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A GUIDE TO THE LAW IN ALBERTA REGARDING

MATRIMONIAL PROPERTY

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GENERAL

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BACKGROUND

Alberta's *Matrimonial Property Act*, or 'MPA' attempts to divide property fairly between spouses when they separate and/or divorce. The *MPA* deals with division of property issues, possession of the matrimonial home, use of household goods, and general law and procedure.

ELIGIBILITY

MPA applies only in Alberta and **to legally married spouses.** **The MPA does not apply to common-law spouses.** The spouses must be ordinarily resident of Alberta for one year.

The person asking for a matrimonial property order must show the Court:

- a. Both spouses currently live in Alberta; or
- b. Their last joint residence was in Alberta; or
- c. If the parties have not established a joint residence since marriage, that each spouse resided in Alberta at the time of the marriage; or
- d. That a Statement of Claim for divorce has been filed in Alberta.

If you are not sure if you meet the above requirements, you should get legal advice. In most cases, a lawyer will likely be needed for any application under the *MPA*.

PROCEDURE

An application to divide property under the *MPA* can be made by itself or with another application (such as divorce, judicial separation, or annulment). A spouse can make an application if he/she has separated but not yet divorced, or if he/she has begun divorce proceedings.

TIME LIMITATIONS

If spouses are separated (but not yet divorced) or if spouses have not begun divorce proceedings, the application must be made **within two years from the date of separation**. If a divorce judgment has been given, any application for property division under the *MPA* **must also be made within two years**. If a spouse is suspected of selling or giving away property (i.e. to keep it from the other spouse) legal action must begin **within one year of the date the property was sold or given away**. The Court may order the spouse who sold or gave away the property to account to the other spouse, and may give relief by way of an uneven distribution of the remaining property.

DIVISION OF PROPERTY

'Matrimonial Property' is all property acquired by spouses during the marriage. Generally, matrimonial property is divided equally between spouses when a marriage ends, unless the result would be unfair. Certain kinds of property acquired before the marriage may not be divided when a marriage ends. This is called 'exempt property'. However, sometimes the increase in *value* of exempt property may be considered 'matrimonial property'. Nonetheless, this increase in value may not automatically lead to an equal split. The Court will make a decision based on what is just and equitable.

1. Property which may be divided includes, but is not limited to:

- a. the matrimonial home;
- b. household goods (this includes almost all personal property used by family members);
- c. R.R.S.P. and employment pensions;
- d. business interests;
- e. investments, stocks, bonds;
- f. cars; and

- g. other property that has been purchased during the marriage or brought into the matrimonial relationship, or used for the mutual benefit of the spouses.

2. Property which may not be divided includes:

- a. property acquired by one spouse before the marriage;
- b. property one spouse received as a gift;
- c. property one spouse received by inheritance;
- d. an award or settlement for damages in tort law in favour of one spouse (i.e. money paid for pain and suffering in an automobile accident) unless the award was meant to compensate both spouses.

No claim by the other spouse can be made on the property listed above, unless it has been brought into the marriage. An example of this would be taking a home purchased by one spouse before the marriage and putting it under both spouse's names.

3. Division of Pensions

As noted above, pensions are considered property under the *MPA*. There are two types of pensions: private pensions (by employment) and the Canada Pension Plan.

Certain pensions may have legislation that determines how the pension will be divided when a marriage ends. Contact your pension administrator to find out if this kind of legislation applies to you.

4. Canada Pension Plan

Division of the Canada Pension Plan is automatic unless both spouses agree otherwise. The reason behind this is to provide some financial protection to a spouse who did not work outside of the home and/or could not reasonably have contributed to the plan. Note that taking money out of CPP can have significant tax implications.

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MATTERS TO BE CONSIDERED IN THE DISTRIBUTION OF PROPERTY

The *MPA* requires the Court to be fair in determining what each spouse's share of the property will be. Equal division of property will usually take place unless there are very good reasons presented to the Court that this should not be the case. When spouses cannot agree on how property will be split, the judge will consider spousal contributions to the marriage, contributions to the family, business endeavours, financial resources of both spouses, the length of the marriage, as well as any agreements made. The judge may also consider whether a spouse transferred or sold property, previous Court orders, tax liability one spouse may incur as a result of the transfer/sale of property, and any other relevant circumstances. The Court will not consider misconduct by a spouse, unless it relates to the improper use or sale of matrimonial property.

PROPERTY HELD OUTSIDE ALBERTA

The *MPA* allows the Court to consider property held outside the province when dividing matrimonial property but cannot make any orders relating to it. The Court may divide property within Alberta in a way that ensures an equal distribution of all the matrimonial property.

POSSESSION OF THE MATRIMONIAL HOME

"Matrimonial home" is broadly defined as a house, a part of a house, a part of a business being used as a house, a mobile home, a condominium, or a suite. The matrimonial home must be owned or leased by one or both spouses and must be occupied as the family home (i.e. this does not include a summer cottage). The home must be located in Alberta.

