What Choice Do I Have?

The effect of a choice on common law spousal support.

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[Or, is Spousal Support for Common Law Couples Awarded Differently than for Married Couples?]

Introduction and Premise

The law distinguishes between common law couples and married couples when dividing property upon their separation. Does it distinguish between them when determining spousal support? Should it? The answer seemed deceptively simple when the *Family Law Act* of Alberta[1] is compared with the *Divorce Act (Canada)*[2].

However, the two Supreme Court of Canada cases of *Walsh v. Bona*[3] and *Kerr v. Baranow*[4] lead to the consideration of the philosophy behind the differences between common law relationships and marriage for property division may apply to the issue of spousal support. When considering the logic behind the Walsh case, the thin line between income and property may seem arbitrary, and even a way to avoid the spirit of the decision. *Walsh* does not support the idea that income for common law couples changes its nature upon it being deposited in a bank account due to a choice made at the start of their relationship, and therefore the test for its division should change.

The basic principles of the *Walsh* decision focus on the decision made by the couple at the start of their relationship. The logic to this is as follows:

a. Married couples have 'chosen' to enter into a relationship which is recognized as distinct from a non-married couple in a legal, historical, and philosophical sense,

[1] S.A., 2003, c. F-4.5, ("FLA")
[2] R.S.C., 1985, c. 3 (2nd Supp.), ("DA")
[3] [2002] 4 S.C.R. 325 ("*Walsh")*
[4] [2011] 1 S.C.R. 269

b. The above choice represents a public acknowledgment of a joint familial venture by the married couple. As such, married couples are entitled to certain legal rights regarding their property division,

c. The legal rights provide a material and personal benefit to the married couple upon their separation, namely the equal division of property as per the *Matrimonial Property Act*[5] of Alberta,

d. Common law couples have chosen to not enter this public relationship of a joint familial venture, and as such, do not have the same legal rights regarding their property division, and

e. The distinction does not apply to issues related to children and their support, who are a special class of individuals protected by the law.

Why would the language and logic of choice, as per the *Walsh* decision, and the public acknowledgment of a joint familial venture, not apply to the issue of spousal support? In other words, is there the same legal distinction between married and common law couples? If there is no legal distinction, should there be?

What follows is a review of the logic providing for the distinction between married couples and common law couples, an analysis of the legislation governing the issue for both couples, a review of recent case law to consider the practical side of the issue. My three conclusions are set out at the end, namely that (i) that save for definitions set out in the legislation, there is no legal distinction between married and common law couples when addressing spousal support, (ii) the case law does not show a pattern of any practical difference between the two couples, and (iii) there should be no distinction made between married and common law couples for the issue of spousal support.

[5] R.S.A. 2000, c. M-8, ("MPA")

Theory

The majority decision from *Walsh* to divide property differently for married couples as compared to non-married couples is based upon the choice made by the married couples upon entering the relationship. Regardless of any similarity of any one married couple and non-married couple upon the breakdown of the relationship, it is the couple's choice to marry at the beginning of the relationship that is determinative of the legal rights entitled to their property division on the breakdown of their relationship.

The choice made by two individuals to marry may be considered a public acknowledgement of the beginning of their joint familial venture. The venture is economic and social, public and private, and both internal and external to the family unit. It requires the consent and act of both individuals at the beginning of their relationship, and is not available through the operation of law. It cannot be coerced or otherwise fraudulently made or obtained.

It may be true that when deciding to marry, the couple is likely not considering their legal entitlements on the breakdown of the marriage. This was one of the elements and arguments of the dissenting opinion in *Walsh*. However, I believe that individuals who make this decision understand that they are embarking on a relationship unlike one where they remain unmarried. Our society as a whole understands that when two individuals marry, they begin a life where both individuals' interests are interconnected; they have similar and common goals, with a commitment to continue this connection and commonality for a long term period of time. For this paper, I am assuming that a couple who chooses to marry understand that they are beginning a joint venture that encompasses their social and economic lives, and that they are making a public announcement of their joint intention to do so.

