

TAB 4

Family Law Refresher 2020

Dealing with Difficult Financial Issues

George Karahotzitis
Thomson Rogers

Rebecca Organ
Thomson Rogers

February 21, 2020



DEALING WITH DIFFICULT FINANCIAL ISSUES¹

*George Karahotzitis and Rebecca Organ
Thomson, Rogers*

BASIC PROPERTY DIVISION AND EQUALIZATION

Section 5 of the *Family Law Act* governs the law of equalization of net family properties. Section 5(1) stipulates that equalization occurs in three scenarios:

- 1) a divorce is granted;
- 2) a marriage is nullified; or
- 3) spouses have separated and there is no reasonable prospect that they will resume cohabitation.

The spouse who has the lesser valued net family property is entitled to receive one half of the difference between the spouses net family properties.

The word “spouse” is defined by the *Family Law Act* as “either of two persons who, (a) are married to each other, or (b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right”. Therefore, common law spouses are not entitled to an equalization of property under the *Family Law Act*. Common law spouses are entitled to use trusts doctrines to assert a claim over property.; in appropriate circumstances.

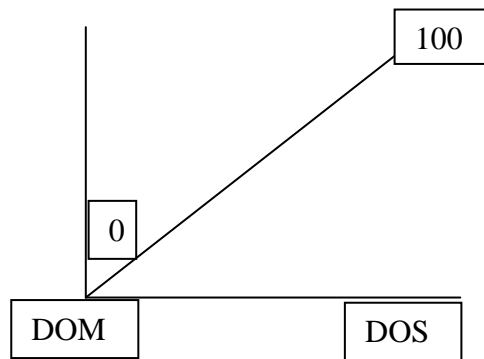
The concept of equalization may be confusing to many clients. It is important to emphasize that the net family property is determined using two key dates: the date of marriage and the date of separation.

In addition, there are several exceptions to the rule of the inclusion of assets accumulated during the marriage as forming a part of a person’s net family property (see Section 4(2) of the *Family Law Act*). For example, the following may be excluded from a spouse’s net family property: inheritances, gifts, some legal settlements and insurance proceeds. However, these items must remain traceable and cannot be commingled into shared items, for example a matrimonial home. If they are untraceable, it is likely that they will be included in the net family property calculation. The following illustrations are a helpful guide to equalization.

¹ The tax, trusts/ estates and pensions sections of this paper were originally prepared for and presented at the Law Society of Ontario’s Continuing Professional Development Program entitled The Family Law Refresher 2018, held on February 23, 2018. These sections have been updated for this program.

Example 1

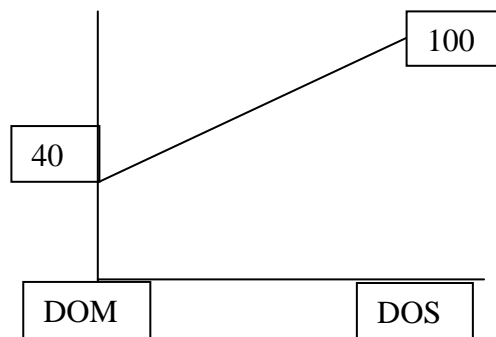
The wife had zero assets at the date of marriage. She is now worth \$100.



Let's assume the Husband had \$0 at the date of marriage and \$0 at the date of separation. In this case, the husband would be entitled to one half the difference between his net family property (\$0) and his wife's net family property (\$100), therefore the husband would receive \$50 from the wife as an equalization payment.

Example 2:

Now let's assume the wife had \$40 in assets coming into the marriage. At the date of separation, the wife is worth \$100.



The wife's net family property is calculated by subtracting her date of marriage assets from her date of separation assets ($100 - 40 = 60$). Therefore, the wife acquired \$60 in assets during the marriage. Let's assume again that the husband had \$0 at the date of marriage and \$0 at the date of separation. The husband would be entitled to one half of the wife's net family property of \$60 (\$30).

An exception to the rights of a spouse for an equal division of assets obtained during the marriage is found in Section 5(6) of the *Family Law Act*.

The threshold for an unequal division of assets is very high. In order to achieve this, the standard claim for an equal division of assets must shock the conscience of the Court.

Evidence must be lead that will demonstrate unconscionability. Section 5(6) states the following list of factors be considered:

The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,

- (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.

If successful, an unequal division may be awarded up to 100 per cent of the value of a spouse's net family property.

TAX ISSUES

Contingent Disposition costs.

