

November 28, 2017

## The Cost of Cohabitation Agreements: Considering Property Division Laws for Unmarried Cohabitants

By: Kyle Gardiner

**Report Commented On:** [\*Alberta Law Reform Institute, Property Division: Living Together Before Marriage, Report for Discussion No. 31\*](#)

On September 29, 2017, the Alberta Law Reform Institute (ALRI) released [\*Property Division: Common Law Couples and Adult Interdependent Partners, Report for Discussion No. 30\*](#), addressing Alberta’s lack of statutory law dealing with property division for unmarried cohabitants. That report recommended that property division rules should apply to adult interdependent partners as defined in the *Adult Interdependent Relationships Act*, [SA 2002, c A-4.5 \(AIRA\)](#) (i.e. “common-law partners”), and that those rules should be based on the *Matrimonial Property Act*, [RSA 2000, c M-8 \(MPA\)](#) — the statute that governs property division upon marriage breakdown in Alberta. This recommendation necessitated a further question answered by ALRI’s Report for Discussion 31: how should laws of property division deal with couples who first cohabit and later marry?

In this blog post I review both reports and, with a few caveats, accept their recommendations. One issue in particular is of note — the question of whether an agreement about ownership and division of property should continue in effect if couples marry. In other words, should a couple’s cohabitation agreement remain in force as a marriage agreement if that couple marries? This question was addressed in RFD 30 (at page 20) and ALRI’s recommendation in the affirmative was relevant to RFD 31 (see page 13). I discuss some factors including misconceptions and access to justice concerns that illustrate why ALRI’s answer to this issue is so important. The full extent of both reports’ recommendations are beyond the scope of this post, but I will review some of their supporting research, and briefly explain their salient points and the current law required to understand them. For a summary of RFD 31, see [the recent blog post](#) written by Genevieve Tremblay-McCaig, who authored the report. For more information on RFD 30, see [Laura Buckingham’s post](#).

The question of how to address common-law property issues in Alberta is not a new one. In 2010, ALRI commissioned a [research paper](#) by Professor Jonnette Watson Hamilton and Annie Voss-Altman to identify property division issues. In 2013, the Legal Education Society of Alberta presented a paper on the topic titled “[Is it Time to Update the Matrimonial Property Act?](#)” More recently, ALRI has carried out surveys and held roundtables with lawyers who practice family law in the province. These reports represent a culmination of much research, and fill in many gaps in knowledge about common-law property division in Alberta.

## To Whom Would the New Laws Apply?

ALRI proposes to use the existing statutory framework around adult interdependent partnerships, governed by the *AIRA*, to determine the parameters of the unmarried relationships to which new property division laws would apply (see RFD 30 at page 36). To become adult interdependent partners, two people must live in a “relationship of interdependence” as defined in [section 1](#) of the *AIRA*. Cohabitants may become adult interdependent partners by entering into an agreement to become adult interdependent partners (pursuant to [section 7](#)), by cohabiting for three years in a relationship of interdependence, or by doing so for less time if they have a child of the relationship. I often point out that the relationship does not have to be conjugal to meet these criteria, and ALRI’s view is that there is no principled reason to exclude those in non-conjugal relationships of interdependence from proposed property division laws.

ALRI has also proposed that no minimum “waiting period” should apply to partners in a relationship of interdependence — a departure from the current adult interdependent partnership framework in Alberta. If the pre-marital relationship meets the interdependence criteria (of sections [1\(f\)](#) and [1\(2\)](#) of the *AIRA*), the whole relationship will be taken into account for purposes of property division, regardless of its length.

RFD 31 recommends extending the [presumption of equal division](#) to property acquired by the spouses while they lived together before marriage. Currently, property of married spouses is partitioned into three categories when being divided under the *MPA*, and each category has its own rules and considerations. Property acquired before spouses marry is exempt from division under [section 7\(2\)\(c\)](#) of the *MPA*. Property under [section 7\(3\)](#) includes specific things like the increase in value of property otherwise exempt, and this property is to be divided by the court in a manner that is just and equitable (not necessarily equal). Property under [section 7\(4\)](#) includes most property acquired during a marriage, and there is a presumption under that section that each spouse will receive an equal share.

