

**PEOPLE OF SHXWHÁ:Y VILLAGE
MATRIMONIAL REAL PROPERTY LAW**

WHEREAS the peoples of Shxwhá:y Village has taken control of its reserve lands and resources pursuant to the *Framework Agreement on First Nation Land Management*, and has enacted the *Shxwhá:y Village Land Code* which came into force and effect on January 8, 2007;

AND WHEREAS, pursuant to the *Framework Agreement*, the Shxwhá:y Village agreed to enact rules and procedures, applicable on the breakdown of a marriage, to the use, occupancy and possession of Shxwhá:y Village Land, and the division of interests in that land, by amendment to the *Shxwhá:y Village Land Code* or by Shxwhá:y Village law;

AND WHEREAS the peoples of Shxwhá:y Village intends to honour its undertaking to provide rights and remedies, without discrimination on the basis of sex, with respect to Spouses who have or claim interests in Shxwhá:y Village Land upon the breakdown of their marriage;

AND WHEREAS the peoples of Shxwhá:y Village intends to respect the following principles with respect to the use, occupancy or possession of matrimonial real property on Shxwhá:y Village Land, and the division of interests in that land on the breakdown of a marriage:

- a. the Children, if any, of Spouses should have a right to remain undisturbed in the Matrimonial Home;
- b. each Spouse should have an equal right to possession of the Matrimonial Home;
- c. each Spouse should be entitled to an undivided half interest in the Matrimonial Home as a tenant in common;
- d. the rules and procedures shall not discriminate on the basis of sex; and
- e. no person is entitled to hold a permanent interest in Shxwhá:y Village Land.

AND WHEREAS the Shxwhá:y Village further intends to respect the following procedural principles with respect to the use, occupancy and possession of matrimonial real property on Shxwhá:y Village Land, and the division of interests in that land on the breakdown of a marriage:

Firstly, the right of the parties to a marriage to make their own agreement as to the disposition of interests in Shxwhá:y Village Land in the event that their marriage does, or has, broken down;

Secondly, the value and necessity for mediation where the parties have not or are unable to reach their own agreement as described above; and

Thirdly, the right of the parties to have access to a court of competent jurisdiction to deal with all of their property rights, entitlements and obligations on the breakdown of their marriage, subject to Shxwhá:y Village law where their property includes an interest in Shxwhá:y Village Land.

IT IS THEREFORE ENACTED AS A LAW OF THE PEOPLES OF SHXWHÁ:Y VILLAGE:

PART ONE - APPLICATION OF LAW AND INTERPRETATION

1. This law may be cited as the *Peoples of Shxwhá:y Village Matrimonial Real Property Law*.
2. This law applies only to interests in or claimed pursuant to this law in Shxwhá:y Village Land.
3. Subject to its terms, this law shall not be construed as limiting or precluding any right or remedy otherwise available to persons who are or may be affected by it pursuant to any other law applicable on the breakdown of a marriage with respect to any property other than interests in Shxwhá:y Village Land, or other entitlements or obligations of Spouses.
4. For the purposes of this law, the following definitions shall apply:
 - a. **"Child"** includes a child born in or out of wedlock, a legally adopted child and a child adopted in accordance with Shxwhá:y Village custom.
 - b. **"Council"** means the Chief and Council of Shxwhá:y Village.
 - c. **"Common-Law Marriage"** means two persons not married to each other, who have lived together as a couple for a period of not less than five years.
 - d. **"Domestic Contract"** means:
 - i. an agreement entered into between two Spouses or two persons who intend to marry, made in writing and signed by the parties and witnessed, in which they agree on their respective rights and obligations under the marriage or on separation, with respect to the possession or division of interests in Shxwhá:y Village Land; and
 - ii. a "separation agreement" entered into between two Spouses who are living separate and apart, made in writing and signed by the

parties and witnessed, in which they agree on their respective rights and obligations under the marriage or on separation, with respect to the possession or division of interests in Shxwhá:y Village Land.

