

The Property and Equalization Regime in Ontario, Canada

Oren Weinberg & Maria Belfon

Boulby Weinberg LLP

INTRODUCTION

In Ontario, division of matrimonial property is governed by the *Family Law Act* (“FLA”).¹

The guiding principle is that when married spouses separate, they are required to share the growth in value of their assets accrued during the marriage by equalizing the value of their respective Net Family Property as defined by the FLA. In Ontario, couples who are considered common law do not have any property rights.²

This paper provides a general overview of the property and equalization regime prescribed by the FLA.

1) PROPERTY REGIME

Determining Net Family Property

Upon separation, a spouse must determine the net value of his or her property at the date of marriage and deduct that from the value of his or her net assets at the date of separation – **the valuation date**.³ It is a straightforward accounting exercise.

¹ *Family Law Act*, R.S.O. 1990, c. F.3 (“FLA”).

² FLA, s.29, specifies the definition of a spouse, in addition to two married people as including, two persons who are not married to each other and have cohabited,

(a) continuously for a period of not less than three years, or

(b) in a relationship of some permanence, if they are the parents of a child as set out in section 4 of the *Children’s Law Reform Act*. (“conjoint”) R.S.O. 1990, c. F.3, s. 29; 1999, c. 6, s. 25 (2); 2005, c. 5, s. 27 (4-6); 2009, c. 11, s. 30; 2016, c. 23, s. 47 (1).date of

³ The FLA, s. 4(1) defines valuation date as the earliest of the following dates:

1. The date the spouses separate and there is no reasonable prospect that they will resume cohabitation.
2. The date a divorce is granted.

The FLA defines property expansively and includes any present or future interest, vested or contingent that a person has in real or personal property starting at the date of marriage and ending at the date of separation.⁴

Specifically, a spouse's "net family property" means the value of all the property that he or she owns at the valuation date after deducting:

- i) his or her debts and other liabilities; and
- ii) the value of all property (other than a matrimonial home) he or she owned at the date of marriage (after deducting his or her debts and other liabilities other than any debts or liabilities related directly to the acquisition or significant improvement of a matrimonial home, calculated as of the date of the marriage).⁵

A spouse's net family property cannot be less than zero so in situations where the NFP is calculated to be less than zero, it is deemed to be equal to zero.⁶

Exclusions

Under section 4(2), the value of the following property that a spouse owns on the valuation date is excluded from the calculation of the spouse's net family property:

- i. Property other than a matrimonial home acquired by gift or inheritance during the marriage;
- ii. Income from gifts or inheritances if the donor expressly stated that it was to be excluded;

3. The date the marriage is declared a nullity.

4. The date one of the spouses commences an application based on subsection 5 (3) (improvident depletion) that is subsequently granted.

5. The date before the date on which one of the spouses dies leaving the other spouse surviving.

⁴ FLA, s. 4(1).

This includes:

- (a) property over which a spouse has, alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself,
- (b) property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property, and
- (c) in the case of a spouse's rights under a pension plan, the imputed value, for family law purposes, of the spouse's interest in the plan, as determined in accordance with section 10.1, for the period beginning with the date of the marriage and ending on the valuation date. [FLA, s. 4(1)].

⁵ FLA, s.4(1). The liabilities referred to in the definition of net family property include any applicable contingent tax liabilities [see s.4(1.1)].

⁶ FLA, s. 4(5).

- iii. Damages or right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of the settlement that represents those damages;
- iv. Proceeds of or the right to proceeds of a policy of life insurance (payable on the death of the life insured);
- v. Property, other than a matrimonial home, into which property referred to above (i-iv) can be traced;
- vi. Property that the spouses have agreed by a domestic contract is not to be included in the spouse's net family property;
- vii. Unadjusted pensionable earnings under the *Canada Pension Plan*.

The onus of proving a deduction or an exclusion is on the person claiming it.⁷

Determining Ownership Interests– Title and Possible Trust Claims⁸

The court can determine questions of title as between spouses (current or former) as to their ownership interests (or right to possession) in a particular property. A spouse may seek a declaration as to his or her ownership interest from the court, which can then lay the groundwork for an equalization claim.⁹ The court must determine questions of ownership interests of the spouses before calculating equalization of the net family properties.¹⁰

A spouse may not be on title to the matrimonial home or other property, but may have made contributions to the acquisition, improvement or maintenance of the property during the marriage. As such, he or she may be able to make a resulting or constructive trust claim to the property.

