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A 2015 Alberta Guide to the Law

DIVIDING PROPERTY AT  
SEPARATION: MARRIED COUPLES



Student Legal Services  
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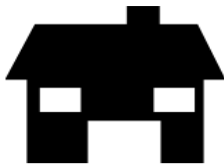
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# Dividing property for married couples

## Albertan Married Couples follow the: *Matrimonial Property Act*

If you were married and are in the midst of a divorce, separation, or have just gotten a divorce judgment and you have lived in Alberta for at least 1 year before separating then the law that deals with the separation of your property is the Matrimonial Property Act.

### Start



What is matrimonial property?

Matrimonial property is all of the property acquired during or after the marriage (and can include property from before the marriage). This includes property that was bought together AND property bought in only one person's name.

### Divisible Property



Some types of property that may be divided upon separation include the home, household goods, RRSPs, business interest, debts, bank accounts etc. This is not an exclusive list and can be different for each family.

### Other Property Types



Some property may not be divided equally between the spouses or may not be divided at all. This can include: property one person had before the marriage, inheritance, gifts, etc.

### What Could a Court Look at?



When making a decision the Court can look at...contributions made by each spouse to the family, financial situations of each person, length of the marriage etc.

### Property Outside Alberta



Albertan Courts can't make Orders that deal with property outside of Alberta but they can consider this other property when deciding how to divide up the remaining property/goods.

### The Matrimonial Home



The Matrimonial Home means the home that the family lived in, whether that is a house they own or rent, a mobile home, a condo, a suite etc. There are a number of options available for remaining in the matrimonial home.

## DIVIDING PROPERTY AT SEPARATION: MARRIED COUPLES

WHAT IS MATRIMONIAL PROPERTY AND WHAT IS THE LAW?.....	1
WHEN CAN AN APPLICATION FOR DIVIDING PROPERTY BE MADE?.....	1
WHEN DO I HAVE TO MAKE AN APPLICATION BY?.....	1
WHAT ARE SOME OF THE GENERAL RULES FOR THE DIVISION OF PROPERTY?.....	2
WHAT ARE SOME COMMON PROPERTY TYPES?.....	2
Property which may divided under the <i>MPA</i> .....	2
Property which might not be divided under the <i>MPA</i> .....	2
Division of Pensions (government and other).....	3
WHAT ARE SOME THINGS THAT MAY BE CONSIDERED WHEN DIVIDING PROPERTY?...3	
WHAT ABOUT PROPERTY THAT IS OUTSIDE OF ALBERTA?.....	3
WHO GETS TO KEEP THE HOUSE?: POSSESSION OF THE MATRIMONIAL HOME.....	4
Exclusive Possession Orders.....	4
WHAT IF I AM BEING HARASSED BY MY SPOUSE?.....	5
DO I HAVE ANY OTHER OPTIONS?: MARRIAGE AND SEPARATION AGREEMENTS.....	6
WHERE CAN I GET HELP OR MORE INFORMATION?.....	7



## DIVIDING PROPERTY AT SEPARATION: MARRIED COUPLES

### WHAT IS MATRIMONIAL PROPERTY AND WHAT IS THE LAW?

Alberta's *Matrimonial Property Act*, or 'MPA' is the law that is used to try to divide property fairly between spouses when they separate and/or divorce. The *MPA* provides rules and procedures for who gets which property, who gets to live in the home, and who gets to use household goods and can deal with almost all of the property issues that your family may have.

It applies to all of the property that is being divided up between the spouses and *might* include property bought by either spouse before, during, or after the marriage.



The *MPA* applies **only in Alberta** and **only to legally married spouses**. The *MPA* **does not apply to common-law spouses**. The spouses must be ordinarily resident in Alberta for one year which means that they must have been leading their ordinary lives in Alberta for at least one year before separation/divorce.

The person asking for a matrimonial property Order must show the Court that:

- a. Both spouses currently live in Alberta; or
- b. Their last joint residence was in Alberta; or
- c. If the parties have not established a joint residence since marriage, that each spouse resided in Alberta at the time of the marriage; or
- d. That a Statement of Claim for divorce has been filed in Alberta.

If you are not sure if you meet the above requirements, you should get legal advice. In most cases, a lawyer **will** be needed for any application under the *MPA*.

### WHEN CAN AN APPLICATION BE MADE?

An application to divide property under the *MPA* can be made by itself or with another application (such as divorce, judicial separation, or annulment). A spouse can make an application if he/she has separated but has not yet divorced, or if he/she has begun divorce proceedings.