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A spouse can also apply for an order giving him/her exclusive use of household goods. "Household goods" are defined as personal property owned by at least one of the spouses and used or enjoyed by either spouse or the children - for transportation, household use, educational use, recreational use, social use, or aesthetic purposes. Household goods include motor vehicles, furniture, and appliances. The Court can make this order for any amount of time that the Court thinks is necessary.

The Court may order an 'exclusive possession order'. An exclusive possession order essentially allows one spouse to keep the other out of the house. This is given when spouses cannot live together peacefully, but neither is willing to leave the home. An application for the matrimonial home may be made 'ex parte' (i.e. without telling the other spouse) if the Court finds that there is potential danger to the spouse making the application or to a child living in the home.

In granting the order, the Court may do one or more of the following:

direct that a spouse be given exclusive possession of the home (regardless of whose name the property is in);
direct that a spouse be evicted from the matrimonial home;
stop a spouse from entering or going to the matrimonial home.

When deciding whether a possession order will be granted, the Court will consider the following:

- a. whether each spouse can find and maintain another place to live;
- b. the needs of any children living in the home;
- c. the financial position of each spouse;
- d. property of either spouse; and
- e. any existing Court orders regarding child or spousal support.

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A Court order for exclusive possession is not easy to get. The person applying for the order must prove that the *MPA* guidelines have been met, and that there is good reason for the order (i.e. not that it is simply a matter of convenience). Note that an exclusive possession order **does not change legal ownership of the property**. This means that a person may have the right to stay in the house but it is still considered matrimonial property that may be divided by the Court at a later date.

Under the *MPA* the Court can only grant an order to prevent a person from *entering or visiting the home*. If one spouse is harassing the other, he/she has some options:

An **Emergency Protection Order (EPO)** is designed to protect individuals against *immediate* violence from family members. The order can prevent a family member from contacting each other. This order is served by the police and lasts for up to one year. A violation of the order may result in a criminal conviction and an even longer protection period. Note also that changing the terms of the EPO does NOT change the terms of criminal restraints (such as a probation order).

In addition to the above, one may also apply for a **restraining order**. A lawyer may be needed, and one will have to show a real or suspected danger to one's safety. A restraining order can be attached to another action (such as a divorce) or applied for on its own. The Respondent must be served with a copy of the order, and an automatic review will take place two weeks later at the Court of Queen's Bench. The applicant and the respondent will likely have to attend this hearing. The order should specifically mention all the places the respondent may try to initiate contact (i.e. workplaces etc.).

The restraining order should give the police the power to make an arrest if the conditions are not followed (i.e. it should say that the police 'shall' make an arrest, not 'may' make an arrest). A copy of

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the restraining order should be kept readily available, in case the police need to see it. It may also be a good idea to have the restraining order registered with the police and given a case number so law enforcement officials can have immediate access to it if necessary.

Remember that these kinds of orders are not to be used for alternative purposes (such as an attempt at gaining the upper hand in divorce proceedings). Filing an application based on a false statement can result in a charge of contempt or a fine.

MARRIAGE AND SEPARATION AGREEMENTS

One may make an agreement with his/her spouse regarding how property will be divided in the event of a separation and/or divorce. To be valid, the agreement must:

- a. be in writing;
- b. have been entered into freely and NOT have been forced by the spouse or some other person;
- c. show that each spouse had **INDEPENDENT LEGAL ADVICE** about the effects of signing the agreement. That means that each spouse must execute the agreement with a different lawyer.

Creating a separation agreement will allow the parties to contract out of the *MPA*. That means that the *MPA* will not apply to their property. The spouse must understand that they are giving up their right to future claims— this right is being replaced with the agreement.

It is important to note that the Court will not enforce an agreement that it considers to be "unconscionable". An agreement would be unconscionable if one spouse was unable to properly protect his/her own interests at the time of the agreement. Examples of an unconscionable agreement may include taking advantage of a

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spouse that cannot afford legal advice or lying about property to induce an agreement.

In order to prevent a spouse from selling property while an action is in the works, one may wish to register with the Registrar of Land Titles in the area in which the land is located. You can also apply for an injunction to freeze your spouse's assets. See a lawyer immediately.

CONCLUSION

If the law surrounding matrimonial property seems somewhat confusing, you are not alone. When in doubt, seek legal advice. If you cannot afford a lawyer, there are services that may be able to assist you in finding one.

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REFERRAL NUMBERS

Emergency Protection Order Program [780] 422-9222

F.L.I.C. (Family Law Information Center) [780] 415-0404

Lawyer Referral Service 1-800-661-1095 (toll free)

*This is a toll free number which provides you with names of three lawyers who have indicated a desire to practice a given area of the law. You get a thirty-minute consultation without charge.

Legal Aid Society [780] 427-7575

Website: www.legalaid.ab.ca

Family Law Office [780] 415-8800

Provides a lawyer for criminal and civil matters for those who cannot afford a lawyer. This is not a free service.

Student Legal Services

Civil/Family Office [780] 492-8244

www.slsedmonton.com

NOTE: SLS can provide you with information and referrals. We cannot represent you or give you advice on matrimonial property issues.