ALRI proposes that only property acquired by the spouses before the commencement of the relationship of interdependence should remain exempt from the presumption of equal division. Because adult interdependent relationships are deemed to have commenced on the date the partners began to cohabit, this will typically mean that only property acquired before the partners lived together will be excluded from division. Property acquired during the cohabitation period will engage proposed property division laws and be included in an equal division.

## Misconceptions Addressed

Prior to making their recommendations, ALRI partnered with the Population Research Lab at the University of Alberta to carry out a survey of Albertan’s attitudes toward (and understandings of) cohabitation and property division laws in the province. The [survey results](#) aligned with what many lawyers in the province have noticed anecdotally. There is a widespread misconception that the law about division of property in Alberta treats common-law partners and married spouses alike. Approximately 31 percent of all survey respondents reported that when common-law partners split up, property acquired by either partner is divided equally between them (at page 10). Specific results included ranging views that property is divided equally after five years,

after three years, after two years, and after one year of cohabitation (at page 14). Lawyers in Alberta anecdotally report meeting with many individuals who believe living in a common-law relationship establishes a legal right to share property with a partner, and I can absolutely support these anecdotal findings.

In Alberta, no length of cohabitation gives rise to property rights for unmarried cohabitants. While other rights and obligations including those related to spousal support, intestacy, and income tax flow from common-law relationships, common-law property rights are not addressed by any statute in Alberta. [Statistics Canada data](#) cited by ALRI suggests that the majority of people aged 20 to 29 are expected to live in a common-law relationship before marriage. These relationships, and the legal issues that flow from them, are not going away.

### **What Problem is ALRI Trying to Fix?**

Because there is currently no statutory law in Alberta addressing how the property of unmarried cohabitants is to be divided upon relationship breakdown, the remedies available to separating cohabitants are both limited and complicated. ALRI points out that in 2011, [Statistics Canada found](#) there were 135,660 couples in Alberta who were living together without being legally married — over 15 percent of all “couple families” in the province. Between 2006 and 2011, the number of common-law couples in Canada [grew faster than the number of legally married](#) couples. It is inevitable that some of these couples will end their relationship, and they do, they will need to divide their property.

In these circumstances, the only property that an unmarried cohabiting spouse is presumptively entitled to, without a need to take legal action, is property owned by that spouse, or jointly owned with his or her spouse. If one spouse claims an entitlement to property owned solely in the name of the other, the non-owning spouse must rely on equitable remedies in Alberta, because no statutory relief is available. This requires that the spouse seeking entitlement to an asset prove an entitlement. The equitable claim made by the non-owning spouse is usually based on unjust enrichment.

In *Rathwell v Rathwell*, [1978] 2 SCR 436, [1978 CanLII 3 \(SCC\)](#), Justice Dixon stated (at 455) that “for the principle [of unjust enrichment] to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason – such as contract or disposition of law – for the enrichment.” The approach was further developed in *Pettkus v Becker*, [1980] 2 SCR 834, [1980 CanLII 22 \(SCC\)](#), where the court held (at 850) that it would impose a trust on the respondent where the claimant is able to show that the respondent has been unjustly enriched as a result of the claimant’s labour or other services. Unjust enrichment is proven by demonstrating that (i) the respondent was enriched as a result of the claimant’s contributions, (ii) the claimant was correspondingly deprived, and (iii) there exists no legal reason for the respondent’s enrichment. If unjust enrichment has been found, the court may then determine what the appropriate remedy would be to compensate the claimant for his or her interest in the property. Concrete values have since been attached to many domestic services offered inside the home, or to services and labour that benefit the value of a property.