### WHEN DO I HAVE TO MAKE AN APPLICATION BY?

There are important time limits to follow when starting an application for the division of property after separation.

- Before a divorce judgment but after separation, an application for the division of property must be made **within two years of the date of separation**.
- If a divorce judgment has been given, any application for property division under the *MPA* **must be made within two years of receiving the judgment or Court Order**.
- If a spouse is suspected of selling or giving away property (i.e. to keep it from the other spouse) legal action must begin **within one year of the date the property was sold or given away**. The Court may order the spouse who sold or gave away the property to repay the other spouse or may divide the rest of the property in a way that makes sure both spouses end up with



equal amounts.

## WHAT ARE SOME OF THE GENERAL RULES FOR THE DIVISION OF PROPERTY?

- ‘**Matrimonial Property**’ is all the property that is acquired by either or both spouses during the marriage. It can be property bought by both spouses together, as a family, or individually. Generally, matrimonial property is divided equally between spouses when a marriage ends, unless the result of this equal division would be unfair.
- Certain kinds of property acquired before the marriage may not be divided when a marriage ends. This is called ‘exempt property’.
- However, sometimes the increase in *value* of exempt property may be considered ‘matrimonial property’. An example of this may be that you owned a condo worth \$20,000 at the beginning of the marriage. That amount may be exempt from division but if the condo increased in value, the increase may be divided between the spouses.
- This increase in value may not automatically lead to an equal split. The Court will make a decision based on what the Court considers to be fair.

## WHAT ARE SOME COMMON PROPERTY TYPES?

1. Property which **may** be divided includes:
  - a. the matrimonial home;
  - b. household goods (this includes almost all personal property used by family members);
  - c. R.R.S.P. and employment pensions;
  - d. business interests;
  - e. investments, stocks, bonds;
  - f. cars;
  - g. other property that has been purchased during the marriage or brought into the matrimonial relationship, or used for the mutual benefit of the spouses;
  - h. debt and
  - i. bank accounts.



This is not a complete list and there may be other property that a Court or the partners may decide to divide at the time of separation.

2. Property which **might not** be divided includes:
  - a. property acquired by one spouse before the marriage;
  - b. property one spouse received as a gift;
  - c. property one spouse received by inheritance;
  - d. an award or settlement for damages in tort law received by one spouse (i.e. money paid for pain and suffering in an automobile accident) unless the award was meant to compensate both spouses.



- No claim by the other spouse can be made on anything that is listed as property which may not be divided, unless it has been “*brought into the marriage*”.

- If property is “*brought into the marriage*” it is then considered to be property of both spouses and can be divided.
- An example of “*bringing property into the marriage*” would be taking a home purchased by one spouse before the marriage and putting it under both spouse’s names.

### 3. Division of Pensions

As noted above, pensions are considered property under the *MPA*. There are two types of pensions: private pensions (by employment) and the Canada Pension Plan.

Certain pensions may have legislation that determines how the pension will be divided when a marriage ends. Contact your pension administrator to find out if this kind of legislation applies to you.

Division of the Canada Pension Plan is automatic unless both spouses agree otherwise. The reason behind this is to provide some financial protection to a spouse who did not work outside of the home and/or could not reasonably have contributed to the plan. Remember that taking money out of CPP can have significant tax implications.

### WHAT ARE SOME THINGS THAT MAY BE CONSIDERED WHEN DIVIDING PROPERTY?

The *MPA* requires the Court to be fair in determining what each spouse’s share of the property will be. Equal division of property will usually take place unless there are very good reasons presented to the Court that this should not be the case.



When spouses cannot agree on how property will be split, the judge will consider:

- Spousal contributions to the marriage,
- Contributions to the family,
- Business endeavours,
- Financial resources of both spouses,
- The length of the marriage,
- As well as any agreements made.

The judge may also consider:

- Whether a spouse transferred or sold property,
- Previous Court Orders,
- Tax liability one spouse may incur as a result of the transfer/sale of property, and
- Any other relevant circumstances.

The Court **will not** consider misconduct by a spouse (for example cheating or domestic abuse), unless it relates to the improper use or sale of matrimonial property.

### WHAT ABOUT PROPERTY THAT IS OUTSIDE OF ALBERTA?

If one spouse also owns property outside of Alberta, different rules will apply for the out of province property.



The *MPA* allows the Courts in Alberta to consider property held outside the province when dividing matrimonial property but Alberta Courts cannot make any orders relating to it. Therefore, what the Court may do is take into account property that is outside of Alberta and then divide the property that is in Alberta in a way that ensures an equal distribution of **all** of the matrimonial property.