The public acknowledgement of this joint intention at the beginning of their relationship is the rationale to distinguish married and non-married couples in *Walsh*:

> "The *MPA* created a regime of 'deferred sharing,' replacing the regime of absolute separate property. The new legislative scheme deems married persons to have agreed to

> an economic partnership wherein both pecuniary and non-pecuniary contributions to the marriage partnership are considered to be of equal worth."[6]
>
> "Unmarried cohabitants, on the other hand, maintain their respective proprietary rights and interests throughout the duration of their relationship and at its end. These couples are free to marry, enter into domestic contracts, to own property jointly. In short, if they so choose, they are able to access all of the benefits extended to married couples under the MPA."[7]
>
> "The *MPA*, then, can be viewed as creating a shared property regime that is tailored to persons who have taken a mutual positive step to invoke it. Conversely, it excludes from its ambit those persons who have not taken such a step. This requirement of consensus, be it through marriage or registration of a domestic partnership, enhances rather than diminishes respect for the autonomy and self-determination of unmarried cohabitants and their ability to live in relationships of their own design."[8]

Most importantly:

> "In the present case, however, the *MPA* is primarily directed at regulating the relationship between the parties to the marriage itself; parties who, by marrying, must be presumed to have a mutual intention to enter into an economic partnership. Unmarried cohabitants, however, have not undertaken a similar unequivocal act. I cannot accept that the decision to live together, without more, is sufficient to indicate a positive intention to contribute to and share in each other's assets and liabilities."[9]

Are 'income' and 'living expenses' capable of being added to that last sentence?

The division of marital property is based upon the equal contribution of the spouses, whether the contribution is economic or not. Spousal support awarded under the Divorce Act is, in part, to address the economic advantages, disadvantages and hardship arising from the marriage and its breakdown. It is economic in nature, and seeks to divide the economic resource of income acquired during the marriage in such a way as to ensure, in part, a comparable standard of living upon the marriage's breakdown.

[6] Walsh, supra, paragraph 46.
[7] Walsh, supra, paragraph 49.
[8] Walsh, supra, paragraph 50.
[9] Walsh, supra, paragraph 54.

Both property division and spousal support provide a monetary award to an individual. Both are based on concepts of compensation for contributions made to the marriage based upon the joint familial venture, both monetary and non-monetary.

As such, the argument can be made that spousal support also provides a personal entitlement of sharing the income earning resource due to choice of the joint familial venture in a similar way as property. A married couple choses this model with their public declaration of a joint familial venture, and can expect their incomes to be used for the benefit of the joint familial venture. A common law couple has the expectation to retain control over their income and how it is spent, that they may dispose of their income as they choose without regard to their spouse.

On this basis, it is plausible in theory to argue that the considerations for spousal support are different for married couples when compared to non-married couples.

The Legislation

I have summarized the salient parts of the DA, the FLA, and the Adult Interdependent Relationships Act of Alberta[10] in a table found at Appendix A to this paper. I have tried to organize the table so that the relevant portions of the acts are comparable.

The Definitions

The relevant portions of the DA and the AIR start with definitions; Section 2 of the DA and Section 1 of the AIR. These definitions support the theory of choice as it relates to spousal support. The DA definition ensures gender equality, without describing any requirements on the couple for determining if they fit the definition. The purpose of the DA definition is not to define the individuals as they relate to the public at large, as this is done by their choice to marry. To use the language of the AIR, a married couple is presumed to be in a relationship of interdependence.

[10] S.A., 2002, c. A-4.5 ("AIR").

This presumption is absent for the common law couple. There has been no public acknowledgement of a joint familial venture. As such, the FLA and AIR go to great lengths to define how an individual in a common law relationship qualifies to consider the issue of spousal support. The definitions are required to identify the common law couple as separate from the public at large, which is required because they have not made a public acknowledgement of a joint familial venture.

This difference in definitions is a condition precedent for the common law couple to meet prior to the analysis for spousal support is undertaken.