- The disposition of assets may have a corresponding cost to the parties.

Where do disposition costs arise?

- Sale of the matrimonial home
- Sale of other property
- Registered accounts (such as RRSPs, RIF, LIRA)
- Pensions
- Investment accounts

Sengmueller v Sengmueller, [1994] 17 O.R. (3d) 208 –

This case stands for the proposition that costs of disposition should be deducted from the value of the asset for purposes of equalization, unless there is ambiguity as to the realization of the value of the asset.

Knight v Knight, 2018 ONSC 3294

Justice Nelson stated that in order to deduct disposition costs, a specific date for the sale of an asset is not required. Instead, there must simply be some evidence lead that the asset will likely be sold. (See paragraph 56).

TRUSTS/ ESTATES ISSUES

1) Proper estate planning and gifts during the marriage

a. Definition of property

Section 4(1) of the *Family Law Act* defines property as follows:

“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, 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

2) Family Trusts

Case	Facts
<i>Borges v Santos</i> , 2017 ONCJ 651	Justice Kurz stated that a contingent interest in a trust is not considered property under the <i>Family Law Act</i> where the contingent beneficiary does not have control over the disposition or named beneficiaries of the Trust.
<i>Mudronja v Mudronja</i> , 2014 ONSC 6217	<p>The Applicant had a beneficial interest in the Mudronja Trust and was the sole Trustee. The Trust had been created by the Applicant's father. The Respondent argued that the entire value of the Trust should be included in the Applicant's Net Family Property as a result of his control over the Trust. The Applicant argued that 35% of the trust property was owned by the Respondent as a beneficiary of the Trust. The Applicant had the power to dispose of the Trust's property to himself without any fiduciary responsibility to any other person.</p> <p>Justice Seppi concluded the following at paragraph 98 of the decision:</p> <p style="padding-left: 40px;">I find an interest in a discretionary trust is an interest in property for purposes of equalization pursuant to the FLA. That statute in its preamble endorses the necessity of providing “the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the [marriage] partnership”. Having regard to the numerous and varied methods spouses choose to arrange their financial affairs during marriage, 5 Margaret R.O’Sullivan, “Valuation Issues and Discretionary Trusts” [2008], <i>Estates, Trusts and Pensions Journal</i>, vol. 28, at page 75-76 6 Ibid., at page 76 2014 ONSC 6217 (CanLII) - 45 and the need to ensure an equitable result on marriage breakdown, a beneficial interest in a trust is not automatically excluded from a spouse's net family property merely because it is subject to discretion. The approach needs to be contextual, having regard to the particular circumstances of the parties, their financial situation and the terms of the trust in relation to the marital relationship on V-</p>

	day.
<i>McNamee v McNamee</i> , 2011 ONCA 533	<p>This case involves an estate freeze initiated by the Husband's father. The Husband's father transferred 500 common shares in his company to the Husband as part of the estate freeze. At trial the Husband claimed these shares were a gift. The Trial Judge determined that the shares were not a gift and therefore included the value of the shares in the Husband's Net Family Property. The Husband appealed.</p> <p>The Court of Appeal found that the Husband did receive the shares as a gift from his father as the shares were given gratuitously and the gift met all of the essential factors to meet the definition of a legally valid gift. The Husband's father's intention was to gift the shares, and the estate freeze was his ultimate motivation for providing such, not to avoid the wife's claim under the <i>Family Law Act</i> (see paragraph 34 of the decision).</p>
<i>Reisman v Reisman</i> , 2014 ONCA 109	<p>The main issue on appeal was whether the Husband's father's estate freeze was considered a fraudulent conveyance. The Trial Judge determined that the estate freeze was not a fraudulent conveyance. The Wife appealed. The Court found that since the parties were still married at the time of the conveyance, and the Wife previously agreed that the shares given to the Husband were a gift, the Court of Appeal dismissed the appeal. The Wife was not a creditor at the time of the conveyance, therefore, she could not claim the transfer of shares was a fraudulent conveyance.</p>
<i>Spencer v Riesberry</i> , 2012 ONCA 418	<p>The Wife held a contingent beneficial interest in Trust Property, which was created by her mother. However, the Wife did not have an interest in any specific property held by the Trust. Furthermore, the Court emphasized the importance of not conflating the Wife's power as trustee with her position as a beneficiary of the trust. The two roles must be considered separate and distinct.</p>
<i>Sagl v Sagl</i> , 1997 CarswellOnt 2144.	<p>The Husband created a trust two years prior to the parties marriage. The Trust held 98% of the common shares of a company. The Trustees were the husband and two others. The Trustees held absolute discretion over the Trust. There was no evidence before the Court that the Husband intended to create the Trust in order to defeat the Wife's family law claims. Justice MacDonald determined that the value of the Husband's contingent capital interest in the assets of the Trust constituted property. The Court determined that the value of the Trust should be calculated as at the valuation date and the total value was divided <i>pro rata</i> between the beneficiaries. (See paragraphs 37</p>