- e. **"interest in Shxwhá:y Village Land"** includes any legal or equitable interest held in possession by either Spouse, or both Spouses, in Shxwhá:y Village Land.
 - f. **"Matrimonial Home"** means an interest in Shxwhá:y Village Land that is or, if the Spouses have separated, was at the time of separation ordinarily occupied by one or both Spouses as their family residence or that is mutually intended by the Spouses to be occupied by one or both of them as their family residence, and, where a parcel of Shxwhá:y Village Land that is an interest in Shxwhá:y Village Land for purposes of this law includes a matrimonial home and is normally used for a purpose other than residential, the matrimonial home is only the part of the interest in Shxwhá:y Village land that may reasonably be regarded as necessary to the use and enjoyment of the family residence.
 - g. **"Member"** means a person who is defined as a "member" by the terms of the *Shxwhá:y Village Membership Code*.
 - h. **"Shxwhá:y Village Land"** has the same meaning ascribed to it in the Shxwhá:y Village Land Code.
 - i. **"Spouse"** means a person who:
 - i. is married to another, whether by traditional, religious or civil ceremony, and includes a spouse by Common-Law Marriage; or
 - ii. has, in good faith entered into a marriage that is voidable or void and is asserting aright under this Law.
5. This law does not apply to an interest in Shxwhá:y Village Land held by either spouse, or both Spouses, where neither Spouse is a Member.
6. For greater certainty, a Spouse does not have an election, on the death of the other spouse, to claim, take or pursue and interest in Shxwhá:y Village Land held by the other Spouse under this law, and his or her interest will be determined by the will or administration of the estate of the other spouse.

PART TWO - DOMESTIC CONTRACTS

7. It is the purpose and intention of this law to respect the agreement of the parties to a marriage as to the use, possession, occupancy, disposition or partition of an interest in Shxwhá:y Village Land, including an interest that is a Matrimonial Home.
8. Subject to this Part, a provision in a Domestic Contract that reflects the agreement of the parties with respect to an interest in Shxwhá:y Village Land, including an interest that is a Matrimonial Home, is valid, binding and enforceable.
9. Notwithstanding section 8:
 - a. Provision in a Domestic Contract that would give, award, acknowledge or create an interest in Shxwhá:y Village Land greater than a life estate to occupy or possess an interest in Shxwhá:y Village Land, in favour of a Spouse who is not a Member, is void.
 - b. In applying this section, a valid life estate to possess or occupy an interest in Shxwhá:y Village must be delimited by the life of the person intended to enjoy it.
10. Subject to this Law, a court of competent jurisdiction may, on application under Part Four, set aside a provision of a Domestic Contract with respect to an interest in Shxwhá:y Village Land:
 - a. if a party failed to disclose to the other all of his or her interests in Shxwhá:y Village Land, or any material information in respect of those interests;
 - b. if a party did not understand the nature or consequences of the provision;
or
 - c. otherwise in accordance with the law of contract.
11. This Part applies whether the Domestic Contract was entered into by the parties on, before or after the date that this law comes into force and effect.

PART THREE - COMPULSORY FIRST NATION MEDIATION

12. It is the intention of this Part that Spouses who, on the breakdown of their marriage, do not have and are unable to conclude a Domestic Contract with respect to interests in Shxwhá:y Village Land, submit to mediation in respect

of interests in Shxwhá:y Village Land under the direction of the Council. Council will be subject to all applicable conflict of interest rules.