The condition precedent requires that the common law couple share in each other's lives, be emotionally committed to one another, and function as an economic and domestic unit. This definition could just as well be a descriptor of a married couple. The difference is that the married couple is presumed to meet this definition due to their choice made at the start of their relationship, and the common law couple must show evidence of these elements arising during their relationship.

Looked at in a different way, the public declaration of their joint familial venture by a married couple permits them to bypass the condition precedent set out by the FLA and AIR. However, the absence of the initial public declaration of their joint familial venture does not preclude a common law couple from spousal support. The common law couple has the initial test to meet before they may move forward to address the issue of spousal support.

There is no way for a common law couple to meet the AIR definition or the condition precedent at the beginning of their relationship, other than through a contract. The definition requires a review of the relationship over time, to see if the required level of interdependence has developed between the common law spouses, namely by having a three year interdependent relationship or by having a child.

This does not fit the language of choice as contemplated in *Walsh*, which focuses on the initial intentions and actions taken by the couple at the start of their marriage. For *Walsh*, a couple is

either ‘in’ (the married couple) or ‘out’ (the non-married couple). The logic of *Walsh* would not permit a non-married couple to acquire the same entitlements as a married couple over time or by having a child; the equal contributions to the familial property is acquired solely by the choice made by the parties, regardless of the length of the relationship or whether or not a child is born of the couple.

Therefore, the comparison of spousal support and property division in terms of the language of choice in *Walsh* fails here. The FLA and AIR extends the concept of choice to include actions other than the initial public declaration of a joint familial venture, and permits that declaration to come at a later point of their relationship.

This is supported by a comparison of Section 15.2(1) of the DA and Section 56 of the FLA. The DA assumes the Court has authority to order the support of a married spouse based upon the fact they are married, from the choice made at the beginning of the relationships. The FLA specifies the Court’s authority based upon a legislated obligation for common law spouses to provide for each other’s support. This shifts the focus of from the start of the relationship to the relationship itself, and its breakdown. This is a different premise from compensating for the presumed equal contributions by the spouses.

The Tests

Once past the condition precedent and authority, the DA and the FLA use similar and, at times, identical language for the factors and objectives considered when determining spousal support for both married and common law couples.

Both the DA and the FLA consider:

a. The parties’ conditions, means, needs and other circumstances;

b. The length of time living together;

c. The functions performed by the individuals; and

d. any order and arrangement relating to support of either spouse.

The FLA specifies additional items for factors which may comfortably fit into the general language of the conditions, means, needs and other circumstances of the parties at section 58(b), (c), and (d). These additions do not affect the consideration of the concept of choice; nor do the exceptions noted in the FLA Section 59(a) and (b) to spousal misconduct.

The DA and the FLA are even more similar when considering the objectives of spousal support, with virtually identical language in Section 15.2(6) of the DA and Section 60 of the FLA. The similarity of the factors and objectives for spousal support between the two pieces of legislation suggests that once the common law couple satisfies the condition precedent, the analysis used for them is the same as that of for married couple.

This supports two conclusions:

(a) The definitions set out in the AIR and FLA legislation address the issue of choice by setting out the condition precedent, or

(b) The issue of spousal support focuses on something other than the compensation of contributions made to a joint familial venture.

I conclude that both of the above are correct. The condition precedent recognizes the difference between a couple who chooses to marry and one who chooses not to marry. The married couple move immediately to the analysis required for determining the issue of spousal support, while the common law couple must fit the definition. This can be seen as the legislation considering the factor of choice, and that further argument focusing on this aspect of the issue is not available to the common law couple.

However, the focus of spousal support is distinct from the focus of the division of property. Spousal support addresses financial need at the breakdown of the relationship, based on the factors arising from the relationship itself. The focus of spousal support is at the end of the

relationship, not the beginning of the relationship. I believe that Justice Gonthier summarises this nicely:

> "…While spousal support is based on need and dependency, the division of matrimonial assets distributes assets acquired during the marriage without regard to need."[11]

As the objective of spousal support is to address economic issues at the end of a relationship, societal objectives go beyond those identified in *Walsh* to be important for the division of property. Therefore, the consideration of choice at the beginning of a relationship has no further role than that set out in the definitions of the FLA and AIR.

