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"THE FAMILY LAW ACT: PROPERTY DIVISION FOR UNMARRIED COUPLES"

MAUREEN L.A. LUNDELL

Of the many changes in the law brought in with the coming into force of the *Family Law Act*, the extension of statutory rights of property division between unmarried couples is one of the most significant departures from the previous law.

The extension of these rights to unmarried (often referred to as "common law") couples applies to couples that first moved in together prior to this act coming into force, when there were no such legislative property rights. Suddenly, for these people, the nature of their relationship has changed, at least in respect of the parties' rights on separation.

Under the old law, the *Family Relations Act*, although unmarried spouses could opt into the property division provisions in that act by agreement, there was no automatic application of the law. It was relatively rare for unmarried couples to opt in by agreement. Without such an agreement in place, parties seeking to make a property claim had to rely on the common law action of "unjust enrichment", which provided the parties with less certainty.

Under the *Family Law Act*, unmarried couples have gained the right to share in property once they have lived together in a "marriage-like relationship" for a period of two or more years or alternatively have had a child together.

There is a significant body of case law that already exists considering what a "marriage-like relationship" is under the old act, which is based on a common-sense approach: how did you explain your relationship to your friends, did you have joint bank accounts, were you in a monogamous, sexually intimate relationship, and so on and so forth. It is likely that this case law will apply to this definition in the *Family Law Act*.

Simply because unmarried spouses have gained a statutory right to share in property does not mean that they necessarily are entitled to an interest in one half of everything the other spouse owns. The *Family Law Act* provides for the exclusion of certain assets from distribution, unless it would be "significantly unfair" to do so. Examples of property excluded from distribution include property acquired before the relationship began, gifts or inheritances, and certain kinds of trusts. In these cases the value of the property at the date of marriage or cohabitation is exempt, and only the increase in value during the relationship is shared.

While the concern may be that there will be a wave of claims from two-year-long marriage-like relationships, unless there has been a significant increase in the asset pool during the time of the relationship it is not likely that a significant claim to property in these short relationships will be successful.

The counterweight to this new development in the law is the increased respect that courts are showing to agreements made between spouses regarding property made at the outset of the relationship, providing that certain conditions are satisfied, such as full financial disclosure. The *Family Law Act* confirms this and reinforces it with explicit provisions that are intended to allow agreements to be upheld subject to certain exceptions such as the lack of full financial disclosure or one spouse having taken improper advantage of the other. If unmarried couples decide to live together and do not wish to have the property division provisions of the *Family Law Act* apply they should consider having an agreement drawn up and drafted by a lawyer to reflect their intentions. A well-drafted agreement will increase the probability that it will be enforced if and when the time comes that it is challenged in court.

Seeking legal advice early on, as a general rule, maximizes options and reduces legal fees. An agreement signed before or soon after moving in together is, of course, ideal. However, absent an agreement there are other things that can be done upon breakdown of the relationship that can preserve individual rights and options if legal advice is sought early on. These include preserving documents that can bolster a case if a claim is made as well as taking steps to trigger limitation periods to run, so that there is a sunset date beyond which a claim is more difficult to bring, if not impossible.

While it is not entirely clear how certain provisions of the F*amily Law Act* will be considered by the courts, it is clear that those that take early steps to preserve their rights are likely to be best protected.

Maureen L.A. Lundell, QC 604.895.2827
Harper Grey LLP mlundell@harpergrey.com

If you have any questions regarding this article or about family law in general, please contact me.

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