13. A member of Council or its representative will meet with the Spouses to explain the mediation process and will include a recommendation that the Spouses obtain independent legal advice.
14. Council may, by resolution, provide for:
 - a. the discharge of any function under this Part by a member of Council or by an officer of the Shxwhá:y Village;
 - b. rules and procedures applicable to the conduct of compulsory mediation pursuant to this Part;
 - c. the qualifications of mediators and the establishment of a roster of qualified mediators for the purposes of this Part;
 - d. an option for the parties to select their own mediator, and in default of such selection, the selection of a mediator by the Council;
 - e. setting an appointment with the mediator and giving notice to the Spouses of an appointment with the mediator;
 - f. forms, certificates, and other documents or instruments deemed necessary or advisable for the purposes of this Part;
 - g. waiver of compliance with this Part where it appears that a party is avoiding service, refusing to comply with the requirements of this Part, or taking or failing to take action in a manner calculated to frustrate the intention of this Part that the parties have a reasonable opportunity to resolve any dispute with respect to interests in Shxwhá:y Village Land;
 - h. fees, costs and consequential relief in respect of the provision of mediation services.
15. Upon the breakdown of a marriage and where the Spouses do not have and are unable to conclude a Domestic Contract with respect to interests in Shxwhá:y Village Land, a Spouse may give notice of a request for compulsory mediation to the Council, setting out in writing that:
 - a. his or her marriage has resulted has resulted in a breakdown;
 - b. the he or she and the other Spouse are living, or intend to live, separate and apart with no reasonable prospect for the resumption of cohabitation;

- c. that either Spouse has, or both Spouses have, an interest in Shxwhá:y Village Land; and
 - d. the Spouses do not have a Domestic Contract including provisions in respect of an interest in Shxwhá:y Village Land:
 - i. there is no reasonable prospect that the Spouses will conclude a Domestic Contract including provisions in respect of an interest in Shxwhá:y Village Land within a reasonable period of time; or
 - ii. the parties have concluded a Domestic Contract, but one of the parties intends to seek relief pursuant to section 10.
16. It is the responsibility of the Spouse requesting compulsory mediation to ensure that the notice referred to in section 15 is served on the other Spouse before it is delivered to Council. For greater certainty, service may be effected by personal service, by delivery to a solicitor representing the other Spouse in the matter of the breakdown of the marriage, as provided in a Domestic Contract, or by registered mail to the address where the other Spouse is known or believed to be residing. Service by registered mail shall be deemed to be effected four days after the day the notice is mailed.
17. Proof of service on the other Spouse shall be delivered to the Council at the same time the notice referred to in section 15 is delivered to Council.
18. Council shall arrange for a qualified mediator to be available to the parties within 30 days after the notice referred to in section 15 is received. That period may be extended by Council:
- a. at the joint request of the parties; or
 - b. where Council is unable to secure the services of a qualified mediator to be available to the parties within the 30 day period.
19. Notice of an appointment for mediation shall be served upon both Spouses by the Council no less than 10 days before the date of the appointment for mediation set in section 18.
20. The mediator shall proceed expeditiously with the mediation and use best efforts to assist the parties in resolving any and all issues with respect to interests in Shxwhá:y Village Land.
21. Where the mediation is successful, the agreement of the parties with respect to interests in Shxwhá:y Village Land shall be reduced to writing in a separation

agreement, and that agreement shall expressly provide that each party waives all rights to challenge its provisions pursuant to section 10.

22. A separation agreement for the purposes of section 21 shall include provision for all interests in Shxwhá:y Village Land held by either spouse, or both Spouses, and shall be a sufficient Domestic Contract for purposes of this law if it deals only with those interests.
23. Upon the conclusion of an unsuccessful mediation, the mediator shall provide a certificate to the Spouses and to the Council, which may be:
 - a. a certificate of compliance with this Part; or
 - b. a certificate of waiver in favour of the Spouse requesting the mediation in circumstances where the mediator reasonably concludes that the other Spouse cannot be located, is avoiding or ignoring service of documents or has otherwise refused to participate in the mediation.
24. At the conclusion of successful mediation under this Part, the mediator shall provide a certificate to the Council and the parties attesting to their compliance with this Part.
25. No party shall proceed with any application in respect of an interest in Shxwhá:y Village Land, or seek any remedy pursuant to Part Four, unless the certificate referred to in section 23 has been obtained and is filed with a court of competent jurisdiction.
26. For greater certainty, nothing in this Part is intended to deprive or limit the right of a Spouse to seek any other or further alternate dispute resolution on the breakdown of his or her marriage in relation to any matter other than interests in Shxwhá:y Village Land, or to restrict the parties from otherwise reaching agreement with respect to interests in Shxwhá:y Village Land provided that such agreement results in a separation agreement that meets the requirements set out in this law.
27. The mediator's costs shall be borne equally by the parties to the mediation.