For example, if one spouse has a house outside of Alberta that they will be able to keep in their name, the Court can take this into account when dividing up who will get to keep property in Alberta, such as second home or a car.

## **WHO GETS TO KEEP THE HOUSE?: POSSESSION OF THE MATRIMONIAL HOME**

“Matrimonial home” can mean a number of different things. It can be:

- A house,
- A part of a house,
- A part of a business that is being used as a house,
- A mobile home,
- A condominium, or
- A suite.



The matrimonial home must be owned or leased by one or both spouses and **must be occupied as the family home** (i.e. this does not include a summer cottage). The home must be located in Alberta. It does not have to be in both spouses names, to be considered the matrimonial home it must only be lived in as the family home.

### **Exclusive Possession Orders**

If one spouse wants to be able to live in the house after separation either alone or with children, one option is to ask the Court for an Exclusive Possession Order.



An Exclusive Possession Order essentially allows one spouse to keep the other out of the house. This is given when spouses cannot live together peacefully, but neither is willing to leave the home. An application for the matrimonial home may be made ‘ex parte’ (i.e. without telling the other spouse) if the Court finds that there is potential danger to the spouse making the application or to a child living in the home. If the Court does not believe there is danger in making the application then the other spouse must be told about the application. A Court can grant an Order for exclusive possession even without a threat of danger present.

In granting the Order, the Court may do one or more of the following:

1. Direct that a spouse be given exclusive possession of the home (regardless of whose name the property is in);
2. Direct that a spouse be evicted from the matrimonial home;
3. Stop a spouse from entering or going to the matrimonial home.

When deciding whether a possession Order will be granted, the Court can consider:

- Whether each spouse can find and maintain another place to live;
- The needs of any children living in the home;
- The financial position of each spouse;
- Property of either spouse; and
- Any existing Court orders regarding child or spousal support.



A Court Order for exclusive possession is not easy to get. The person applying for the Order must prove that the *MPA* guidelines have been met, and that there is good reason for the order (i.e. not that it is simply a matter of them not wanting to move out of the home because moving would be inconvenient).

Note: an Exclusive Possession Order **does not change legal ownership of the property**. This means that a person may have the right to stay in the house for a period of time but it is still considered matrimonial property that may be divided between the two spouses at a later date.



Under the *MPA* the Court can only grant an Order to prevent a person from *entering or visiting the home* but this does not prevent the spouses from contacting on another. If one spouse is harassing the other and they want to prevent contact, he/she has some other options such as an Emergency Protection Order or a Restraining Order.

A spouse can also apply for an Order giving him/her exclusive use of household goods. “Household goods” are defined as personal property owned by at least one of the spouses and used or enjoyed by either spouse or the children - for transportation, household use, educational use, recreational use, social use, or aesthetic purposes. Household goods include motor vehicles, furniture, and appliances. The Court can make this order for any amount of time that the Court thinks is necessary.

## WHAT IF I AM BEING HARASSED BY MY SPOUSE?

If one spouse is being harassed or feels threatened by the other spouse there are a number of options depending on the situation. The type of Order will depend on the type of safety issues facing one or both of the spouses.

1. An **Emergency Protection Order (EPO)** is designed to protect individuals against *immediate* violence from family members.

- The Order can prevent a family member from contacting other members of the family.
- This Order is served by the police and lasts for up to one year.
- A violation of the Order may result in a criminal conviction and an even longer protection period.



Changing the terms of the EPO does NOT change the terms of criminal restraints that may already exist (such as a Probation Order).

2. You may also apply for a **Restraining Order** against a spouse or family member. A lawyer may be needed for this application, and to receive a Restraining Order you will have to show a real or suspected danger to your safety. A Restraining Order can be attached to another action (such as a divorce) or applied for on its own. The other person must be served with a copy of the order, and an automatic review will take place two weeks later at the Court of Queen's Bench. Both you and your spouse will likely have to attend this hearing. The Order should specifically mention all the places your spouse may try to initiate contact (i.e. workplaces etc.).

Some things to remember:

- The Restraining Order should give the police the power to make an arrest if the conditions are not followed (i.e. it should say that the police 'shall' make an arrest, not 'may' make an arrest).
- A copy of the Restraining Order should be kept readily available, in case the police need to see it.
- It may also be a good idea to have the Restraining Order registered with the police and given a case number so law enforcement officials can have immediate access to it if necessary.

