

CHANGING TIMES FOR FAMILY PROPERTY

by Erin Connick

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Relationship breakdowns can be costly to individuals and they may have a significant impact on business planning as well. The rules have changed, however, and everyone should be aware of their impact.

In Saskatchewan, it used to be the case that when two married people separated, their property was (with some exceptions) divided equally under *The Matrimonial Property Act*. Persons who separated after living in a common law relationship were not subject to the legislation. *The Matrimonial Property Act*, along with other Saskatchewan statutes, has now undergone some major revisions to include common law relationships. It is important to recognize the extent and consequences of the amendments and, if necessary, how to protect property from being subject to the legislation.

The presumption of *The Matrimonial Property Act* was that there were joint contributions, financial or otherwise, to the acquisition of property. Although there were certain exceptions, the starting point was that the property would be divided equally in the event of marriage breakdown. While not subject to the legislation, persons in common law relationships had some remedies. They could claim an interest in the other spouse's property based on equitable principles such as constructive trust and unjust enrichment.

Enter *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001* and *The Miscellaneous Statutes (Domestic Relations) Amendment Act 2001 (no. 2)*. This legislation expands the definition of "spouse" in a number of existing statutes and is responsible for the complete revision of *The Matrimonial Property Act*. Examples of other Acts that have been amended include *The Pension Benefits Act* and *The Wills Act*.

The Family Property Act replaces *The Matrimonial Property Act* as the legislation that governs the division of property between spouses. It is virtually the same as the previous legislation with one important exception: the definition of "spouse". This definition now includes not only married persons, but persons who have been living in a spousal-type relationship of no less than two years. There is also no limitation that the persons in a spousal relationship be of the opposite sex.

That is not all. The legislation applies to parties who entered into a spousal relationship or commenced court proceedings to determine property rights between spouses prior to the proclamation of the amending legislation as well as to property acquired prior to the amending legislation. However, there is a limitation that applications under the new legislation must be brought within two years after the separation. The important distinction between married spouses and common law spouses is that there is no "waiting period" for married spouses. The entitlement to an equal division is immediate. The entitlement for an equal division for common law spouses is only after cohabitation for two years.

The definition of property remains the same, and includes both real and personal property, securities, shares, and interests in corporations, trusts, partnerships or joint ventures. The

exceptions remain the same as well. The legislation states that fair market value of property acquired before the spousal relationship commences is exempt from division. The family home and household goods, including vehicles, are not exempt under this section even if they were acquired prior to cohabitation.

The implications of *The Family Property Act* are far reaching, and may indeed reflect the intentions of parties in a common law relationship. For those who do not intend to divide their property equally, preventative action is necessary.

Common law couples do have some options available if they do not desire *The Family Property Act* to apply. For instance, they can limit the duration of their cohabitation to less than two years. A more practical option is to enter into an agreement (married couples, of course, also have this option). If the agreement meets the criteria set out in *The Family Property Act*, it will be binding, and the property dealt with in the agreement will be exempt from division under *The Family Property Act*. To be binding, the agreement must be in writing, signed by each of the parties and witnessed. The parties must receive independent legal advice on the agreement and acknowledge their awareness of the nature and effect of the agreement and any future claims they may have under *The Family Property Act*, as well as their willingness to give up any future claims under the Act. Such agreements may be entered into prior to the commencement of the relationship, during the relationship, or upon separation.

As mentioned earlier, the definition of spouse has been expanded in other legislation as well, including *The Pension Benefits Act* and *The Wills Act*. *The Pension Benefits Act* now includes a common law spouse, making it possible to divide pensions and other benefits upon the breakdown of a common law relationship. The definition of spouse has been amended in *The Wills Act* as well. One effect of the amendment is that a will is revoked, with certain exceptions, when the testator marries or has cohabited in a spousal relationship for at least two years. This may catch a number of people off guard.

It is important to take a moment and evaluate your personal situation in order to determine whether the amendments to the legislation reflect your intentions, either on an individual or business level.

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