Historically, the monetary value of a successful unjust enrichment claim was measured on a “quantum meruit” or fee for service basis. In the most recent Supreme Court of Canada decision on unjust enrichment, *Kerr v Baranow*, [2011 SCC 10 \(CanLII\)](#), the Court introduced a change to the determination of the monetary award for unmarried cohabitants who separate, if the spouses were engaged in a “joint family venture.” These claims place the onus on the applicant spouse to present evidence that the spouse should receive compensation. Even if applicants succeed in proving their claims, there is no presumption of equal division, and no formula for determining the amount of an award.

ALRI actually reviewed all reported Alberta trial decisions of unjust enrichment claims between former common-law partners issued since *Kerr* was decided in 2011 to inform its recommendations (RFD 30 at 12). Of the 17 such cases, it found that there was a generally a delay of several years from separation to trial, and that cases took a great deal of time once they reached trial. A [2015 survey of legal fees](#) suggests legal fees for a five-day trial averaged \$33,425 in the Western provinces and could run up to \$76,688. What is more, the decisions reviewed did not reveal any pattern in the share of property awarded — awards ranged from zero to 50 percent of assets, many through a variety of different approaches taken by the court. Thus, seeking equitable remedies in court is time consuming, expensive, and unpredictable. The concern is also not exclusively that these issues will actually see the inside of a courtroom — that is increasingly rare. Rather, the issues result partly from the steps that must be taken, necessarily in that direction, with a view toward resolution.

Things get even more complicated when married spouses, who cohabited before marriage, divorce and divide their property. Spouses who believe that they are entitled to a share of property acquired during premarital cohabitation can either abandon claims for property acquired before marriage, ask the court to consider the full length of cohabitation in distributing property (under the basket clause of [section 8\(m\)](#) of the *MPA*), or seek equitable remedies in court (including an unjust enrichment claim) in addition to their matrimonial property claim. These remedies, together, are unwieldy.

The requirement that unmarried family law litigants, who are often self-represented, appear in court to argue for these rights therefore raises many issues from an access-to-justice perspective. A [recent study conducted by Dr. Julie Macfarlane](#) as part of the National Self-Represented Litigants Project found that 60% of all self-represented litigants were family law litigants. It is therefore ALRI’s opinion that these common-law remedies be replaced with statutory law in Alberta, outlining a formula for division of property acquired by spouses who lived together before marriage in a relationship of interdependence, just as the *MPA* does for married couples who need to divide their property following divorce. The main objective of ALRI’s recommendations is to reduce the need to resort to more complex, unpredictable and costly common law remedies by extending the presumption of equal division to the whole economic partnership, even if it began prior to marriage.

## Cohabitation Agreements: Contracting Out of Proposed Laws

ALRI recognizes that the changes it recommends will inevitably have a retrospective effect on property rights if the spouses separate or divorce, and acknowledges such recommendations should only be made after careful review (RFD 31 at page 4).

Nevertheless, statutes touching domestic relations like the *MPA* and others flowing from English and Canadian common law still contain remnants of patriarchy and heteronormativity, written, to varying degrees, with a certain paradigm in mind (see, for example [Claire Young and Susan Boyd](#)). That paradigm is one of a family comprised of a wealthy male earner and his childbearing spouse, increasingly destitute if not for his support. It should be no surprise that unmarried cohabitants who feel they fall outside this paradigm may not want proposed property division laws to apply to them. A well-drafted cohabitation agreement can address virtually any concern spouses may have with current or proposed property division laws and can effectively stand in place of the equitable remedies I discussed earlier, keeping the spouses out of court. As noted in *Kerr*, recovery for unjust enrichment is permitted if the applicant can establish the absence of a juristic reason for the enrichment. One of those juristic reasons is the existence of an agreement between the parties.

ALRI's [survey results](#) suggest great support for cohabitation agreements between unmarried spouses, but also illustrate their prevalence in Alberta is uncommon. Seventy-seven percent of respondents said they did not have a written agreement with their partner about how they would divide property if they split up (at page 10). If the idea of cohabitation agreements is generally favoured by common-law couples, why are so few agreements executed?