**Remember** that these kinds of Orders are not to be used for alternative purposes (such as an attempt at gaining the upper hand in divorce proceedings). Filing an application based on a false statement can result in a charge of contempt or a fine.

## **DO I HAVE ANY OTHER OPTIONS?: MARRIAGE AND SEPARATION AGREEMENTS**

You may make an agreement with your spouse regarding how property will be divided in the event of a separation and/or divorce. To be valid, the agreement must:

- Be in writing;
- Have been entered into freely and NOT have been forced by the spouse or some other person;
- Show that each spouse had **INDEPENDENT LEGAL ADVICE** about the effects of signing the agreement. That means that each spouse must sign the agreement with a different lawyer.



Creating a separation agreement will allow the parties to contract out of the *MPA*. That means that the *MPA* will not apply to their property. The spouse must understand that they are giving up their right to use the *MPA* for any property division issues in the future— this right is being replaced with the agreement.

It is important to note that the Court will not enforce an agreement that it considers to be “unconscionable”. An agreement would be unconscionable if one spouse was unable to properly protect his/her own interests at the time of the agreement. Examples of an unconscionable agreement may include taking advantage of a spouse that cannot afford legal advice or lying about property to force an agreement. The Court must consider the agreement to be relatively fair in order to enforce it.

**Note:** In order to prevent a spouse from selling property while an action is in the works, one may wish to register a certificate of Lis Pendens with the Registrar of Land Titles in the area in which the land is located. You can also apply for an injunction to freeze your spouse's assets. See a lawyer immediately.

**If the law surrounding matrimonial property seems somewhat confusing, you are not alone. When in doubt, seek legal advice. If you cannot afford a lawyer, there are services that may be able to assist you in finding one.**



## WHERE CAN I GET HELP OR MORE INFORMATION?

### Legal Resources

- Emergency Protection Order Program.....(780)-422-9222  
Can help you to get an emergency protection order against a spouse or family member if you feel as though you are at an immediate danger.
- Edmonton Community Legal Centre.....(780)-702-1725  
Provides free legal information sessions on different family law topics as well as a clinic for those who are interested in a summary legal clinic with a volunteer family lawyer. Contact the office for more information about both options.
- F.L.I.C. (Family Law Information Center).....(780)-415-0404  
Service located in the courthouse that can help you with questions about appearing in Court or with filling out forms.
- Lawyer Referral Service.....1-800-661-1095 (toll free)  
This is a toll free number which provides you with names of three lawyers who have indicated a desire to practice a given area of the law. You get a thirty-minute consultation without charge. You may also call back as many times as you need.
- Legal Aid Society.....(780)-427-7575  
Website: [www.legalaid.ab.ca](http://www.legalaid.ab.ca)  
Family Law Office.....(780)-415-8800  
Provides a lawyer for criminal and civil matters for those who cannot afford a lawyer. This is not a free service but is given at a highly reduced rate for those who qualify.
- Student Legal Services.....Civil/Family Office (780)-492-8244  
[www.slsedmonton.com](http://www.slsedmonton.com)  
SLS can provide you with information and referrals. We cannot represent you or give you advice on matrimonial property issues.

## Housing Resources

- Women's Emergency Accommodation Centre (WEAC) ..... (780) 423-5302  
9611-101A Ave, Edmonton AB  
An emergency place to stay for homeless women, new women admitted at 9pm every night
- Hope Mission Emergency Shelter ..... (780) 422-2018  
9908-106 Ave, Edmonton AB  
A safe place to sleep for those living on the streets. Separate shelter areas available for men, women, couples, and youth. Open at 8pm.
- YESS (Youth Empowerment and Support Services) ..... (780) 468-7070  
Emergency shelter and short-term shelter for youth. 9310- Whyte Ave, Edmonton, AB T6C 0Z6
- Edmonton Women's Shelter (WIN House) .. (24 Hour Crisis Line) (780) 479-0058  
Shelter and support for women with or without children who are fleeing domestic violence
- Lurana Shelter ..... (Crisis Line) (780) 424-5875  
High security shelter and support for women with or without children who are fleeing domestic abuse
- SAGE Seniors Safe House ..... (780) 702-1520  
Emergency housing for men and women over 60 years of age who are leaving abusive situations
- A Safe Place (Sherwood Park) ..... (24 Hour Crisis Line) (780) 464-7233  
A shelter and support for abused women and their children, including free transportation (from Edmonton, Sherwood Park, & Fort Saskatchewan) for admission to the shelter