In Practice – the Case Law

To see how the practical application of spousal support is addressed, I searched for spousal support cases with written judgments for year between September 2010 and September 2011, with the following results:

a. 65 reported cases addressing spousal support in some fashion,
b. Of the 65, 3 dealt with common law spouses,
c. Of the 3 common law cases, only two awarded monthly payments of spousal support.

The following is a brief summary of the three cases addressing common law spousal support.

Rubin v. Gendemann[12]

This was a six year common law relationship, with no children being born of the parties. Ms. Rubin sought compensatory spousal support upon the breakdown of the relationship. Mr. Gendemann's income increased steadily throughout the relationship, topping out at approximately $1,000,000.00 at the end of the relationship. Ms. Rubin's income fluctuated between $50,000.00 and $128,000.00. Justice Moen reviewed the factors of the FLA, and concluded that Ms. Rubin was self-sufficient, although no longer enjoyed the lifestyle she

[11] *Walsh,* supra, at paragraph 203.
[12] 2011 A.J. No. 248

previously had with Mr. Gendemann. The conclusion was that the approximately $119,000.00 she received since separation was sufficient for any support obligation, and no further support was ordered.

What is interesting in this case is the comparison to the *Godin*[13] case, wherein a married spouse was held to have suffered no economic disadvantage and as such, no spousal support was ordered. The comparison is made to a married couple, and the definitions held in AIR do not appear to be considered.

Thompson v. Williams[14]

This was an 18 year common law relationship, with the parties separating in 2007. The issues determined at trial was the division of the parties' property based on a restitution and unjust enrichment argument, and spousal support.

Justice Strekaf finds that the parties meet the AIR definition for adult interdependent partners. The parties had no children, and Ms. Thompson had a difficult employment history which was, in part, the result of her psychological issues. Justice Strekaf found that she could reasonably expect to earn $20,000.00 to $25,000.00. Mr. Williams was regularly employed with an income of $100,000.00. At trial, he declared that he was willing to pay spousal support on a declining basis over four years.

Justice Strekaf noted the roles played by the parties during their relationship, that Ms. Thompson was facing challenges after separation in light of her work history and health, and the Spousal Support Advisory Guidelines. As a result, spousal support was ordered at $2,400.00 per month for the first 5 years of separation ending in 2012, then $2,000.00 per month for the next two years, and finishing with $1,500.00 per month for a final two years.
After applying the condition precedent and finding it met, Justice Strekaf used an analysis which would not likely be significantly different than if the parties were married.

[13] *Godin v. Godin*, 1999 ABQB 614
[14] 2011 A.J. No 517

Park v. Slevinsky[15]

Mr. Slevinsky sought spousal support from Ms. Park. The parties had a common law relationship over 17 years, and were the parents of four children from that relationship. Mr. Slevinsky was 38 years old, and Ms. Park was 41. The children were residing with Ms. Park. Mr. Slevinsky suggested that he was a stay at home dad for 4 years prior to separation, and sought compensatory spousal support.

Ms. Park was found to have an income of $105,000.00 per annum and Mr. Slevinksy was imputed an income of $30,000.00.

Justice Veit awarded spousal support to Mr. Slevinsky in the amount of $800.00 per month for a one year period of time. She relied upon a comparison of the common law parties' relationship to a married couple, noting that the length of time of their relationship would qualify M. Slevinsky for spousal support if we were looking at the Divorce Act. This analysis came under the guise of reviewing the factors set out in Section 58 of the FLA.

Justice Veit does not mention the AIR, although Mr. Slevinksy likely did meet the definitions in AIR, given Justice Veit's comment that their partnership was similar to the partnership in most marriages.

Justice Veit concluded that as Mr. Slevinsky was not employed for over 4 years and parenting the children, he was entitled to spousal support. Justice Veit awarded him limited spousal support "… in order to get himself back on his own road to economic self-sufficiency."[16] The Spousal Support Advisory Guidelines were influential on the quantum awarded.