⁷ FLA, s. 4(3).

⁸ See *Kerr v. Baranow*, 2011 SCC 1.

⁹ FLA, s. 10(1).

10(1) A person may apply to the court for the determination of a question between that person and his or her spouse or former spouse as to the ownership or right to possession of particular property, other than a question arising out of an equalization of net family properties under section 5, and the court may,

- (a) declare the ownership or right to possession;
- (b) if the property has been disposed of, order payment in compensation for the interest of either party;
- (c) order that the property be partitioned or sold for the purpose of realizing the interests in it; and
- (d) order that either or both spouses give security, including a charge on property, for the performance of an obligation imposed by the order and may make ancillary orders or give ancillary directions.

Estates

(2) An application based on subsection (1) may be made by or continued against the estate of a deceased spouse.

¹⁰ See *Rawluk v. Rawluk*, [1990] 1 SCR 70.

Under section 14 of the FLA, there is a presumption of a resulting trust as related to questions of ownership of property between spouses, as if they were not married, except as follows:

- (a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and
- (b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

Matrimonial Home

The matrimonial home held at the valuation date is given special treatment under the legislation.

The matrimonial home forms part of the calculation of a spouse's net family property. A spouse who brings the asset into the marriage must share the full value as at the date of separation – whether or not the matrimonial home was gifted or purchased with gifted funds.¹¹ The spouse does not have the benefit of a date of marriage deduction for the value of the matrimonial home brought into the marriage.

Section 18 of the FLA defines a matrimonial home as: “every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home”.

Spouses can have more than one matrimonial home. Any real property that is ordinarily occupied by the parties can be considered a matrimonial home (for instance, a cottage).¹²

The legislation provides that one or both spouses may designate property owned by one or both of them as a matrimonial home.¹³ If both spouses designate a property as the matrimonial home, any other property that is a matrimonial home but is not designated by both of them as such is no longer considered to be a matrimonial home.¹⁴ However, if only one spouse designates the property as a matrimonial home, any other property that is a matrimonial home

¹¹ As outlined in O. Weinberg's presentation: “Domestic Contracts and the Ontario Matrimonial Property Regime – In Ten Minutes or Less” presented at the International Family Law Conference, September 2017. Section 4(2)(i) of the FLA, which lists the exclusions, specifically provides that the matrimonial home is not excluded even if it is gifted.

¹² *Ibid.*

¹³ FLA, s. 20(1).

¹⁴ FLA, s. 20(4).

remains one.¹⁵ The designation may be cancelled and the property will no longer be considered a matrimonial home if there is a cancellation executed by the person(s) who made the designation, a divorce (or judgment of nullity), an order by the court (under s. 23(e)) cancelling the designation, or proof of death of one of the spouses.¹⁶

Importantly, a spouse cannot dispose of or encumber a matrimonial home without the consent of the non-owner spouse or court order.¹⁷ A non-titled spouse has possessory rights in the matrimonial home as against the titled-spouse.¹⁸

Sale of Jointly Owned Property (including the Matrimonial Home)

A spouse may seek the partition and sale of any jointly owned property under the *Partition Act* prior to the final determination of the equalization.¹⁹

If the property in question is the matrimonial home which is jointly owned, the court may order the sale under section 23 of the FLA and may also dispense with the other spouse's consent if he or she is found to be unreasonably withholding consent.

2) EQUALIZATION OF NET FAMILY PROPERTY

The purpose of the equalization regime in Ontario is to recognize that child care, household management and financial provision are the joint responsibilities of both spouses, and that equal contribution by the assumption of these responsibilities is inherent in the marital relationship, which entitles each spouse to the equalization of the net family properties (subject only to the variation based on equitable considerations set out under s. 5(6) of the FLA, as explained below).²⁰

Under the s. 5(1) of the FLA, separating spouses must equalize their respective net family properties once determined as set out above. The spouse whose net family property is the

¹⁵ FLA, s. 20(5).

