debt" is demanded after the parties have separated. As an example, it arises when monies received from one party's parents during the marriage are now said to be due and owing.