

Unequal Division of Family

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Question: I was advised by my lawyer that the value of all property that is acquired after marriage is to be divided equally on separation. I do not think that would be fair in my case as I did far more financially for the family then did my spouse during the marriage. Is there any way I can get out of equally dividing the value of all of our property on separation with my spouse?

Answer:

Part I of the Ontario Family Law Act (FLA) provides for the equalization of net family property on separation. Ontario courts have little in the way of discretion to vary the provisions of the FLA as it relates to the equalization of net family property. Pursuant to section 5(6) of the FLA, the Court may only 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* (italics added) having regard to the eight enumerated factors set out in Section 5(6).

The Ontario legislature's use of the word "unconscionable" sets a very high bar. The goal of the equalization provisions of the FLA as currently worded is to promote certainty of application and finality in order to limit litigation related to property issues. Therefore, case law has equated "unconscionable" with an equalization payment that would "shock the conscience of the Court" (*Merklinger v. Merklinger*, (1992), 11 O.R. (3d) 233 (Ont. Gen Div.) aff'd (1996) 30 O.R. (3d) 575 Ont. C.A.). An equalization that may result in an unfair or inequitable payment is not sufficient for a court to intervene.

The goal of the FLA in promoting certainty and finality is important. The FLA presumes that spouses will make equal contributions to a marriage. This is inherent in section 5 (7) of the FLA:

“The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contributions, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of net family properties, subject only to the equitable considerations set out in subsection (6). “

There are numerous instances where spouses may not contribute to the well- being of the family, financial or otherwise. This may not be the fault of the individual spouse due to illness or addiction that may prevent a meaningful contribution. In other cases a spouse may lack work ethic, the ability or desire to participate in the bringing up the children of the marriage, or an ambition to accumulate wealth. Some may argue that In situations where it can be demonstrated that one spouse contributed far more to the general well- being of the family, financial or otherwise than the other spouse there should be some judicial discretion to vary the equalization payment that may be owed even if the equalization payment would not be “unconscionable”. However, as the FLA now reads, it is not likely that the Court in your situation would award more of the value of the family property to you based solely on unequal financial contributions during the marriage.