PART FOUR - ACCESS TO A COURT OF COMPETENT JURISDICTION

A. GENERAL RULES REGARDING INTERESTS IN LAND

28. For the purposes of this Part, "court of competent jurisdiction" and "court" refer to the British Columbia Superior Court of Justice or the Unified Family Court in British Columbia.
29. For greater certainty, no court other than a court of competent jurisdiction shall exercise jurisdiction under this law in respect of interests in Shxwhá:y Village Land.
30. In the event of the breakdown of his or her marriage, a Spouse may apply to a court of competent jurisdiction to resolve disputes in relation to interests in Shxwhá:y Village Land provided that he or she has first complied with the requirements of Part Three or is specifically relieved of such compliance by a provision of this Part.
31. No court shall take or exercise jurisdiction under this Part without first enquiring whether or not the Spouses have pursued and participated in mediation pursuant to Part Three and, if there has been no mediation, the court may:
 - a. direct that there be mediation pursuant to the rules of the court or under Part Three; or
 - b. where a requirement for mediation may result in an injustice, proceed to deal with an application under this Part.
32. Subject to this law, a court of competent jurisdiction may deal with interests in Shxwhá:y Village Land held by either spouse, or both Spouses, in manner consistent with the provisions of the *Family Relations Act* (British Columbia) relevant to the ownership, possession or occupancy of real property, the division of interests in real property, and net family property representing the value of interests in real property.
33. Notwithstanding section 32, the fact that an interest in Shxwhá:y Village Land does not include future or contingent interests in First Nation land shall not be taken to confer jurisdiction upon a court over such interests under this law.
34. An interest in Shxwhá:y Village Land received by way of gift or inheritance by one Spouse only from a third person who is a family member, or by one Spouse only together with one or more members of that family, shall be deemed, subject to proof to the contrary, to have been transferred with the intention that the interest should continue to be held within that family exempt from any claim of the other spouse, and subject to the intention that the interest, the income from the interest and the value of the interest are to be excluded from the transferee spouse's net family property.

35. Section 34 does not apply with respect to an interest in Shxwhá:y Village Land that is a Matrimonial Home.
36. Notwithstanding section 34, the court may make any appropriate and equitable order on the ground of unconscionability where a Spouse has intentionally, recklessly or fraudulently depleted his or her net family property that is an interest in Shxwhá:y Village Land and that would otherwise be subject to the presumption set out in section 34.
37. Subject to this law, the court may make any order in relation to interests in Shxwhá:y Village Land held by a spouse, or by both Spouses, that the court could make in respect of real property situated in the province of British Columbia, but not on Shxwhá:y Village Land, including, in appropriate circumstances:
- a. an order that an interest in Shxwhá:y Village Land be transferred to a Spouse absolutely, where permitted under this law;
 - b. an order that an interest in Shxwhá:y Village Land be subject to a lease by one Spouse to the other for a term of years subject to such conditions as the court deems just in all the circumstances;
 - c. an order that an interest in Shxwhá:y Village Land held by both Spouses be partitioned or partitioned and, subject to the Shxwhá:y Village Land Code, sold.
38. An order shall not be made under paragraph 37 (a) in favour of a Spouse who is not a Member.
39. Where an order is made under paragraph 37 (c) for the partition of an interest in Shxwhá:y Village Land, the Council shall direct the transaction, and may by resolution make provision for a survey and for the allocation of the costs of the transaction unless the court has already made an order to that effect.
40. Where an order is made under paragraph 37 (c) for the sale of an interest in Shxwhá:y Village Land, that sale shall be by auction directed by the Council, which shall by resolution make provision for a reserve bid representing a fair sale price for the interest, and for the allocation of costs of the transaction unless the court has already made an order to that effect.
41. Where the interest of a Spouse in Shxwhá:y Village Land is held through a trust, the court may order that he or she transfer a share in that interest to the other Spouse.

