



# Heads up! New common law legislation has come to Alberta

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The landscape for common-law relationships in Alberta is changing, and Albertans in common law relationships should make themselves aware of recently enacted legislation as it may have a significant impact upon them. Forthcoming legislative changes will primarily affect child support for adult children and establish guidelines for the division of common law property. Some of these changes are long overdue and mean that provincial legislation will now dovetail with certain federal laws around child support for adult children of married couples. Provincial legislation will also establish a framework for the distribution of common law property akin to what is currently in place for the distribution of matrimonial property.

## Some background

In Canada, legislative authority over marriage, divorce, property rights, and common law relationships is divided between the federal and provincial governments. For married couples, divorce, child and spousal support is governed by the federal *Divorce Act*, but their respective property rights are covered by provincial legislation, and in Alberta that is through the *Matrimonial Property Act*. Common law relationships were, for a long time, primarily dealt with through what is known as “judge made law”, meaning that it was various common law principles developed over time that were relied upon to settle most disputes between separating couples (unjust enrichment and constructive trusts, for example). This all began to change in 1985 when the Canadian Charter of Rights and Freedoms was enacted, and then decisions came down from the Supreme Court of Canada which dealt with discrimination based on grounds analogous to those listed in Section 15(1): sexual orientation, and common law relationships, same sex and otherwise. As a result, both the federal government and the provinces all started to develop their own legislation to take these decisions into account, and a legislative framework around common law relationships began to develop. Alberta was a bit late in getting its legislation prepared, but on December 4th, 2002, Bill 30-2, the *Adult Interdependent Relationships Act*, which also contained amendments to some 69 statutes, was passed by the legislature. It was proclaimed into force on June 1st, 2003, and has been Alberta’s primary governing law on common law relationships ever since.

## An overview of the Adult Interdependent Relationships Act

The *Adult Interdependent Relationships Act* (“AIRA”) not only provides the framework for common law relationships in Alberta, but also for other “relationships of interdependence”, which are not necessarily conjugal in nature. Section 1 of the *Act* defines a relationship of interdependence as a relationship outside of marriage in which two persons: Section 4



In determining whether a couple functions as an “economic and social unit”, all of the circumstances of the relationship are to be taken into account, including:

- a) whether or not those persons have a conjugal relationship,
- b) the degree of exclusivity of the relationship,
- c) the conduct and habits of the persons in respect of household activities and living arrangements,
- d) the degree to which the persons hold themselves out to others as an economic and social unit,
- e) the degree to which the persons formalize their legal obligations, intentions and responsibilities toward one another,
- f) the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well being,
- g) the degree of financial dependence or interdependence and any arrangements for financial support between the persons,
- h) the care and support of children, and
- i) the ownership, use, and acquisition of property.

of the *Act* states that a relationship of interdependence may exist between two persons who are related to each other by blood or adoption, except where one of those persons is a minor (these relationships are obviously non-conjugal in nature).

No relationship of interdependence exists between two persons where one provides domestic support to the other for a fee or on behalf of another person, organization, or government.

Section 3 of the *Act* states that an adult interdependent partnership may be established between two persons by ascription, or by agreement. An adult interdependent partnership may be established between two persons by ascription if they have lived in a relationship of interdependence:

- a) for a continuous period of not less than 3 years, or
- b) of some permanence (and less than 3 years) if there is a child of the relationship by birth or adoption.

Once that partnership is established, the persons are then considered to be adult interdependent partners ("AIPs"), even if the consequences of that partnership are not known or even intended by the persons now finding themselves to be AIPs, assuming that all the relevant factors are in place.

Persons who are related to each other by blood or adoption may not become AIPs by ascription, but may do so by agreement. Any other two persons living together or intending to live together in a relationship of interdependence can also become AIPs prior to the 3-year period by entering into an agreement in the form prescribed by the Regulations to the AIRA.

Section 10 of the *Act* specifies that an adult interdependent partnership will terminate under any of the following circumstances:

- a) If the partners enter into a written agreement evidencing that they wish to live separate and apart without the possibility of reconciliation.
- b) If the partners live separate and apart for more than one year and one or both of the partners intend that the relationship not continue.
- c) If the partners marry each other or one of the partners marries a third party.
- d) In the case of an adult interdependent partnership by ascription, if one of the partners enters into an adult interdependent partner agreement with a third party.

One area that the *AIRA* did not venture into was property division upon the breakdown of the relationship, so disputes over property were still left to be decided based on the laws of unjust enrichment, constructive trusts, as well as "joint family ventures", along with reference to the various cases involving those principles that have already been decided by the courts. Given that there was no legislative guidance, the outcomes of such cases were unpredictable, and subject to considerable variation. Further, they were overly complicated, very costly and time consuming to litigate, and generally had challenging evidentiary burdens and hurdles to be met in order to substantiate any claims to the property at issue. All in all, a very unsatisfactory situation.

