

July 3, 2018

## Breaking Up Is Hard to Do, But Dividing Property Shouldn't Be

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**Case Commented On:** Alberta Law Reform Institute, [Property Division: Common-law Couples and Adult Interdependent Partners, Report 112](#)

Last fall, I wrote a [post](#) about the Alberta Law Reform Institute's project on property division for common-law couples. At that time, we were seeking feedback on preliminary recommendations for reform. Since then, we have heard from hundreds of Albertans. We considered all the feedback we received to develop our final recommendations. Last week, ALRI published its final recommendations in [Property Division: Common-law Couples and Adult Interdependent Partners, Report 112](#).

### We Heard Strong Support for Reform

This project has the potential to affect a large number of Albertans. As of 2016, there were more than 300,000 Albertans living in common-law relationships, who are currently ineligible for the rules for property division that apply to married couples under the *Matrimonial Property Act*, [RSA 2000, c M-8](#). It was important that we hear from as many Albertans as possible before making our final recommendations. Our consultation included:

- A public opinion survey that reached more than 1200 Albertans;
- Three online surveys that had approximately 200 respondents;
- Seven presentations to groups of lawyers;
- Four roundtable discussions with lawyers who practice family law or wills and estates; and
- Informal meetings with other stakeholders.

We also received more than 30 comments in writing or by phone.

We heard both positive and negative comments on ALRI's proposals for reform. It was clear that many people feel strongly about this issue. Comments on both sides were well thought out and constructive. We are grateful to everyone who shared their views with us.

The feedback generally confirmed our initial premise that there is a need for reform. A large majority of people we heard from were in favour of reform. Many respondents echoed our concerns that the law of unjust enrichment – the current regime for dealing with property division for common law couples – is complex and contributes to lack of access to justice.

Feedback was generally supportive of ALRI's preliminary recommendations for reform. The key points in ALRI's preliminary recommendations were:

- People who live together should be able to make agreements about ownership and division of property.

- For those couples that do not make an agreement, there should be new property division legislation with default rules. The new property division legislation:
  - should apply to couples who are adult interdependent partners, as defined in the *Adult Interdependent Relationships Act*, [SA 2002, c A-4.5](#); and
  - should be based on the *Matrimonial Property Act*.

Given the high level of support for these key points, ALRI has adopted them in its final recommendations.

If ALRI's recommendations are implemented, fewer common-law couples will have to rely on the law of unjust enrichment to divide their property.

### **Couples Should Be Encouraged to Make Agreements About Property**

As is currently the case, some couples will make their own agreements about property. ALRI's recommendations would clarify how couples can make an enforceable agreement. We recommend that an agreement should be enforceable if it is in writing and both partners have met separately with different lawyers. These requirements are the same as the ones that currently apply to agreements between married spouses, and are intended to ensure that each partner understands the effect of the agreement and enters it voluntarily.

While the use of agreements should be encouraged, experience shows they are not a solution for everyone. Our research found that only a minority of common-law couples make agreements about property. In the public opinion survey, 23 per cent of respondents living in a common-law relationship said they had a written agreement with their partner about how they would divide property if they split up. That leaves 77 per cent who would have to rely on the law of unjust enrichment.

The majority of couples would benefit from default rules, which would provide a formula about dividing property for those who do not have agreements.

### **Property Division Rules Should Apply to Adult Interdependent Partners**

ALRI recommends that legislated rules apply to adult interdependent partners, which is a term used in Alberta law to identify partners eligible for various rights, benefits, and obligations. Adult interdependent partners already have most of the same rights, benefits, and obligations as spouses. To become adult interdependent partners, a couple must live in a relationship of interdependence, which means that they share their lives, are emotionally committed to each other, and cooperate to take care of each other or their family. They become adult interdependent partners as soon as one of the following things happens:

- they live in a relationship of interdependence for at least three years;
- they live in a relationship of interdependence “of some permanence” and have a child together by birth or adoption; or

- they enter an adult interdependent partner agreement, which is a written agreement in a prescribed form.

The requirements are found in *Adult Interdependent Relationships Act*, ss 1, 3.

