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A GUIDE TO THE LAW IN ALBERTA REGARDING

MATRIMONIAL PROPERTY

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GENERAL

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BACKGROUND

Many provinces have passed laws to make sure that property is divided in a fair way between spouses when they separate. The law tries to recognize the different ways in which spouses contribute to the relationship. In Alberta, there is the MPA (The Matrimonial Property Act). This Act is divided into three main parts. The first part is called Matrimonial Property and talks about the division and distribution of property between spouses. The second part, called Matrimonial Home Possession, deals with possession of the matrimonial home and sole use of the household goods. The third part of the Act contains general law and procedure.

It should be noted that the MPA does not replace the Dower Act. it only adds to it. The Dower Act only deals with the matrimonial home. It does not give the spouse who is not the registered owner the rights to half of the value of the home. The Dower Act requires the spouse who is not registered to give his/her permission before the home can be sold, mortgaged, or otherwise encumbered. Also the Dower Act allows the spouse who is not a registered owner to live in the house if he/she is still alive after the registered owner (other spouse) dies. The Act does not replace any court ordered remedies that may be available, such as trusts.

ELIGIBILITY

For the MPA to apply to your situation, you must be legally married. The Act does not apply to people just living together. There are also provincial residence requirements. This is because the Act is a provincial one. A court can only make decisions about property located in the province that the husband and wife live in. However, when dividing the property, the court may consider property outside the province. For example, assume that Lindsay and Jeff are divorcing. While married, Lindsay and Jeff bought a house in Edmonton, Alberta, and a

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cabin in Radium, British Columbia. The judge may decide to give Lindsay the house in Alberta if the cabin in BC is of equal or greater value. Jeff will get the cabin. Section 3 of the Act talks about residency (where you live). The person asking for the MPA to apply must show the Court:

- a. that both spouses currently live in Alberta whether or not they reside together and that their last joint residence was in Alberta; OR
- b. where the parties have not established a joint residence since marriage, but each resided in Alberta at the time of the marriage; OR
- c. that a Statement of Claim for divorce has been issued in Alberta.

Section 5 of the Act talks about the conditions of the marriage that must be met before an application under the MPA is allowed. Almost all applicants will be able to meet at least one of the needed conditions. If you are not certain that you meet the above listed residency and marriage requirements, you should get legal advice. In any case, a lawyer will likely be needed for any application under this Act.

PROCEDURE

An application for division of property under Part I can be made on its own or with an action for divorce, judicial separation, or annulment. Therefore, you can make an application if you have separated but not yet divorced or started to get a divorce. You can also bring an application under the MPA for property division once divorce proceedings have started.

If the application is made while the two spouses are separated, but not divorced, or if the spouses have not started to get a divorce, it must be made within two years after the date the spouses separated. You can get around this time limit by starting divorce proceedings, but the application for property division must

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be made no later than two years after the date of the divorce judgment. Also, if you think your spouse is giving/selling property to a 3rd party so that the Act will not apply, you must start the action within one year of the date your spouse gave away or sold the property. The Court has the power to stop your spouse from giving or selling property and to order the spouse who is moving the property to pay the other spouse an amount equal to the value of the property being given away or sold.

An application under Part II for Matrimonial home possession, can be made at the same time as an application under Part I, on its own, along with divorce proceedings, or along with an action under the Family Law Act. An order under Part II can be made without telling the other spouse (“ex parte”) if the court decides that there is danger of injury to the spouse asking for the application or danger to a child living in the home.

PART I OF THE MPA - DIVISION OF PROPERTY

The basic idea behind the MPA is all matrimonial property should be divided equally between the spouses when the marriage ends. Matrimonial property is all property acquired by the spouses while they are married. The increase in value of property owned by the spouses is also included as matrimonial property. As a general rule, the MPA tells the Judge to divide all property owned by both or either spouse. Generally speaking, a Judge will divide all of this property equally between the spouses. The Judge will not do this if it would be unfair. When deciding what is fair the judge must consider Section 8 of the MPA. Section 8 is discussed later in this pamphlet. All property will be divided, unless it is classified as exempt property (property that does not fall within the MPA rules).

1. Property which may be distributed under Section 7 of the Act includes, but is not limited to:

- a. the matrimonial home (owned, leased or rented);

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- b. household goods (this includes almost all personal property used by all family members);
- c. cars;
- d. other property that has been purchased during the marriage or brought into the matrimonial relationship - whatever has been used for the mutual benefit of the spouses.