¹⁶ FLA, s. 20(6). When a designation of a matrimonial home made by both spouses is cancelled, section 18 applies again in respect of other property that is a matrimonial home (S. 20(7), FLA).

¹⁷ FLA, s.21.

¹⁸ FLA, s. 19. See FLA, s.24 regarding orders for possession of the matrimonial home.

¹⁹ *Partition Act*, R.S.O. 1990, c. P.4, ss. 2-3.

²⁰ FLA, s. 5(7).

lesser of the two net family properties is entitled to one-half the difference between the two net family properties (i.e., 50% of the difference).²¹

If a spouse dies, the surviving spouse is entitled to elect to take under the will or the laws of intestacy under the *Succession Law Reform Act* (“SLRA”),²² or pursue an equalization claim under the FLA. If no election is filed, the surviving spouse is deemed to have elected to take under the will or the SLRA, or both, unless a court orders otherwise.²³

When equalization may be varied

In certain circumstances, the court may award a spouse more or less than half the difference between the two net family properties. This occurs when there is evidence before the court that equalizing the NFPs would be unconscionable, with regard to the following factors set out at s.5(6) of the FLA:

- (a) a spouse’s failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;
- (b) the fact that debts or other liabilities claimed in reduction of a spouse’s net family property were incurred recklessly or in bad faith;
- (c) the part of a spouse’s net family property that consists of gifts made by the other spouse;
- (d) a spouse’s intentional or reckless depletion of his or her net family property;
- (e) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;
- (f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;
- (g) a written agreement between the spouses that is not a domestic contract; or
- (h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

²¹ A claimant whose spouse becomes bankrupt during or after the proceedings is merely an unsecured creditor who is left to his or her remedies in the bankruptcy court to collect the equalization payment. CED Family Law - Property I.4.(a) at §61.

²² R.S.O. 1990, c. S.26

²³ See FLA. s. 5(2) and s. 6.

Limitation Period

An application to the court for equalization may not be brought after the earliest of any of the following:

- i. Two years after a divorce (or judgment of nullity);
- ii. Six years after the day the spouses separate and there is no reasonable prospect that they will resume cohabitation; or
- iii. Six months after the first spouse's death.²⁴

The court may extend the limitation within which property proceedings may be commenced if the delay is incurred in good faith and if no person will suffer substantial prejudice as a result of the extension.²⁵

3) FORMALIZING AN AGREEMENT REGARDING PROPERTY DIVISION AND EQUALIZATION²⁶

Spouses can, by agreement, contract out of all or part of the legislated equalization regime by way of a "domestic contract".²⁷

The FLA governs the formation and enforceability of domestic contracts. To be enforceable, agreements must be made in writing, signed by the parties, and witnessed.²⁸

Section 56(4) of the *FLA* provides that a court may set aside a domestic contract or a provision of a domestic contract if:

- i. A party failed to disclose their significant assets, debts and liabilities existing at the date the contract was made;

²⁴ FLA, s. 7(3).

²⁵ FLA, s. 2(8).

²⁶ O. Weinberg's presentation: "Domestic Contracts and the Ontario Matrimonial Property Regime – In Ten Minutes or Less" given at the International Family Law Conference, September 2017.

²⁷ They can do so before marriage by co-habitation agreement, during the marriage by marriage contract and on separation, by separation agreement. Collectively these agreements are defined in the *Family Law Act* as domestic contracts. Parties to a cohabitation agreement may contract about their respective rights to ownership and division of property, support obligations, the right to direct the education and moral training of their children (but not the right to custody and access). If they marry, the cohabitation agreement will be deemed a marriage contract governing the parties' rights on separation. Even if a couple is not cohabiting, they may enter a marriage contract in contemplation of their marriage.

²⁸ If the parties contract to have the law of another jurisdiction apply to the determination of their property rights on separation, an Ontario court will apply that law as long as the contract itself is valid and enforceable under Ontario law.

- ii. A party did not understand the nature or consequences of the contract; or
- iii. Otherwise in accordance with the common law of contract – i.e., fraud, duress, mistake, misrepresentation etc.

In addition, under s.56(5), provisions of a contract could be set aside if the court is satisfied that the consideration for the provision was the removal of barrier to remarriage within the spouse's faith.