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## **From Recommendation to Legislation: Bill 28 Implements ALRI's Recommendations about Property Division for Common-law Couples**

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**Legislation Commented On:** Bill 28, [\*Family Statutes Amendment Act\*](#)

On December 11, 2018, Bill 28, the *Family Statutes Amendment Act* received royal assent and became law. The new legislation implements nearly all of the recommendations the Alberta Law Reform Institute made in [\*Property Division: Common-law Couples and Adult Interdependent Partners, Final Report 112\*](#).

Bill 28 accomplishes three things. It:

- changes the law about property division for common-law couples by creating legislated rules;
- remedies a gap in child support legislation that did not allow courts to order child support for disabled adult children of unmarried parents; and
- repeals the *Married Women's Act*, a statute dating from 1922 which is now obsolete.

Although all three are important, this post focuses on the new rules about property division for common-law couples.

### **New Legislated Property Division Rules**

As I've written before ([here](#) and [here](#)), the *Matrimonial Property Act*, [RSA 2000, c M-8](#) has a clear formula for dividing property at the end of a relationship, but it currently applies only to married spouses. There are no legislated rules for common-law partners. They must rely on the judge-made law of unjust enrichment, which is complex and unpredictable.

Bill 28 introduces legislated rules. On January 1, 2020, the *Matrimonial Property Act* will become the *Family Property Act* and will apply to both married spouses and adult interdependent partners. Adult interdependent partners are unmarried couples who meet the criteria in the *Adult Interdependent Relationships Act*, [SA 2002, c A-4.5](#). As ALRI recommended, the same property division rules will apply to married spouses and adult interdependent partners. If couples do not make an agreement about how to divide property, the default rules in the legislation will apply. Generally speaking, spouses or partners will equally divide most property they acquired during the relationship, without having to prove what each of them contributed.

Bill 28 also includes amendments affecting married spouses who lived together before marriage. Currently, married spouses only divide property acquired from the date of marriage. It is increasingly common for couples to live together before marriage, so the date of marriage does

not necessarily mark the beginning of the relationship. ALRI recommended that both adult interdependent partners and spouses should equally divide property acquired during the entire relationship. The *Family Statutes Amendment Act* implements that change.

Couples who prefer to divide their property differently can do so by making an agreement. The *Matrimonial Property Act* includes requirements that must be met for an agreement to be enforceable. As ALRI recommended, the same requirements will now apply to agreements between adult interdependent partners. Going forward, an agreement will be enforceable if it is in writing, if each partner or spouse has met separately with their own lawyer, and each signs an acknowledgement that they are aware of the effect of the agreement and enter it voluntarily.

ALRI also made a number of technical recommendations, including ones to clarify rules about agreements, ones about time to make a claim, and ones about the transition to new legislation. Bill 28 reflects ALRI's recommendations on these issues.

### **A Comprehensive Solution for Discrimination in Pension Legislation**

Bill 28 implements ALRI's recommendation to address an issue with pension legislation. The Bill eliminates a barrier that had been found to discriminate against unmarried partners.

Earlier this year, the Alberta Court of Queen's Bench held that section 78 of the *Employment Pensions Plans Act*, [SA 2012, c E-8.1](#) violates the *Canadian Charter of Rights and Freedoms*. The spouse or partner of a pension plan member is a "pension partner" if certain conditions are met. Married and unmarried pension partners are generally treated identically, but there is an exception when dividing pension benefits upon relationship breakdown. Provincial pension legislation, including the *Employment Pensions Plan Act*, permits only married spouses to divide pension benefits. Unmarried pension partners may not do so. Neither an agreement between partners nor a court order can override the prohibition. In *Lubianesky v Gazdag*, [2018 ABQB 290](#) an unmarried pension partner successfully challenged the legislation. The applicant and her partner made a separation agreement. Among other things, they agreed that the partner would transfer a lump sum from his pension to the applicant. When they tried to make the transfer, they discovered it could not be done. The applicant challenged the law that stood in the way of fulfilling the agreement. The Court of Queen's Bench declared that the legislation discriminated on the grounds of marital status and read in language to put unmarried pension partners in the same position as married ones.