42. Subject to this law, a Spouse may apply to the court for determination of a question between him or her and his or her Spouse in relation to the right to possession of an interest in Shxwhá:y Village Land, and the court may make:
 - a. an order declaring the right of possession to the interest in Shxwhá:y Village Land; and
 - b. any order that could be made under section 37 in respect of that interest in Shxwhá:y Village Land.
43. Where the interest of a Spouse in Shxwhá:y Village Land is held through a corporation, the court may order that he or she transfer shares in the corporation to the other Spouse or have the corporation issue shares in the corporation to the other Spouse.
44. An order shall not be made under this Part so as to require the sale of an operating business or farm on Shxwhá:y Village Land, or so as to impair seriously its operation, unless there is no reasonable alternative method of achieving an equitable result between the parties.
45. Where a proceeding has been commenced under this Part, and either Spouse dies before all issues relating to interests in Shxwhá:y Village Land have been disposed of by the court, the surviving Spouse may continue the proceeding against the estate of the deceased Spouse.
46. For greater certainty, a "spouse" for the purposes of applying for relief from a court includes a former Spouse after the marriage has been dissolved by decree absolute of divorce or by judgment of nullity.
47. Nothing in this law relieves a party of the requirement to observe the rules and procedures of a court of competent jurisdiction in relation to matrimonial causes.
48. Nothing in this law limits the application of valid laws of British Columbia and Canada in respect of matrimonial causes, except to the extent that such laws deal expressly or implicitly with interests in Shxwhá:y Village Land and to that extent this Law applies.
49. It is the intention of this Law that all rights, entitlements and obligations of Spouses be dealt with equitably on the basis of the totality of their circumstances, including rights, entitlements and obligations in respect of interests in Shxwhá:y Village Land, but subject to the special provisions set out in this law.

B: MATRIMONIAL HOME

50. Whether or not an interest in Shxwhá:y Village Land is a Matrimonial Home is a question of fact and, for greater certainty, the provisions of the *Family Relations Act* (British Columbia) dealing with the designation of a Matrimonial Home do not apply in respect of interests in Shxwhá:y Village Land.
51. Subject to the limitations inherent in the nature of Shxwhá:y Village Land, both Spouses have an equal right to possession of a Matrimonial Home.
52. When only one Spouse holds an interest in Shxwhá:y Village Land that is a Matrimonial Home, the other Spouse's right of possession is:
 - a. personal against the Spouse who holds the interest; and
 - b. ends when they cease to be Spouses, unless a Domestic Contract or court order provides otherwise.
53. No Spouse shall dispose of or encumber an interest in Shxwhá:y Village Land that is a Matrimonial Home unless:
 - a. the other Spouse freely joins in the instrument or freely consents to the transaction;
 - b. the other Spouse has released all rights in respect of that interest by Domestic Contract; or
 - c. A court order has authorized the transaction or has released the interest in Shxwhá:y Village Land from the application of this section.
54. If a Spouse disposes of or encumbers an interest in Shxwhá:y Village Land that is a Matrimonial Home in contravention of section 53, the transaction may be set aside on an application to the court, unless the person holding the interest or encumbrance at the time of the application acquired it for value, in good faith and without notice, at the time of acquiring it or making an agreement to acquire it, that the property was a Matrimonial Home.
55. When a person proceeds to realize upon an encumbrance or execution against an interest in Shxwhá:y Village Land that is a Matrimonial Home, the Spouse who has a right of possession under section 51 has the same right of redemption or relief against forfeiture as the other Spouse and is entitled to the same notice respecting the claim and its enforcement or realization.