	and 38 of the decision).
--	--------------------------

PENSIONS²

Forms

Form	Description
Form 1	Application for Family Law Value
Form 2	Joint Declaration of Period of Spousal Relationship
Form 3	Contact Person Authorization
Form 4A	Statement of Family Law Value (Defined Contribution Benefit)
Form 4B	Statement of Family Law Value (Active Plan Member with a Defined Benefit)
Form 4C	Statement of Family Law Value (Active Plan Member with a Combination Benefit)
Form 4D	Statement of Family Law Value (Former Plan Member with a Defined Benefit or a Combination Benefit)
Form 4E	Statement of Family Law Value (Retired Member with a Defined Benefit Pension) <ul style="list-style-type: none"> - If this form applies, the plan is unable to transfer any amount of the value to a spouse's locked in retirement account (LIRA)
Form 5	Application to Transfer the Family Law Value <ul style="list-style-type: none"> - This form is used to transfer the spouse/former spouse's share of the family law value
Form 6	Application to Divide a Retired Member's Pension
Form 7	No Division of Family Law Value/Pension Assets <ul style="list-style-type: none"> - This form is used to advise the Plan Administrator that the Family Law Value or pension assets will not be divided.
Form 8	Post-retirement Waiver of Joint and Survivor Pension by the Former Spouse of a Retired Member on Spousal Relationship Breakdown <ul style="list-style-type: none"> - This form is used to waive the right to receive a survivor benefit on the death of the retired plan member.

Pension plans registered under the *Pension Benefits Act* (“PBA”) are regulated by The Financial Services Commission of Ontario (“FSCO”).

² This section is an amalgamation of the information provided in the following papers/presentation on this topic: “Recent Developments and Complex Issues in Property & Equalization Division of Pension Benefits” presented by Anna Slivinskis at the 6th Annual Recent Developments and Complex Issues in Property and Equalization on April 5, 2017; “Valuation Issues Involving Employment Pensions” presented by J.M. Norton at the 4th Annual Recent Developments and Complex Issues in Property and Equalization on March 4, 2015.

The *PBA* applies to all pension plans provided for persons employed in Ontario (with the exception of federally regulated plans).

To determine the value of a pension plan for the purposes of determining the net family property, either spouse may apply to the Plan administrator to have the plan valued (*PBA* 67.2).

Upon receipt of the application, the Plan Administrator will calculate two values:

- 1) the preliminary value. This is the value of the member's pension assets calculated as at the family law valuation date (see: *PBA* s. 67.2(1),(2), (3) and (4)).
- 2) the imputed value. This is the value of the pension assets that accrued while the parties were spouses as of the family law valuation date. (see: *PBA* s. 67.2(5)).

Preliminary Value

- Calculations of the preliminary value will depend on whether the plan is defined benefit or defined contribution, as well as, whether the member was eligible for an earliest unreduced retirement or was a former member entitled to a deferred pension or whether the spouse retired at the Family Law Valuation Date.
- The calculation is usually determined:
 - a) As if the member terminated employment or membership on the Family Law Valuation Date
 - b) Without consideration of future salary, benefits or changes to the plan
 - c) Adjusted to include all ancillary benefits that the member was eligible for on the Family Law Valuation Date.

Defined Benefit Plans

- Defined benefit plans guarantee the income at retirement. This income is based on factors such as the average employment income, years of service and age of the plan member

Defined Contribution Plans

- Defined contribution plans generally constitute a fund that is held for the benefit of the plan member with employee and employer contributions.