Other property which may be distributed would include such things as: R.R.S.P.'s, business interests, investments, and stocks and bonds. One other type of property which falls under this category that is very important is pensions.

2. Property which is exempt from distribution under Section 7(2) of the Act includes:

- a. property of one of the spouses that they got before the marriage;
- b. property one spouse receives as a gift;
- c. property one spouse gets by inheritance;
- d. an award or settlement for damages in tort law in favour of a spouse (i.e. damages paid for injury in an automobile accident) unless the money is for a loss to both spouses.

Exempt property (property that does not fall under the MPA) belongs to the spouse who received the exempt property. No claim by the other spouse can be made on this exempt property, except as explained in the section dealing with divisible property.

If there is an increase in value of the exempt property, this increased value may be divided between the spouses.

3. Division of Pensions

Pensions are property under the MPA. There are basically two types of pensions: private pensions by employment and the Canada Pension Plan.

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4. Private Pensions

There are three ways the court can divide the value of private pension plans. You should contact a lawyer to determine what approach you should take.

a. Contributions Approach

This is often used for shorter length marriages. The court will use this approach when the contributing spouse's (the one paying into the pension) annuity (pension payments) start a long way into the future. The court takes the amount the contributing spouse has given to the pension plan and divides it by two, minus any reduction in the amount because of taxes. The court then orders that the contributing spouse pay the non-contributing spouse a lump sum equal to one half of the amount of contributions. Alternatively, because the court will not make the contributing spouse cash in the pension, the non-contributing spouse might receive a larger share of the other property involved in place of the pension amount.

A simplified example would be as follows:

Husband's Properties

Half interest in house	25,000.00
Bank Account	25,000.00
Value of pension	<u>25,000.00</u>
TOTAL HUSBAND'S PROPERTY	75,000.00

Wife's Properties

Half interest in house	<u>25,000.00</u>
TOTAL WIFE'S PROPERTY	25,000.00

If there is to be an equal division of property the court could order the husband to transfer his half in the house to the wife or pay the wife 25,000.00. Each spouse would then have an equal share.

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The court may deduct tax liabilities from the actual pension in determining the value of the pension. For example, the pension value could be reduced by the amount of tax that would have to be paid if the pension was cashed in.

Usually the contributions will only include the employee's contributions and not the employer's. University pensions are different as these pensions include both the employee and employer's contribution to the pension plan.

b. McCallister Formula

This formula, developed by the courts, is used in longer term marriages where the spouse is close to retirement or has retired. Here, the non-contributing spouse will receive a share in the monthly pension if and when the contributing spouse receives his or her pension. The formula is:

$$\left[\frac{\text{No. of years married}}{\text{No. of years employed}} \times \text{Amount Pensioned} \right] \times \text{percentage (\%)} \text{ to which the court thinks the non-contributing spouse should be given (usually 50\%)}$$

An example would be as follows:

Non-pensioned spouse entitlement	50%
Number of years married	20
Number of years employed	40
Amount received on retirement	\$1,000/month

$$\left[\frac{20}{40} \times \$1,000.00 \right] \text{ multiplied by } 50\% = \$250.00/\text{month.}$$

The non-contributing spouse would be entitled to \$250.00/month.

c. Legislative Requirement

Some pensions are subject to legislature that dictates how the pension is divided. You should contact the pension

administrator for the pension in question to determine if the pension is subject to legislative division with respect to marriage breakdown.

5. Canada Pension Plan

You may also apply for a division of Canada Pension Plan credits. The rationale behind this program is to provide some financial protection to the spouse who did not work outside of the home and could not contribute to the plan or had lower earnings during the marriage.

Exceptions: credits will not be divided if the minister of National Health and Welfare is satisfied that it would not be in the best interests of both spouses to divide them.

If you want to have Canada Pension Plan credits divided, you should submit an application to your nearest Income Security Programs Client Service Centre. The following information should also be provided:

- a. the social insurance number of both parties;
- b. birth or baptismal certificate of both spouses;
- c. marriage certificate;
- d. divorce or annulment papers; AND
- e. address of former spouse.

If some of this information is not available, do not delay your application. Contact your nearest Income Security Programs Client Service Centre and a staff member will assist you.

Both parties will be told of the results of the application. If the division is approved, a notice showing the pensionable earnings credited before and after the division will be sent to the spouses or former spouses. The period for which the credits are divided begins January of the year the marriage ended, or of the year that the spouses stopped living together. Either spouse has the right to appeal the decision made.

