

FINANCIAL PRINCIPLES OF MARITAL
BREAKDOWN

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Financial Principles Of Marital Breakdown

Property Division

1. You may be called upon by your clients to assist them in dividing their property on a marital breakdown. In fact, in a number of cases that I have been involved in where both the husband and wife felt comfortable in having their accountant divide their property for them.
2. The governing statute is the family law act of Ontario. It can be found at the following web site: <http://www.canlii.org/on/laws/sta/f-3/20050111/whole.html>
3. It is important to note that we do not have a California style community property sharing regime in Ontario.
4. Rather, we have what the law professors call deferred community of property. The property that is divided is the property earned by each spouse during the marriage.
5. Each spouse must calculate his or her net family property.
6. From that net family property may be deducted the net value of property owned on the date of the marriage whether it exists at the time of separation or not.
7. Excluded from the net family property are items that were acquired as gifts or bequests from outside third parties. In order to be excluded, this property must exist in some form at the date of separation.
8. Another difference with California is the date upon which equalization occurs. In Ontario, it is the date of separation.
9. Section 4 of the statute sets out some definitions:

PART I
FAMILY PROPERTY

Definitions

4. (1) In this Part,

“court” means a court as defined in subsection 1 (1), but does not include the Ontario Court (Provincial Division); (“tribunal”)

“matrimonial home” means a matrimonial home under section 18 and includes property that is a matrimonial home under that section at the valuation date; (“foyer conjugal”)

“net family property” means the value of all the property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,

(a) the spouse’s debts and other liabilities, and

(b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse’s debts and other liabilities, calculated as of the date of the marriage; (“biens familiaux nets”)

“property” means any interest, present or future, vested or contingent, in real or personal property and 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 that have vested, the spouse’s interest in the plan including contributions made by other persons; (“bien”)

“valuation date” means 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.

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. (“date d’évaluation”) R.S.O. 1990, c. F.3, s. 4 (1).

Excluded property

(2) The value of the following property that a spouse owns on the valuation date does not form part of the spouse’s net family property:

1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage.

2. Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse’s net family property.

3. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages.

4. Proceeds or a right to proceeds of a policy of life insurance, as defined in the *Insurance Act*, that are payable on the death of the life insured.

5. Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced.

6. Property that the spouses have agreed by a domestic contract is not to be included in the spouse’s net family property. R.S.O. 1990, c. F.3, s. 4 (2).

Onus of proof re deductions and exclusions

(3) The onus of proving a deduction under the definition of “net family property” or an exclusion under subsection (2) is on the person claiming it. R.S.O. 1990, c. F.3, s. 4 (3).

Close of business

(4) When this section requires that a value be calculated as of a given date, it shall be calculated as of close of business on that date. R.S.O. 1990, c. F.3, s. 4 (4).

Net family property not to be less than zero

(5) If a spouse's net family property as calculated under subsections (1), (2) and (4) is less than zero, it shall be deemed to be equal to zero. R.S.O. 1990, c. F.3, s. 4 (5).

10. Under this scheme, the matrimonial home is treated differently than other assets. The matrimonial home is defined under section 18 as:

18. (1) 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. R.S.O. 1990, c. F.3, s. 18 (1).

11. So a matrimonial home is a home in which the parties were residing at the time of their separation.

12. As a result, if one spouse owns a home on the date of the marriage and if they reside in the home at the time of separation it goes into the pot for division.

13. On the other hand, if the couple moved from that home and purchased another the entire amount of the equity would be deducted from the net family property of that spouse.