

**INTERNATIONAL ACADEMY OF FAMILY LAWYERS
OPEN INTERNATIONAL FAMILY LAW CONFERENCE
NEW YORK, 2018**

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High Net Worth Matters – Outcomes, Procedures & Strategy

Ontario

Overview

Ontario family law has some of the most generous provisions for non-titled spouses in the world. Absent a marriage contract, the value of all wealth generated during a marriage is shared, subject to limited restrictions. Unmarried spouses may assert restitutionary claims to business or personal assets on the basis of a joint family venture. Spousal and child support awards are substantial and based on division of after tax income. Married spouses have greater property entitlements than unmarried spouses but both have the same rights to spousal and child support.

Ontario is a common law jurisdiction. As a province of Canada, family property law is governed by provincial legislation. Spousal and child support is governed both by the federal Divorce Act and provincial statutes, which are substantively parallel. There are different jurisdictional tests for each element of family law. For a divorce, a claimant must have resided in Ontario for one year before commencing the claim. Spousal and child support may be claimed as a corollary to a divorce

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application. If the spouses are unmarried or married, they may seek spousal support under provincial legislation if ordinarily resident in Ontario at the time of the application. Ontario courts have recognized that a couple may have more than one ordinary residence. A spouse may obtain the benefit of Ontario family law rights even if the couple's only residence in the province was a secondary residential property such as a family cottage. The right to seek spousal support under provincial legislation is lost once the parties divorce. For family property rights married spouses may apply if Ontario was their last common habitual residence as a couple or if they did not have a last common habitual residence.

Family Property Law

a. Married Spouses

Ontario deems all marriages to be economic partnerships. A married spouse has the right to share in the wealth generated during a marriage from the date of marriage to either the date of separation or the date of death. This is calculated using a formula. Each spouse must calculate his/her net family property. Net family property is the value of all assets net of liabilities owned at the valuation date less the value of all assets net of liabilities owned at the date of marriage. A spouse's net family property can never have a negative value. If the spouse's wealth declined during the marriage the net family property is deemed to be nil. The valuation date is the date of separation or, if the claim is made at death, the day before the date of death. A matrimonial home is treated differently than other assets. There is no deduction for the value of a matrimonial home as of the date of marriage if that home is still owned and ordinarily occupied as a matrimonial home at the valuation date. There are certain exceptions as to what

is included in net family property. Notably, assets that were inherited or gifted to a spouse from a third party during the marriage, were not co-mingled and still exist or are traceable into another asset at the valuation date are excluded from net family property. Once the parties' respective net family properties are determined, the difference is calculated. The spouse with the greater net family property must pay an equalization payment to the other spouse which is one half the difference between their respective net family properties. The equalization payment is a simple debt with interest potentially payable from the valuation date. There is a very high threshold to depart from the equalization entitlement. A court must find that it would be unconscionable to equalize – this is a test rarely met other than in short term relationships of less than five years.

Ontario's equalization scheme was designed for a traditional long term marriage of a couple who started with nothing and built a life together. The scheme does not work as well for couples who marry later in life and who already have assets or have children from prior relationships. The scheme also does not work as well for those with complex family holdings.

The most common problems are:

- a. The matrimonial home—if a spouse brings a matrimonial home into the marriage and occupies that house as a family home at the end of the marriage then he or she cannot claim a deduction for the value. That means that, in effect, one half the value of the home brought into the marriage is lost to the other spouse. Spouses may have any number of matrimonial homes. Not only the primary residence but recreational properties may be

matrimonial homes. This applies to properties owned by a spouse or a corporation owned by the spouse. It does not apply to properties held by a trust and occupied by one of the spouses as a beneficiary of the trust.

- b. Date of marriage valuations – To calculate the value of all the assets and liabilities held by each spouse at each date can be an expensive exercise requiring expert evidence. For date of marriage assets and liabilities it may be an impossible exercise if the marriage occurred long ago as documents may be irretrievably lost. Aside from these logistical problems, there is no provision in the equalization calculation to protect the growth in value of an asset brought into the marriage. A spouse may bring a business into a relationship which has nominal value at the date of marriage but has grown exponentially in value during the relationship. In that case, although the spouse owned the asset before marriage most of the value of that asset must be shared with the spouse.
- c. Inherited/Gifted assets – These assets are treated inconsistently depending on the date of the gift or inheritance. To take an extreme example, if a spouse received a gift from his grandfather the day before the wedding of \$1 million in shares and held those shares to the date of separation at which point they were worth \$2 million then he would have to equalize the increase in value and pay \$500,000 to his spouse. If the grandfather had given the shares the day after the wedding then the spouse receiving the shares could exclude them from equalization and pay nothing.
- b. What is Property – The definition of property for family law purposes is broad in scope. It includes legal and beneficial interests, vested and contingent assets and liabilities. These

include beneficial interests in testamentary or *inter vivos* trusts and property over which a spouse has a power of appointment.

b. Unmarried Spouses

Unmarried spouses are not entitled to equalization of net family properties. They must rely on restitutionary principles. An economic partnership is not presumed for unmarried partners but where spouses have engaged in mutual effort, have a history of economic interdependence and integration, had an intention to share property, whether express or inferred, and gave priority to the family in decision-making during the relationship, a court will find a joint family venture granting a beneficial interest in some portion to the titled spouses's assets.