6. Eligibility Requirements for the division of CPP credits

Eligibility requirements for the division of credits are different depending on the situation giving rise to the division. There are **four** typical situations:

- a. Divorce or legal annulment effective prior to January 1, 1978.
- b. Divorce or legal annulment effective on or after January 1, 1978.
- c. Separation of legal spouses on or after January 1, 1978.
- d. Separation of common-law spouses on or after January 1, 1978.

7. Divorce prior to January 1, 1978

- a. the couple must have lived together for at least thirty-six months in a row;
- b. application for the division must be made within thirty-six months of the Certificate of Divorce;
- c. a spousal agreement signed prior to June 4, 1986, may stop the division of CPP credits (the division may not be prevented by the terms of a spousal agreement signed on or after that date);
- d. only the credits received during the period of the marriage will be divided.

8. Divorce after January 1, 1978

- a. the couple must have lived together for at least 12 months in a row;
- b. no application is required. The division of property will be made as soon as the Minister of National Health and Welfare has the necessary information;
- c. there is no time limit to give the information;
- d. a spousal agreement signed before June 4, 1986, may prevent the division of CPP credits (the division may not be prevented by the terms of a spousal agreement signed on or after that date);

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- e. the credits built-up during the period the couple lived together, common-law as well as when married, are subject to the division.

9. Separation of legal spouses after January 1, 1978.

- a. the couple must have lived together for at least twelve consecutive months;
- b. the separation must have lasted for at least twelve months;
- c. one of the spouses must apply for a division of credits;
- d. there is no time limit within which the application must be received;
- e. if one spouse dies, division must be made within three years of the death;
- f. spousal agreements signed before June 4, 1986 may preclude the division of credits (the division of credits may not be prevented by the terms of a spousal agreement signed after that date);
- g. the credits which can be divided include those built-up during the time the couple lived together in the common law relationship as well as when married.

10. Separation of common-law spouses after January 1, 1978

- a. spouses must be of opposite sex and have lived together for at least twelve months in a row;
- b. the separation must have lasted for at least two months, or less if one of the spouses dies;
- c. the application must be made within four years from the date of separation;
- d. spousal agreements signed before June 4, 1986 may prevent the division of credits (division may not be prevented by the terms of a spousal agreement signed on or after that date);
- e. the credits subject to division may include those built-up during the period the couple lived together.

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MATTERS TO BE CONSIDERED IN THE DISTRIBUTION OF PROPERTY (SECTION 8)

Section 8 of the MPA allows the Court to be fair in determining what each spouse's share of property will be when an equal division of the property would be unfair. Usually equal division of the property occurs unless there are very good reasons presented to the Court that it should not be. There are thirteen specific guidelines which the judge considers when the spouses cannot agree on a split of the property:

- i. Contribution made by each spouse to the marriage and to the welfare of the family, including work as a homemaker, parent, farm labourer, etc.
- ii. Contributions made by the spouse to any business, farm, or enterprise owned by one or both of them. This contribution could be financial or otherwise, made directly or indirectly, to acquiring, improving, or managing property.
- iii. Contribution made by either spouse to the acquisition, conservation, or improvement of their property. This could be a financial contribution or otherwise, made directly or indirectly.
- iv. Financial resources of each spouse at the time of the marriage and at the time of the trial. This could include income, earning capacity, liabilities, obligations, property, and other resources.
- v. Length of marriage.
- vi. Whether the couple attained the property while the two were living separately.
- vii. Any verbal or written agreement made between the spouses.
- viii. Whether a spouse gave or transferred property to a third party.
- ix. Whether the property had been already transferred between spouses by gift, by agreement, or by another matrimonial order.

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- x. Terms of any previous court order.
- xi. Any tax liability by one spouse which might result from the transfer or sale of property.
- xii. Whether one spouse had wasted property to the other's disadvantage.
- xiii. Any other relevant facts or circumstances .**

****IMPORTANT:** The last matter listed here gives the Court the right to consider just about any aspect of the marriage before coming to a decision, but most focus is placed on the other twelve factors. Also, in practice the court does not go through every single factor. In each case, certain factors will be more important than others.

PROPERTY HELD OUTSIDE ALBERTA

Section 9 of the MPA allows the Court to consider the effect of property held outside the province. The Court can distribute the property in Alberta in a way that ensures an equal distribution of all the property, in and outside of the province.