Imputed Value

67(5) *PBA* The imputed value, for family law purposes, of each spouse's pension benefits, deferred pension or pension, as the case may be, is that portion of the preliminary value that is attributed by the administrator, in accordance with the regulations,

- (a) to the period beginning with the date of the spouses' marriage and ending on their family law valuation date, for the purposes of an order under Part I (Family Property) of the *Family Law Act*; or
 - (b) to the period beginning with the date determined in accordance with the regulations and ending on the spouses' family law valuation date, for the purposes of a family arbitration award or domestic contract.
- Note: on FSCO applications, if there is a disagreement as to the family law valuation date (aka date of separation), can provide two dates. Therefore, two statements of imputed value will be prepared.
 - The Plan Administrator must provide a copy of the statement of imputed value to each spouse within 60 days.
 - Costs of the Valuation:
 - o \$200 (maximum) for defined contribution plans
 - o \$600 for defined benefit plans
 - o \$800 for plans incorporating both defined contribution and defined benefits

After a value has been determined:

- 50% rule. PBA ss 67.3(6) and 67.4(5) and 67.5(1), no more than 50% of the imputed value may be paid to the spouse.
- Can be transferred by way of lump sum payment if
 - o No reasonable prospect the spouses will resume cohabitation
 - o No installment of the member's pension was paid prior to the family law valuation date.
 - o A statement of the imputed value of the member's deferred pension was obtained from the Plan Administrator
 - o The transfer is provided for by an Order under Part I of the Family Law Act
 - o The amount to be transferred is expressed as a specific amount or as a proportion of the imputed value of the pension benefits.

Lump Sum Payments

- Who can receive a lump sum payment?
 - o Another pension plan registered in Canada if the administrator agrees to accept the transfer
 - o A prescribed retirement savings arrangement
- Section 10.1(4) of the *Family Law Act* governs the factors to be considered in determining whether and how much a lump sum payment from a pension plan should be paid out. These factors include:
 - 1) The nature of the assets available to each spouse at the time of the hearing

- 2) The proportion of a spouse's net family property that consists of the imputed value, for family law purposes, of his or her interest in the pension plan
 - 3) The liquidity of the lump sum in the hands of the spouse to whom it would be transferred
 - 4) Any contingent tax liabilities in respect of the lump sum that would be transferred.
 - 5) The resources available to each spouse to meet his or her needs in retirement and the desirability of maintaining those resources.
- Think about calculation of disposition costs. Since the passing of *Bill 133* in 2009, pensions are not evaluated by Plan administrators. These administrators provide only the gross value of the pension, pursuant to the legislation. Therefore, no tax liabilities are considered.
 - Lawyers should consider hiring an expert to determine the value of the taxes applicable to the pension.

SERPs

- Supplementary Executive Retirement Plans (aka "SERPs") are created when pension plan's formulas exceed the maximum pension accrual permitted under the *Income Tax Act*.
- Funds may not be withdrawn until the retirement age of the plan member.
- These plans rarely permit lump-sum transfers upon the breakdown of marriage.
- It is advisable to have an expert develop a pension value for these plans as they are not included in the valuation prepared by Pension Administrators.

Cases:

Case Name	Conclusions
<i>Decaen v Decaen</i> , 2013 ONCA 218	A plan member may apply for a lump sum transfer to satisfy an outstanding equalization payment, but may not apply for a lump sum transfer to satisfy a spousal support order as the requirements under <i>PBA</i> s. 67.3(1) do not permit such. (See paragraph 74 of the decision)
<i>Wesley v Wesley</i> – 2015 ONSC 5793	The Husband, who had a pension with Hydro One, refused to take steps to have the pension valued. Therefore, the Court dispensed with the requirement for the Husband's signature or consent and Ordered that the Wife be permitted to obtain the value from the pension plan administrator.
<i>Cirocco v Cirocco</i> 2017 ONSC 97	followed Wesley. The Court has jurisdiction to dispense with the necessity of the Plan member's signature to obtain the commuted value of the Husband's pension and for the division of the commuted value

<i>Nicholson v Nicholson</i> – 2016 ONSC 5573	Value of Husband’s pension increased after the family law valuation date. The Wife sought prejudgment interest on the amount owed to her on equalization, which was being paid by way of pension transfer. The Court held that the wife was entitled to pre-judgment interest from the family law valuation date to the transfer date based on the increase in value following the family law valuation date. The Husband had the ability to pay the equalization payment through a lump sum payment, but did not. Therefore, the Husband had benefitted from the Applicant’s portion of the pension increasing in value prior to the transfer.
---	---

See also: *Pearson v Poulin*, 2016 ONSC 3707, *Kirvan v Kirvan*, 2016 ONSC 7722, *Stephens v Stephens*, 2016 ONSC 367.