I will suggest that there are two main reasons why the prevalence of cohabitation agreements in Alberta is so low: the process is expensive, and the discussion may be, for lack of a better term, awkward. ALRI suggests additional reasons (in RFD 30 at 23), namely that agreements can be difficult to negotiate, and that the progression of relationships is gradual, with no clear decisions being made to progress from one stage to the next. To the extent that common-law couples support the idea of cohabitation agreements, though, the real barrier to their execution may not be the difficulty or awkwardness of the process, but rather the cost.

The same 2015 survey of legal fees cited by ALRI found the average fees for a lawyer to prepare a marriage or cohabitation agreement was \$1,945 in the Western provinces. While that number is an average, it may be on the low end. Flat-rate fees for cohabitation agreements in Calgary tend to vary between \$2,000 and \$3,000, though it is difficult to peg an upper bound. What these fees do not include though, is what it costs for the second spouse to obtain independent legal advice — a requirement under [section 38](#) of the *MPA*. Similarly, [section 62\(3\)\(a\)](#) of Alberta's *Family Law Act* allows courts to make alternate spousal support orders where the challenging party did not receive independent legal advice for an agreement dealing with spousal support or its release.

### Independent Legal Advice

While no legislated requirements or safeguards exist with respect to cohabitation agreements dealing with property division in Alberta (they are not considered by statute), the requirement of

independent legal advice is a crucial (though currently expensive) safeguard protecting the validity of such agreements in court. It is one that ALRI has wisely recommended remain in place for cohabitation agreements made under new property division laws in Alberta.

Difficult questions are also raised if we decide to abandon the requirement for independent legal advice. Those include: What kinds of agreements should be excluded from the requirement? How could legislation distinguish between those agreements that should always require independent legal advice and those for which it should be optional? Does abandoning the requirement open the door for voidable contracts to be executed under duress or without an adequate understanding of the document's implications? The last question may be the most important, and to it I would answer unequivocally that it does. In addition to being grounded in traditional contract principles of common law, safeguarding a signing party from doing so under duress has been codified in [section 38\(1\)\(c\)](#) of the *MPA*, and most cohabitation agreements will not be executed unless there is an attached and executed certificate of independent legal advice from the second spouse. While not yet a requirement, cases like *Webb v Birkett*, [2009 ABQB 239 \(CanLII\)](#) provide factors that may guide a lawyer giving independent legal advice in domestic matters.

Innovative lawyers are increasingly offering flat-rate fees for cohabitation agreements, but the potential issues that might be uncovered by a lawyer offering independent legal advice keeps many lawyers from offering flat fees for that service. Furthermore, the duties placed upon a lawyer offering independent legal advice to clients entering marriage or cohabitation agreements are high. Usually, the client is not known to the lawyer before the advice is sought, and the lawyer must investigate and make determinations with respect to a number of factors in order to competently execute her duty. For these reasons, independent legal advice can often cost just as much as, or even more than, the original agreement being reviewed. Even for cohabitants with modest schedules of property, fully executing a valid and enforceable agreement can exceed \$6,000 or \$7,000 — the cost of a classy wedding the cohabitants may or may not have. While these costs are prohibitive and should arguably be lower, they represent only a small fraction of what common-law partners without cohabitation agreements might be required to pay to seek equitable remedies in court. The story of one common-law partner who spent \$124,000 and four years in court to establish an interest in her home [recently made the news](#) alongside ALRI's proposed changes to the law.