The following are examples of what the Court can consider and order:

- a. transfers of property;
- b. payments of money in a lump sum or in periodic payments;
- c. security of payment;
- d. release of Dower rights;
- e. "any other order that in the opinion of the court is necessary".

This last category allows the Court to make any order that it sees fit to ensure equal distribution of property under Section 7, even where only some of the property is located in Alberta.

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PART II OF THE MPA - MATRIMONIAL HOME POSSESSION

"Matrimonial home" is defined in the Act as a house, part of a house, part of a business being used as a house, a mobile home, a condominium, or a suite. The home also includes as much property around the home as is needed. The house must be owned or leased by one or both spouses and must be occupied as the family home (i.e. does not include a summer cottage). Though the Act does not expressly state it, the home must be located in Alberta.

The court's power to order exclusive possession of the matrimonial home allows the court to deal with problems arising when the spouses cannot live together peacefully but neither is willing to leave the matrimonial home. An exclusive possession order allows one spouse to keep the other out of the house.

As stated earlier, a matrimonial home possession order (possession of the matrimonial home that is enforced by the court) can be applied for by itself or along with some other matrimonial action (i.e. divorce).

In 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 at home (e.g. will they have to go to another school if the parent with custody is not given possession?);
- c. the financial position of each spouse;
- d. any existing court orders as to maintenance and property of either spouse.

The remedy of exclusive possession (sole possession of the home by one spouse, excluding the other) is not one the Courts

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will grant easily. The person applying for an order of exclusive possession must prove that the MPA guidelines have been met. The person applying for the order must show something more than a balance of convenience, that is, it is not good enough to show that one spouse does not like the other person being there. If there is a history of violence in the home, this may also affect the granting of the order.

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

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

Under the MPA, the Court can only grant an order preventing a person from entering or visiting the home. The Court cannot stop one spouse from harassing the people in the home on the telephone or harassing them outside the home. If this happens, you may wish to apply for a restraining order along with a divorce action. However, to get the restraining order, you will have to show a real or suspected danger to your safety.

An order for possession may even be made with conditions. For example, the wife could be given exclusive possession of the house with the condition that the husband must make the mortgage payments.

A spouse can apply to the court without telling the other spouse (“ex parte”) but this will only be done if it can be shown that there is an urgent need, such as danger to the health and safety of the spouse or the children, from the continued presence of the spouse to be excluded.

A spouse can also apply for an order giving him/her exclusive use of the household goods. “Household goods” are defined in the

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Act as personal property owned by at least one of the spouses and used or enjoyed by either spouse, or the children, for transportation, household, educational, recreational, social, or aesthetic purposes. Household goods include motor vehicles, furniture, and appliances. The Court can make this order for any time that the Court thinks necessary.

All orders granted under this part should be registered with the appropriate registry: Motor Vehicles for cars, Land Titles for houses, Central Registry for household goods. Once the order is registered, the home or goods cannot be sold unless the spouse who was granted the order agrees.

PART III OF THE MPA - GENERAL PROVISIONS

1. Marriage and separation agreements

If you agree with your spouse, either before or after the marriage, as to how the property will be divided between you if you separate or divorce, you should know that there are conditions that must be met before such an agreement will be enforced by the Courts.

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. But each spouse must know of the possible future claims to property that they may have under this Act and must want to give up these claims and replace them with the new agreement.

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The Court will also not enforce an agreement that it considers “unconscionable”. An agreement would be unconscionable if one spouse was unable to properly protect their own interests (i.e. because s/he cannot afford legal advice or, because of a mental or physical problem and the spouse does not understand the effects the agreement had on their rights, or where a spouse does not tell about all his/her assets/property, or where the other spouse took advantage of the ‘weaker’ spouse).

If any of these factors are shown to the Court, then the Court will have the power to ignore the agreement altogether. However, if the agreement is valid, then it will be considered a binding contract.

2. Lis pendens and Mareva injunction

In order to prevent your spouse from selling property while an action is in the works, you may file what is called a "Certificate of Lis Pendens" with the Registrar of Land Titles for the land registration district where the land is. You can also apply for a Mareva Injunction to freeze your spouse’s assets, but the conditions that must be proven for this are very difficult to meet.

3. Conclusion

This area of law seems difficult because it is difficult. The most important thing to keep in mind is that if you are involved in a matrimonial property dispute, protect yourself by getting proper legal counsel.

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REFERRAL NUMBERS

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
www.legalaid.ab.ca

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