## **The Family Statutes Amendment Act**

On December 11th, 2018, Bill 28, Alberta's *Family Statutes Amendment Act*, received Royal Assent. Amongst its many changes and revisions to existing legislation, Bill 28 immediately amended the *Family Law Act* with respect to the eligibility to qualify for child support payments for children 18 years of age and older in order to bring those qualifications in line with the federal *Divorce Act*. What this means is that the child support eligibility criteria under the *Divorce Act* will now apply to children over age 18 who are under their parents' charge and unable to, by reason of illness, disability, being a full-time student, or some "other cause", to withdraw from their parents' charge and obtain the necessities of life on their own. Translated, this means that the potential obligation to pay child support has been extended in any of those circumstances.

The *Married Women's Act*, has now been repealed. That *Act* came into force in 1922 and gave married women the freedom to handle money, property, and legal responsibilities without their husbands, but it stopped short of recognizing that married women had their own legal personalities and capacities distinct from their husbands. This was also reflected in the *Family Law Act*, and add to that that the *Canadian Charter of Rights and Freedoms* guaranteed equality rights, so the *Married Women's Act* subsequently became redundant.

Lastly, effective January 1st, 2020, Bill 28 will rename the *Matrimonial Property Act* to the *Family Property Act*, and amend the *Act* to extend the existing matrimonial property division protocols to both Adult Interdependent Partners ("AIPs") and married spouses. This, and the other changes, will be discussed in more detail below.

## So how will these changes affect you?

As mentioned above, the changes to the support provisions for adult children of common law relationships came into effect on proclamation (December 11th, 2018), and thereby aligned Alberta's *Family Law Act* with legislation in all other Canadian provinces, as well as the federal *Divorce Act*, when it comes to support for adult children. Previously, the *Family Law Act* limited child support claims to adult children between the ages of 18 and 22, or to those children who were full-time students. Now a claim for the support of an adult child can be made for any adult child who needs ongoing care due to illness, disability, or the rather ambiguous "other causes". If you are the payor or the recipient of support for an adult child, these changes may affect you and your ongoing rights and obligations.

As mentioned above, Alberta did not have any legislation governing how property was to be divided upon the breakdown of a common law relationship. The forthcoming amendments to the *Matrimonial Property Act* will extend its matrimonial property rules to include AIPs. The existing rules in the *Act* begins with a presumption of an equal split of the value of property acquired during the marriage (as long as it is not "exempt property") upon the dissolution of the relationship, and these rules will apply to "family property" beginning January 1st, 2020. What is and is not matrimonial property is currently defined under section 7 of the *Act*, and factors that a court is to take into consideration when making a distribution of the property are listed under section 8 of the *Act*. It is the application of those factors that can change the percentage distribution of the value of the property. Although this may sound somewhat complex, the distribution of matrimonial property has been clarified by the courts over many years, and is well known to family law lawyers. There is a fair bit of certainty to the process, and this same process will apply to AIPs and their family property, effective January 1st, 2020.

Some other changes to the *Matrimonial Property Act* will include:

- a) Allowing AIPs to draft their own property division agreements instead of having to follow the rules in AIRA (which had a specific form of "Adult Interdependent Partnership Agreement" in its Regulation that had to be used pursuant to section 7 of the *Act*, but did not specifically provide for property agreements between AIPs) thus giving them much more flexibility.
- b) Specifying that the property division rules will apply to property acquired after beginning a "relationship of interdependence". These rules will apply to both AIPs and married couples who lived together before getting married.
- c) Giving each AIP two years from the date they knew, or ought to have known, that their adult interdependent relationship ended, to make a claim for property division.
- d) Clarifying that partners can enter into a property ownership and division agreement that applies during cohabitation before and after the time of marriage. Note that agreements made during cohabitation would not apply after marriage unless that is the clear intention of the agreement.
- e) Confirming that existing property division agreements that were enforceable under the law when they were originally signed would continue to be enforceable.

## Conclusion

These changes, existing and forthcoming, to Alberta's common-law legislation will affect a great many people. If you think you may be one of those people, then you need to take a look at your current situation to see how and if you are going to be affected. When it comes to child support, it is considered in law to be a "right of the child" and parents cannot bargain it away. When it comes to property, however, couples can come to their own agreements so long as there has been full disclosure, no undue influence, and independent legal advice. If you are in a common-law relationship and don't have any sort of agreement in place, it would be prudent to retain a lawyer specializing in family law to evaluate your situation and work with you to get a properly enforceable property and cohabitation agreement in place. You also want to be sure that your estate planning is going to achieve what you expect it to, and that you have considered the rights of AIPs to a share of your estate. Once again, this can be dealt with through a comprehensive property and cohabitation agreement, which will preclude any surprises that could otherwise be waiting in the wind, so to speak.



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