56. The court may, on the application of a Spouse or a person claiming an interest in Shxwhá:y Village Land that is a Matrimonial Home:

- a. make a declaration whether or not the interest in Shxwhá:y Village Land is a Matrimonial Home;
- b. authorize a disposition or encumbrance of the interest in Shxwhá:y Village, provided that such disposition or encumbrance is otherwise authorized under Shxwhá:y Village law, if the court finds that the Spouse whose consent is required cannot be found or is not available, is not capable of giving or withholding consent, or is unreasonably withholding consent, and the court may prescribe conditions including the provision of other comparable accommodation, or payment in place of it, that the court considers appropriate;
- c. dispense with a notice required to be given under section 55;
- d. make an order under section 53, subject to such terms and conditions as the court determines to be equitable and just in all the circumstances.

57. Regardless of which Spouse holds an interest in Shxwhá:y Village Land that is a Matrimonial Home, the court may on application:

- a. order the delivering up, safekeeping and preservation of the interest in Shxwhá:y Village Land that is a Matrimonial Home;
- b. direct that one Spouse be given exclusive possession of the interest in Shxwhá:y Village Land that is a Matrimonial Home, or part of it for such period as the court may direct consistent with this Law, and release any other interests in Shxwhá:y Village Land that is a Matrimonial Home from the application of this Part;
- c. authorize a disposition or encumbrance consistent with Shxwhá:y Village law of a spouse's interest in Shxwhá:y Village Land that is a Matrimonial Home, subject to the other spouse's right of exclusive possession as ordered;
- d. where it appears that a Spouse has disposed of or encumbered an interest in Shxwhá:y Village Land that is a Matrimonial Home in a fraudulent manner calculated to defeat the rights of the other Spouse under this law, or has falsely and knowingly represented in connection with a disposition or encumbrance that the interest in Shxwhá:y Village Land is not a Matrimonial Home, direct the other Spouse to substitute other interests he or she holds in Shxwhá:y Village Land for the Matrimonial Home subject to such conditions as the court considers appropriate;

- e. make any interim or temporary order to give effect to the purposes of this law or to protect the rights of a spouse; or make any ancillary order which the court deems necessary to give effect to this Law.
58. A court, in considering whether to direct that one Spouse have exclusive possession of an interest in Shxwhá:y Village Land that is a Matrimonial Home, shall be guided by the principle that the custodial parent of a Child should have exclusive possession of the family residence for a period sufficient to ensure that the Child, or the youngest Child if there is more than one Child, reaches the age of majority and has the opportunity to complete his or her education, provided that observance of this principle is consistent with the best interests of the Child.
59. Where both parents share joint custody of a Child or Children, the principle set out in section 58 shall be adapted to favour the Spouse with whom the Child or Children principally reside, and if the Child or Children reside substantially equal periods of time with both Spouses, then the principle shall be neutral as between them.
60. In applying the principle set out in section 59, the court may have regard to the fact that one or more of the Children are not Members.
61. The requirement of compulsory Shxwhá:y Village mediation set out in Part Three applies with respect to this Part, except that notwithstanding section 26:
- a. the court may entertain an application under section 56 where the court is satisfied that mediation is not feasible in the circumstances; and
 - b. the court may entertain any application under this Part as a matter of urgency, but shall not make any order unless satisfied that the matter is an urgent one, having regard to the conduct of the party making the application, and shall limit the scope of any order to matters found to be urgent.

PART FIVE GENERAL PROVISIONS

62. In exercising its duties under this Law, Council will comply with all applicable conflicts of interest rules.
63. A Spouse who intends to seek a remedy in relation to an interest in Shxwhá:y Village Land pursuant to this law shall give notice of a request for compulsory mediation under section 15 within a reasonable period after he or she has commenced living separate and apart from the other Spouse, and

in any event before he or she commences any legal proceedings under the *Family Relations Act (British Columbia)* in respect of net family property that includes real property or a Matrimonial Home.

64. A person who contravenes an order made by a court of competent jurisdiction pursuant to this law in relation to an interest in Shxwhá:y Village Land is guilty of an offence and liable, on summary conviction, to a fine of not more than \$5,000 or to imprisonment for a term of not more than three months, or to both.

65. A fine payable under section 64 shall be remitted to the Shxwhá:y Village by the court, after reasonable court costs have been deducted.

This law shall come into force and effect on the 16th day of May, 2008.