There is one more noteworthy feature of the definition of adult interdependent partners. In all other Canadian jurisdictions, partners must be in a conjugal—or marriage-like—relationship to have rights, benefits, and obligations similar to spouses. In Alberta, it is possible for two people to become adult interdependent partners without a conjugal relationship. We heard concerns about this feature, but after considering all feedback, we could not identify a principled reason to restrict property division rules only to partners in conjugal relationships. In any case, the anecdotal information we heard suggests that non-conjugal adult interdependent relationships are rare.

### **Property Division Rules Should Be Based on the *Matrimonial Property Act***

ALRI recommends that property division rules for adult interdependent partners should be based on the rules for spouses, which are found in the *Matrimonial Property Act*. In consultation, we heard from many respondents that the *Matrimonial Property Act* is clear, fair, and produces predictable results. We recommend that all the rules in the *Matrimonial Property Act* should be mirrored in legislation for adult interdependent partners, other than a few specific exceptions where some adjustments would be required.

In *Hodgson v Hodgson*, [2005 ABCA 13 \(Can LII\)](#), the Alberta Court of Appeal clearly explained how to apply the formula for dividing property under sections 7 and 8 of the *Matrimonial Property Act*. If our recommendations are implemented, both spouses and adult interdependent partners would follow this formula. The first step is to identify all the property owned by the spouses or partners, regardless of whether they hold it jointly or as individuals. Then all the property is classified into one of three categories. Each category has its own rules for division:

- The first category is often called exempt property, because it is exempt from division. Each person keeps the exempt property they own. Exempt property includes property that one person owned before the relationship began, property that one person inherited, gifts that one person received from a third party, and certain awards, settlements, or insurance proceeds. The exemption applies to the market value of the property at the time the relationship began or the time the property was acquired, whichever is later.
- The second category includes any increase in the value of exempt property during the relationship, property acquired with the income from exempt property or with proceeds from selling exempt property, and gifts from one spouse to the other. Property in this category is divided in a way that is “just and equitable”. The *Matrimonial Property Act* includes a list of factors for a court to consider in deciding what would be just and equitable, and case law may assist with certain issues.
- All other property acquired during the relationship falls into the third category. This property is divided equally between the spouses or partners, unless it would be unjust or inequitable in the circumstances. In most cases, each spouse or partner receives an equal share of this property.

In our view—and the view of most people who responded to our consultation—this formula would generally produce fair results for both spouses and adult interdependent partners.

The Final Report also addresses secondary issues that arise from the key points. A few rules in the *Matrimonial Property Act* would have to be adjusted to apply to adult interdependent partners. The Final Report includes recommendations about determining the date used to establish exemptions, dealing with overlapping claims when a person begins a new relationship before property division from an earlier relationship is finalized, and when partners should be able to make a claim. Consultation revealed a number of new issues that we had not addressed in our preliminary recommendations. There are new recommendations about transition rules for existing property agreements and about related amendments to pension legislation, among others.

### **Property Division Rules Should Apply to Property Acquired During Premarital Cohabitation**

There is one other significant issue that ALRI considered. Many couples live together before marrying and may acquire property during premarital cohabitation. It is important that property division rules treat all couples fairly. We consulted separately on proposals about premarital cohabitation, described by my colleague Genevieve Tremblay-McCaig in a previous [post](#).

Our Final Report includes recommendations to ensure rules are consistent for spouses and adult interdependent partners. If ALRI’s recommendations are implemented, the presumption of equal division would apply to property acquired while a couple lived in a relationship of interdependence, whether or not they eventually marry.

ALRI’s recommendations would make the law clearer and more predictable, improving access to justice for separating couples. Our proposals won’t make breaking up easy, but they can help couples divide their property fairly.

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This post may be cited as: Laura Buckingham, “Breaking Up Is Hard to Do, But Dividing Property Shouldn’t Be” (July 3, 2018), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2018/07/Blog\\_LB\\_AIP\\_Property\\_Division.pdf](http://ablawg.ca/wp-content/uploads/2018/07/Blog_LB_AIP_Property_Division.pdf)

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