Spousal Support Law

In Ontario both married and unmarried spouses have rights to spousal support. Married spouses acquire this right with marriage while unmarried spouses must have cohabited in a conjugal relationship for three years or have a child together and be in a relationship of some permanence. The duration and quantum of spousal support is largely determined in accordance with Spousal Support Advisory Guidelines. These provide a formula to share after tax disposable income taking into account the length of the relationship and any child support obligations. At incomes over approximately \$800,000/year, the courts exercise a greater degree of discretion in setting the quantum of spousal support. The duration of spousal support is typically in a range from one half to the full length of short and medium term relationships. In long term relationships, or those with older spouses, spousal support is of indefinite

duration subject to review if there is a significant change. Retirement is typically a trigger for a change or termination of spousal support.

Child Support Law

In Ontario child support is governed by mandatory Child Support Guidelines. If children reside primarily in one parent's home, the other parent pays support calculated as a percentage of income. If children reside in both homes equally or on a schedule whereby they are in neither parent's home for more than 60% of the time, then the parents either pay a set off support based on their respective incomes or allocate the children's expenses between them on a discretionary basis. In addition to the basic monthly child support, parents must share special and extraordinary expenses such as private school, child care, and post secondary education in proportion to their respective incomes. The responsibility to pay child support extends beyond the age of 18 while an adult child remains a dependent, potentially through graduate degrees including medical and law school in higher income families.

As child and spousal support are both income based, the calculation of income is often the most important issue. Income for support purposes is calculated on a different basis than for tax purposes. Income is imputed to reconcile the after tax available income to that of an employee. Income from all sources is taken into account including salary, corporate dividends, investment income whether interest or capital gains, pre-tax corporate income for a company of which the spouse is a shareholder, director or officer, and trust income. Income may be imputed to a spouse in a number of ways including:

intentional underemployment, residence in a country with lower tax rates than in Canada, where the spouse's property is not reasonably utilized to generate income, or where a spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

Disclosure Obligations

Spouses have onerous financial disclosure obligations in Ontario. As financial disclosure is mandatory, the court may draw an adverse inference from a party who fails to disclose documents or submit to questioning. Where parties settle issues arising from their separation by agreement, that contract may be set aside if a party made inadequate or misleading financial disclosure.

Canada is not a signatory to the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters. As such, letters of request are necessary to obtain disclosure from Canada. To compel evidence, the letters of request (letters rogatory) must be secured from the domestic court first, and then the foreign party must apply to a Canadian court to enforce them. Enforcement of the letters of requests is determined by the provincial courts and is discretionary.

In Ontario, federal and provincial legislation sets four statutory pre-conditions on an application to give effect to a disclosure request from the foreign jurisdiction.

- (a) it must appear that a foreign court desires to obtain the evidence or that the obtaining of the evidence has been authorized by commission, order or other process of the foreign court;
- (b) the witness whose evidence is sought must be within the jurisdiction of the Canadian court which is asked to make the order;

(c) the evidence sought must be in relation to a civil, commercial or criminal matter pending before the foreign court or in relation to an action, suit or proceeding pending before the foreign court; and

(d) the foreign court must be a court of competent jurisdiction.

If these preconditions are met, the Canadian court may still go behind the letter of request and examine what specifically the foreign court is seeking and give effect only to those requests that satisfy the requirements of the law of the Canadian jurisdiction.

There are six factors that will guide the determination by the Ontario Court as to whether it will exercise of its discretion to enforce the letters of request. These factors are:

- 1) The evidence sought is relevant (not just potentially relevant and the request must identify the facts that establish the relevance of the evidence in the action);
- 2) The evidence is necessary for trial and will be given at trial, if admissible;
- 3) The evidence is not otherwise obtainable;
- 4) The order sought is not contrary to Canadian public policy;
- 5) The documents are identified with reasonable specificity; and
- 6) The order sought is not unduly burdensome, considering the scope of the request against what the witness would be obligated to do, and produce, if the action were to be litigated in Canada.

Dispute Resolution

In Ontario family law disputes that involve divorce or property issues must be heard in the Superior Court. Spouses may choose to submit their issues to mediation, arbitration or a combined mediation/arbitration process by agreement. Family law arbitrations have specific legislated requirements including they must apply Ontario law, both parties must receive independent legal advice on the process, be screened for domestic violence and the parties must retain at least minimal appeal rights to a court. Private dispute resolution has many benefits including the ability to select a decision-maker with specialized family law knowledge and the advantages of a private process.