### **Ensuring Cohabitation Agreements Remain in Force After Marriage**

Throughout both reports, ALRI repeatedly points out that couples retain the option of entering into a cohabitation agreement addressing ownership and division of property. This is true only for couples who can afford to do so. For that reason, ALRI's recommendation that cohabitation agreements dealing with property should remain in force if the couple gets married is a crucial one. It hasn't been established that common-law partners with a cohabitation agreement would expect the agreement to change or be revoked upon marriage. As ALRI points out, cohabitants would likely expect to have the same rules apply throughout the relationship. For similar reasons, the rule revoking a will by testator's marriage has been abolished in Alberta — a reform also [recommended by ALRI](#). Allowing a cohabitation agreement to remain in effect as a marriage

agreement if the cohabitants marry would also be consistent with most other Canadian jurisdictions where common-law property division is addressed by statute.

Access to affordable family law legal services is a pressing issue in Alberta, and allowing cohabitation agreements to remain in force will keep partners from having to go through the entire process, or portions of it, again in contemplation of marriage. Recall ALRI's recommendation that the presumption of equal division should apply to property acquired during premarital cohabitation. One goal of this recommendation addresses the access to justice concerns around family litigants seeking equitable remedies in court. But that recommendation, if implemented, would from a legal perspective bring relationships of marriage and relationships of cohabitation closer than they have ever been before. If the law's consistency in this respect is to be maintained, the power of a couple's cohabitation agreement to continue in force into marriage must at all reasonable costs be encouraged.

Furthermore, ALRI states correctly that legislated property division rules do not simply create entirely new obligations. These obligations already exist — the law of unjust enrichment recognizes that. Codifying these obligations into legislated rules just makes them clearer, and arguably harder to escape.

ALRI also suggests (at page 16 of RFD 30) that legislated rules would be useful because they would clearly inform common-law partners that they may make agreements about property, and also inform partners of the conditions that must be met for the agreement to be enforceable. It is true that legislation would inform partners of the conditions they must meet to reach a valid agreement, though arguably these requirements would be more useful for the family lawyers drafting such agreements. Legislation informing partners that they may make agreements would be effective only insofar as partners actually read the legislation.

As I have discussed, unmarried cohabitants in Alberta seem to be in the dark with respect to what property rights accrue from their relationship, and when. If Albertans already mistakenly believe that property division laws apply to them after two (or one, or three) years of cohabiting, reforming the law to make that misconception a reality will have little effect on the number of cohabitation agreements that get executed in the province. If ALRI's recommendations are implemented, will these misunderstandings be remedied? Informing the public about what the law is and ensuring access to family law services raise the issue of access to justice in Alberta and its root causes — the topic of many other blog posts, but beyond the scope of this one.

My aim has not been to pick the reports apart piece by piece. The proposed property division law does not have to be perfect. It just needs to be better than what we currently have in place. Better from the perspectives of cost, fairness, and access to justice. Replacing expensive and unpredictable equitable remedies with formulaic statutory law will arguably accomplish this, though the importance of cohabitation agreements and their ability to remain in force in the event of marriage cannot be understated. A statutory framework may be better than what currently exists under the common law, but for many Albertans a cohabitation agreement may be best. While proposed property division laws can simplify that aspect of common-law relationship breakdown, these laws still require cohabitants to engage judicial resources, albeit to a lesser extent. Only a well-drafted and enforceable agreement can keep separating cohabitants from

engaging the court at all. With this in mind, we should turn our minds to increasing awareness of the new law for those most likely to be affected by it, and to increasing family law resources so that those who do not want the new law to apply to them can contract out of it.

*ALRI is now seeking feedback on the proposals of RFD 31 until December 15<sup>th</sup>, 2017, before making final recommendations. Any interested person can give feedback by completing a short survey.*

*The survey is at <http://bit.ly/2mtG79b>*

*You can also send comments to ALRI at the address below:*

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This post may be cited as: Kyle Gardiner “The Cost of Cohabitation Agreements: Considering Property Division Laws for Unmarried Cohabitants” (28 November, 2017), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2017/11/Blog\\_KG\\_ALRI.pdf](http://ablawg.ca/wp-content/uploads/2017/11/Blog_KG_ALRI.pdf)

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