[15] 2010 A.J. No. 1492
[16] *Park v. Slevinsky* supra, at paragraph 50.

Justice Veit's analysis contains little language in the way of choice when considering the issue of spousal support. Indeed, she seems to skip the consideration of the condition precedent set out in the FLA, perhaps because it was assumed that he met the definitions in AIR due to the children of the relationship. However, the principle to take from this case is that the common law relationship was a partnership similar to the partnership of married couple, and as such, spousal support was awarded in a similar fashion as it would to a married couple of similar circumstances.

The fact that common law spousal support decisions amount for less than 5% of the reported cases for spousal support over the course of a year suggests the following conclusions, either:

1. Common law spouses are unaware of their potential entitlements for spousal support,

2. The common law couple is unable to fund a court action to obtain their legal entitlements,

3. In the "couple demographic", there are fewer common law couples than married couples,

4. The common law couple naturally seeks assistance from the Provincial Court of Alberta instead of the Court of Queen's Bench of Alberta, and there are fewer reported Provincial Court cases reported,

5. There are fewer common law couples separating than married couples, or

6. There is a systematic bias against common law spousal support inherent in our system.

Three cases are too few to identify a pattern to apply on a go forward basis. However, the review of case law over the course of a greater period of time, or by looking to other provinces for their approach to the issue, would likely additional information to formulate such a pattern to be used when advising clients on the practical issues of taking spousal support for a common law couple into court.

Of those three cases, we see two distinct references of comparison between a common law couple with a married couple, and only one reference to the condition precedent set out by the definitions.

Conclusion

The DA and the FLA does distinguish between married couples and common law couples when determining the issue of spousal support. It does so through their definitions, which presume that a married couple is in a relationship of interdependence, while a common law couple must meet this definition prior to addressing the issue of spousal support. This is a condition precedent that a common law couple must meet, but the married couple does not.

One can imagine a marriage which does not qualify for the definition of a relationship of interdependence set out in the AIR. This couple may still cause the issue of spousal support to be addressed. A common law couple who does not meet this condition precedent is stopped here.

This is the only difference between the two analyses, as the legal tests for entitlement, quantum and duration are nearly identical in the legislation, and their application appears to be similar in the case law.

This leaves us with the question of should the law distinguish between the two forms of relationship more for spousal support. I believe that they should not.

The DA does not presume entitlement to spousal support, nor does it presume an equal sharing of the married couple's income on the breakdown of the relationship. The tests in the DA require a review of the economic factors arising during the marriage and its breakdown, just as the FLA. The objective of spousal support is to address the needs of the parties at the end of the relationship, not their choice of characterizing their relationship at its beginning. The goal is to compensate for economic disadvantages and hardships at the end of the relationship, and the focus is on what has happened during the relationship and at its end.

There is little room to add the language of *Walsh* to a legal argument due to the above. The definitions in the FLA consider the issue of choice in such a way as to preclude their use in the analysis of the issue once the condition precedent is met.

Furthermore, the use of the language of *Walsh* should not be used when we are considering the questions of entitlement, quantum or duration. *Walsh* specifically considered that while a common law couple may not qualify for the presumption of equal division of assets, it does note that the couple's property is subject to a multitude of other claims based on other areas of law. These additional methods of advancing a claim for property are not available for the issue of spousal support.

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Appendix ‘A’ – Summary of Legislation

	Divorce Act (“DA”)	Family Law Act (“FLA”) / Adult Interdependent Relationship Act (“AIR”)
Definitions	Section 2(1): “spouse” means either of two persons who are married to each other	AIR Section 1(1)(f) “relationship of interdependence” means a relationship outside marriage in which any 2 persons (i) Share one another’s lives, (ii) Are emotionally committed to one another, and (iii) Function as an economic and domestic unit. AIR Section 1(2): In determining whether 2 persons function as an economic and domestic unit … all of the circumstances of the relationship must be taken into account, including such of the following matters as may be relevant: (a) Whether or not the 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 formalize their legal obligations, intentions and responsibilities toward one another, (e) The extent to which direct and indirect contributions have been made by either person to the other or to their mutual well-being, (f) The degree of financial dependence or interdependence and any arrangements for financial support between the persons, (g) The care and support of children, (h) The ownership, use and acquisition of property.

