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Matrimonial Real Property on Reserve in Canada

What is Matrimonial Property?

Matrimonial property is commonly defined as the family home that a married couple resides in, although legally the term covers all items of material value acquired during the marriage. Matrimonial property includes real property, which is immovable, such as a house or land, and personal property, which describes those items that can easily be moved and are not attached to the land, such as clothing, vehicles, income, and savings. Throughout the literature, *matrimonial real property* refers to the family home and land, and the *matrimonial property regime* refers to the laws or legislation regarding marital property.

What happens if a status band member divorces on reserve?

There is currently no applicable legislation or guidelines for the division of matrimonial property under the *Indian Act*¹ or by virtue of case law (see below). Each marriage or common-law relationship is treated individually on a case-by-case basis. The presumption that each partner receives 50% of the proceeds from the marriage (or matrimonial property) applies only off reserve to recognized family relationships. Of course, each spouse may negotiate an agreement with his or her former spouse privately. Note that each band or First Nation may have created their own matrimonial property guidelines or bylaws, and this must be researched in each unique case.

What happens if a status band member divorces off reserve?

If the spouses are unable to reach an agreement, the province or territory where the relationship ends will govern the distribution of matrimonial property. Generally speaking, the assumption is that each spouse should receive 50% of the proceeds of

¹ The *Indian Act* (R.S. 1985, c. I-5).

the relationship. Other factors governing the division of matrimonial property include whether each spouse is working, the duration of the relationship, any previous understandings or agreements, and the total assets and loans or debts. Sometimes custody of any children from the relationship may determine who resides in the family home. This is not an exhaustive list of all the factors that may be relevant for the distribution of matrimonial property. Anyone seeking a divorce should obtain legal advice.

What if a common-law relationship ends off reserve?

Each province and territory has different rules that determine whether the same laws apply to common law couples as to married couples.

What if a traditional marriage or Aboriginal customary marriage ends off reserve?

If a couple is unable to reach an agreement, they would have to apply to the courts to recognize the traditional marriage as being the equivalent as a legally recognized marriage and request the provincial or territorial legislation to apply to the relationship.

Does the *Indian Act* address divorces on reserve?

No. Most First Nations are still subject to the *Indian Act* on reserve land. There are no provisions in the *Indian Act* to deal with spousal property rights during a marriage or upon separation or divorce. This means that there is uncertainty and often no laws or guidelines for spouses upon separation or divorce while on reserve. The *Indian Act* falls under federal legislation, s. 91(24) of the *Constitution Act, 1867*² ("the Constitution"), and therefore there are no federal provisions relating to divorce, custody, or matrimonial property because under section 92(13) of the *Constitution*, family law was deemed the exclusive domain of the provincial and territorial governments. While every province and territory has family legislation that applies off reserve, there are almost no provisions on reserve land in the event of a divorce or separation. This gap in the matrimonial property regime has detrimentally affected Aboriginal

² (U.K.), 30 & 31 Victoria, c. 3.

communities. The two cases described below indicate that provincial family legislation cannot apply on reserve.

*Derrickson v. Derrickson*³

Westbank First Nation members Rose Derrickson and her husband, William Joseph, were in the midst of a divorce. Rose Derrickson applied under Part 3 of the BC *Family Relations Act* for a half-interest in the certificates of possession her husband held under section 20 of the federal *Indian Act*. The trial judge held that the provincial legislation is inconsistent with the federal *Indian Act* and is inapplicable to reserve lands. This was appealed to the BC Court of Appeal and then to the Supreme Court of Canada. The Supreme Court of Canada held that the *Family Relations Act* does not apply on reserve.

*Paul v. Paul*⁴

Pauline and Edward Paul, both members of Tsartlip Indian band in BC, had separated. Pauline Paul was awarded interim possession of the matrimonial home situated on reserve land pursuant to section 77 of the *Family Relations Act*.⁵ Edward Paul had a certificate of possession for the matrimonial home pursuant to section 20 of the *Indian Act*. The trial judge granted an order that Pauline Paul have interim possession of the family home. The Supreme Court of Canada held that section 77 of the *Family Relations Act* was in conflict with the *Indian Act* and therefore does not apply to family homes on reserve lands.

Current consultations regarding matrimonial property on reserve

There are many organizations critically examining the problems associated with matrimonial property on reserve. On June 20, 2006, then Minister of Indian Affairs Jim Prentice announced a nationwide initiative on matrimonial property on reserve. This announcement was made with the Native Women's Association of Canada and the Assembly of First Nations. Since that announcement was made, the Assembly of First

³ [1986] 1 S.C.R. 285.

⁴ [1986] 1 S.C.R. 306.

⁵ R.S.B.C. 1996, c. 128.

Nations, Native Women's Association of Canada, Congress of Aboriginal Peoples, Indigenous Bar Association, National Association of Friendship Centres, National Aboriginal Circle Against Family Violence, Femmes Autochtones du Québec, Native Council of Nova Scotia, Federation of Newfoundland Indians, New Brunswick Aboriginal People's Council, and Native Council of PEI held consultations at the regional and national levels for a total of six national sessions and 46 regional sessions regarding matrimonial property.

At the June 20, 2006 government announcement, the Minister appointed Wendy Grant-John, an Aboriginal leader, as his special representative on this issue. On March 9, 2007, her report was released, entitled *Report of the Ministerial Representative: Matrimonial Real Property Issues on Reserve*.⁶ It is expected that new legislation will soon follow the release of the consultations and reports.

On March 4, 2008, the Government of Canada introduced a new bill, *The Family Homes on Reserve and Matrimonial Interests or Rights Act*. This proposed legislation is intended to ensure that matrimonial property rights and remedies are available to all residents on reserve. The proposed legislation has provisions to deal with occupation, emergency protection orders, orders of exclusive possession, division of the value of matrimonial property, death of a spouse, and other terms regarding domestic violence, leases, and notices to First Nations councils. It would allow provincial judges and justices of the peace to hear applications for the division of matrimonial property whenever a divorce or family matter is before the court. As of April 2008, there is significant opposition to this proposed legislation.

Current options

There are several solutions to resolve the issues of matrimonial property division on reserve when a marriage or common-law relationship ends. First, the *Indian Act* could be amended to permit matrimonial property legislation to apply on reserve. Second, a new federal law could be developed, like a Matrimonial Property Act on Reserve.

⁶ Wendy Grant-John, *Report of the Ministerial Representative: Matrimonial Real Property Issues on Reserves* (Ottawa: Women's Issues and Gender Equality Directorate of the Department of Indian Affairs and Northern Development, 2007), http://www.ainc-inac.gc.ca/wige/rmr/index_e.html (accessed April 22, 2008).

Third, the Government of Canada and First Nations could work together to allow provincial matrimonial property legislation to apply on reserve. Lastly, the inherent traditional and sovereign rights of First Nations governments could be recognized through agreements and treaties to enact First Nations laws or legislation to apply to the division of matrimonial property on reserve.

Conclusion

Any solution must address key concerns such as dispute resolution, domestic violence, children, land registration, and many other related issues. The lasting solution is one that comes from the community and builds on Aboriginal traditions. These traditional values of caring, nurturing, supporting, and respect are the proper way forward, not just for Aboriginal women but for everyone, young, old, male *and* female. The community is the solution.