

*Manitoba Association of  
Women and the Law Inc.*



---

# **The Changing Family: Furthering Equality in Manitoba's Property Legislation**

**With the assistance of:**

**Courtenay Kipp, B.A.  
Anna Maria Tosso, B.A.**

**September 2003**

## **ACKNOWLEDGEMENTS**

**Special Thanks for Project Funding**

**Government of Canada  
The Secretary of State,  
Status of Women Canada**

## Executive Summary

Equality between the many diverse families in Manitoba and Canada fails to always be a reality. Current discrepancies in provincial legislation favour married couples over common-law and same-sex couples although statistics show an ever-increasing number of couples are choosing to live as common-law couples rather than marrying. Same-sex couples have even fewer rights within marital property and succession law legislation. MAWL Inc. encourages the Government of Manitoba to step forward and eliminate this discrimination through legislation that will ensure that rights are attainable for all. Our present system is heavily reliant on turning to the courts when the legislation is unclear or discriminating. For the public to attempt to right such inequity singularly means expensive litigation. This option is not available to most Manitobans. Only the provincial government can correct this injustice.

The government of Manitoba has already made very progressive steps in amending its previous legislation to conform to our changing families. MAWL Inc. congratulates the government for encouraging equality among families with the proclamation of *The Charter Compliance Act*, which extends to same-sex and common-law couples rights they were long denied. However, MAWL Inc. is troubled by the lack of consistency in defining common-law relationships shown within the amended legislation.

The government has also introduced *The Common-Law Partner's Property and Related Amendments Act*, a particularly progressive statute that would entrench equality of common-law and same-sex couples. But MAWL Inc. is concerned that this *Act* has yet to be proclaimed. The provincial government may feel there is no need to proclaim *The Common-Law Partners' Property and Related Amendments Act* because of the recent Supreme Court of Canada decision of *Walsh v. Bona*, where the court denied that common-law couples have the same property rights as married couples. However, to allow common-law and same-sex couples to go unprotected when most Manitobans favour this legislation is extremely unfair and unjustifiable. MAWL Inc. strongly urges the government to proclaim *The Common-Law Partners' Property and Related Amendments Act* as soon as possible.

MAWL Inc.'s review of family property legislation reveals clearly that more work must be done to improve the rights available to Manitoban families. After examining various pieces of legislation in Manitoba, including *The Marital Property Act*, *The Homesteads Act*, *The Dependent's Relief Act*, *The Intestate Succession Act* and *The Family Maintenance Act*, MAWL Inc. has developed a list of recommendations required to guarantee to all Manitobans equal treatment and equality under the law and to eliminate uncertainty in the law. These recommendations reflect the shifting face of Manitoba's families.

**MAWL Inc.'s Key Recommendations**  
**Recommendations Re: *The Marital Property Act***

1. The *Act* should be amended to allow the estate of a deceased spouse to make an application under the *Act* if the parties were living separate and apart at the time of the death of one party.
2. The exemption in s. 7(4) to the sharing of the increase or decrease in value of a gift or inheritance should be abolished. In all cases, the increase or decrease in value and the income from the gift or inheritance during the time of cohabitation or marriage should be shareable unless the court considers it grossly unfair or unconscionable. This recommendation brings Manitoba in line with provisions available in Alberta, Saskatchewan, Prince Edward Island, The Northwest Territories and Nunavut.
3. S. 7 of *The Marital Property Act* should be amended so that gifts and inheritances are presumed exempt unless:
  - i. The gift or inheritance was intended to benefit both parties;
  - ii. The gift or inheritance was used as a family asset instead of only to purchase a family asset;
  - iii. The gift or inheritance was used to purchase or improve a family asset.
4. There should be more specific discretion given to the courts to encourage judges to alter the equal sharing of assets where the exemption in the marital property divisions having regard to all the circumstances, including the efforts of both spouses towards that property.
5. Jointly-held assets should be included in *The Marital Property Act* to give judges more flexibility in awards and to ensure equality
6. A new section should be added regarding management and control of non-shareable property. The owning spouse should be placed under a fiduciary duty towards the non-owning spouse. Although one spouse owns the property, that spouse's actions towards the non-shareable property must have regard to the marital property situation as a whole. For instance, the spouse may not manage or control the non-shareable property in a way that limits, diminishes or fails to produce income from or increase the value of that property of which income and appreciation should be shareable.

7. Professional degrees earned entirely during marriage should be classified as shareable property upon the dissolution of marriage, similar to a recent New York state decision.
8. Detailed regulations should be adopted for *The Marital Property Act*, further defining what is shareable and what is not shareable.
9. Sections 31 and 32 of *The Marital Property Act* should be amended to require independent legal advice of a spouse releasing the estate and to make clear that notice be served in all instances where a spouse does not receive the entire estate of his/her deceased spouse.