		AIR Section 3(1): … a person is the adult interdependent partner of another person if (a) The person has lived with the other person in a relationship of interdependence (i) For a continuous period of not less than 3 years, or (ii) Of some permanence, if there is a child of the relationship by birth or adoption
Authority	Section 15.2 (1): A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.	FLA Section 56: Subject to this Division, every spouse or adult interdependent partner has an obligation to provide support for the other spouse or adult interdependent partner. FLA Section 57(1): Subject to this section, the court may, on application by a spouse or adult interdependent partner, make an order requiring a spouse or adult interdependent partner to provide support for the other spouse or adult interdependent partner. FLA Section 57(2): The court may make an order under this section only if (a) in the case of spouses, (i) one or both of the spouses have obtained a declaration of irreconcilability under section 83, (ii) the spouses are living separate and apart, or (iii) although the spouses are not living separate and apart, (A) the spouses are, in the opinion of the court, experiencing such discord that they cannot reasonably be expected to live together as spouses, or (B) one spouse has without sufficient

		cause refused or neglected to provide the other spouse with the necessaries of life, including food, clothing and shelter, when capable of providing them; (b) in the case of adult interdependent partners, (i) one or both of the adult interdependent partners have obtained a declaration of irreconcilability under section 83, (ii) the adult interdependent partners are living separate and apart, or (iii) although the adult interdependent partners are not living separate and apart, (A) the adult interdependent partners are, in the opinion of the court, experiencing such discord that they cannot reasonably be expected to live together as adult interdependent partners, or (B) one adult interdependent partner has without sufficient cause refused or neglected to provide the other adult interdependent partner with the necessaries of life, including food, clothing and shelter, when capable of providing them.
Factors	Section 15.2(4): In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including (*a*) the length of time the spouses cohabited;	FLA Section 58: In making a spousal or adult interdependent partner support order, the court shall consider (a) the conditions, means, needs and other circumstances of each spouse or adult interdependent partner, including (i) the length of time the spouses or adult interdependent partners lived together, (ii) the functions performed by each spouse or adult interdependent partner during the period they lived together,

	(*b*) the functions performed by each spouse during cohabitation; and (*c*) any order, agreement or arrangement relating to support of either spouse. Section 15.2(5): In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage	and (iii) any order or arrangement relating to the support of the spouses or adult interdependent partners, (b) any legal obligation of the spouse or adult interdependent partner having the support obligation under the order to provide support for any other person, (c) the extent to which any other person who is living with the spouse or adult interdependent partner having the support obligation under the order contributes towards household expenses and thereby increases the ability of that spouse or adult interdependent partner to provide support, and (d) the extent to which any other person who is living with the spouse or adult interdependent partner who is to receive support under the order contributes towards household expenses and thereby reduces the financial needs of that spouse or adult interdependent partner FLA Section 59: In making a spousal or adult interdependent partner support order, the court shall not take into consideration any misconduct of a spouse or adult interdependent partner, except conduct that (a) arbitrarily or unreasonably precipitates, prolongs or aggravates the need for support, or (b) arbitrarily or unreasonably affects the ability of the spouse or adult interdependent partner having the support obligation under the order to provide the support.

Objectives	Section 15.2(6): An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should (*a*) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; (*b*) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage; (*c*) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and (*d*) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time	FLA Section 60: A spousal or adult interdependent partner support order should (a) recognize any economic advantages and disadvantages to the spouses or adult interdependent partners arising from the relationship or its breakdown, (b) apportion between the spouses or adult interdependent partners any financial consequences arising from the care of any child of the relationship over and above the obligation apportioned between the spouses or adult interdependent partners pursuant to a child support order or a child support agreement, (c) relieve any economic hardship of the spouses or adult interdependent partners arising from the breakdown of the relationship, and (d) insofar as practicable, promote the economic self-sufficiency of each spouse or adult interdependent partner within a reasonable period of time.