The decision in *Lubianesky v Gazdag* affected only the specific provision at issue in that case. Without legislation, unmarried pension partners would have had to individually challenge similar provisions in a dozen statutes and regulations. Bill 28 amends the relevant statutes, and amendments to the relevant regulations should follow.

### **A Few Lingering Issues**

ALRI's recommendations and Bill 28 aim to reduce the need for litigation. Legislated rules about property division should make the law clearer and more predictable, helping former partners settle or narrow the issues in dispute.

Although the legislation should go a long way to reduce the need for litigation, it would be impossible to eliminate all disputes. Certain issues will remain to be resolved by the courts.

Once the new legislation comes into force, there may be an uptick in litigation about whether couples are adult interdependent partners or when their relationship began. These kinds of cases do not arise under the *Matrimonial Property Act*, as married couples rarely disagree about whether they are married or when they were married. Unmarried claimants will have to prove that the relationship met the criteria in the *Adult Interdependent Relationships Act*, and when it first met them. There is an existing body of case law applying these criteria where support or inheritance were at issue, but there are likely to be more disputes now that property is also at stake.

There may also be new kinds of disputes about property acquired after separation. Under the *Matrimonial Property Act*, there is a presumption that spouses will receive equal shares of any property acquired during the marriage, including property they may acquire between separation and divorce. Courts have interpreted the *Matrimonial Property Act* to require that property be valued and divided as of trial (see *Hodgson v Hodgson*, [2005 ABCA 13](#)). Often, a divorce is granted at the time of trial, so the court can determine the value of everything acquired up to that date and split it equally between the spouses.

Bill 28 will codify the rule that property is to be valued at trial. It adds a new provision, which reads:

7(2.1) Unless a written agreement by the parties that meets the requirements set out in section 38 provides otherwise, the relevant date for valuation of property to be distributed under this Act is the date of the trial.

ALRI had recommended that property should instead be valued as of the date of separation. This recommendation is the only one Bill 28 will not implement. It is interesting that the Legislature chose not only to codify valuation date, but rather to use the phrase “date of the trial”. The phrase implies that most cases will go to trial, which is arguably inconsistent with the aim of promoting settlement.

There will be some new wrinkles when applying valuation and division at the date of trial to adult interdependent relationships. Under the new legislation, adult interdependent partners will equally divide property acquired until they become former adult interdependent partners—usually a year after separation. (One way to become former adult interdependent partners is to separate for more than a year. There are also several ways to become former adult interdependent partners more quickly. For example, an adult interdependent relationship ends immediately if one of the partners marries a third party.) It often takes more than a year to finalize property division, especially if there is litigation. In the meantime, either partner may acquire new property. Under the new legislation, property acquired after the partners become former adult interdependent partners is to be divided “in a manner that [the court] considers just and equitable.” Without objective standards, it will be difficult to predict outcomes or evaluate

options for settlement. Those conditions may tend to push couples into litigation about dividing that portion of property.

There will also be a new issue about overlapping claims. Overlapping claims are possible because in certain circumstances an individual may have both a spouse and an adult interdependent partner. An individual who is separated from their spouse may form a new relationship. If the new relationship meets the criteria in the *Adult Interdependent Relationships Act*, the individual will have both an adult interdependent partner and a legal spouse. Under the proposed legislation, both the spouse and the partner would have a claim to equally divide any property the individual acquires during the time the two relationships overlap. Valuation at separation would minimize overlapping claims, which was a reason for ALRI's recommendation. Bill 28 does not provide a clear rule for addressing overlapping claims. Courts will have discretion under the legislation to resolve individual cases. A court is not required to divide property equally if "it would not be just and equitable to do so." In considering a departure from equal division, a court may take into account "whether the property was acquired when the spouses were living separate and apart" and "any fact or circumstance that is relevant" (*Matrimonial Property Act*, ss 7(4), 8(f), 8(m)). These provisions will allow courts to address overlapping claims on a case-by-case basis, but outcomes may remain unpredictable.

In the big picture, the new issues are a small price for progress. New legislated rules should significantly reduce the need for litigation. Couples that cannot resolve all issues should at least be able to narrow the issues in dispute. When litigation cannot be avoided entirely, it should be more focused, shorter, and less expensive. Bill 28 introduces important changes that should improve access to justice in family law.

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