**Recommendations Re: *The Homesteads Act***

1. A revision should be made to the statements respecting the election of a homestead filed at the Land Titles Office. The statement should be revised with clauses stating:
  - 1) I have never lived on this property with my spouse or common-law spouse or same-sex partner; or
  - 2) My spouse, common-law spouse or same-sex partner has filed an election to elect a different property as the homestead, or
  - 3) The person who consents to this transfer is my spouse, common-law/same-sex partner.
2. The homestead consent or any other election of a spouse or document required to be signed by a spouse under *The Homesteads Act* must be accompanied by a declaration of independent legal advice.
3. *The Homesteads Act* should be amended to require the owners to give notice to a surviving spouse of their right to elect a different homestead if *The Homestead Act* could apply to more than one property and to give notice of the spouses homestead rights to the spouse. The notice should be similar to section 31 of *The Marital Property Act*.

**Recommendations Re: *The Dependent's Relief Act***

1. *The Court of Queen's Bench Surrogate Practices Act* should be amended to require the executor or administrator of an estate to make an investigation of the deceased's affairs and to list any persons the executor/administrator thinks may be a potential dependent of the deceased in their application for probate or

administration. The executor/administrator should be made to serve these potential dependents with a notice notifying the potential dependents of their right to make a claim under *The Dependents Relief Act*. Personal liability should be imposed upon the executor/administrator if they fail to serve the notice and distribute the estate when they know or ought to have known that a person was a dependent and might have a claim pursuant to *The Dependents Relief Act*.

2. *The Court of Queen's Bench Surrogate Practices Act* should also be amended to require all executors/administrators to make applications for probate/administration notwithstanding that third party financial institutions may agree to transfer the estate assets without probate. The Act should make third party institutions that deal with estate assets without probate or administration liable to any potential dependents for their claims under *The Dependents Relief Act*.

### **Recommendations Re: New Legislation**

1. *The Common-Law Partners' Property and Related Amendments Act* should be proclaimed immediately.
2. *The Charter Compliance Act* should be further reviewed to ensure a consistent definition of "spouse" in all Acts with the exception of *The Adoption Act*. *The Adoption Act* should be amended to ensure that judicial discretion is only available to shorten the qualifying period and not to increase it.
3. All amendments under *The Common-Law Partners' Property and Related Amendments Act* should apply to all relationships that existed on the date the legislation was introduced into the legislature (August, 2002) so no one is left without protection.
4. Spousal Agreements
  - a) Any agreement between spouses/partners made prior to the introduction of either *The Charter Compliance Act* or *The Common-Law Partners' Property and Related Amendments Act* should be presumed invalid but that presumption should be rebuttable if the parties or a party can show a court that there was valuable consideration given by each spouse for the waiver and that the valuable consideration was of sufficient nature considering the rights being waived.
  - b) Any spousal/partner agreement, prenuptial or postnuptial agreement made prior to the introduction of either *The Charter Compliance Act* or *The Common-Law Partners' Property and Related Amendments Act* waiving property rights

should be presumed invalid unless both spouses obtained independent legal advice.

- c) All future spousal/partner agreements will be presumed invalid unless both spouses/partners obtain independent legal advice.

### **National Recommendations**

1. MAWL Inc. applauds the decision and the Government of Canada's principled approach in amending *The Marriage Act* to allow same-sex marriages and equality rights. The Government's position upholds the Charter and is the only position it could take. These amendments should be proclaimed as soon as possible. MAWL Inc. urges all Members of Parliament to vote in favour of amending *The Marriage Act*. MAWL Inc. recommends that all provinces and territories amend their legislation to give common-law and same-sex couples equal rights to property division upon separation from or upon the death of their partner/spouse.
2. The rights of spouses upon separation vary widely throughout the country. MAWL Inc. calls on the federal government to use their persuasive powers to encourage all provincial and territorial governments to treat all their citizens fairly and to encourage provincial and territorial governments to revise their family and property legislation to ensure equality for all.

### **Re: Adopting Instantaneous Community of Property**

MAWL Inc. reviewed the jurisdictions and types of community of property. After careful consideration, MAWL Inc. recommends that Manitoba refrain from adopting a full instantaneous community of property scheme provided our other recommendations (including those dealing with fiduciary duty to account) are adopted.

Spouses should hold all marital property in a fiduciary capacity for both spouses' benefit regardless of who is the owner. The spouses should have a legal duty to keep the other spouse informed and to discuss with the other spouse decisions that affect the property. The failure to keep the other spouse informed or the failure to act prudently with the assets should be a factor in awarding an unequal sharing of marital property. This fiduciary duty cannot be altered by any marital property agreement.