Separation and Property Division

It is a commonly believed by many people going through separation that everything they own will be split equally between them. In fact, it is not that simple.

For married couples who have separated, division of property is referred to as "equalization of net family property" and is governed by Part 1 of the *Family Law Act* of Ontario. The general idea behind equalization, with some important exceptions, is that only property, minus debts, accrued from the date of marriage to the date of separation should be divided equally. This is achieved by splitting the difference between the "net family properties" of the spouses.

To illustrate equalization, here is a simple example. Say a husband's only asset on the date he got married and on the date of separation, with no debts on either date was a bank account. He had $1,000 in the bank account on the day he got married, and $2,000 on the day he separated from his wife. In this case, his "net family property" would be the difference between those two numbers, $1,000. Now say his wife has a "net family property" of $2,000. In that case, in general, the equalization payment owed by the wife to the husband would be half of the difference between net family properties, $500.

There are many things that would make the calculation of net family property and equalization much more complicated than my example. There are too many to list here, but there is one asset that is an exception to the general rule that only the increase in the value of assets from marriage to separation is to be used in calculating equalization: the "matrimonial home". Under Part 1 of the *Family Law Act*, the net value of a house that a spouse owned on the date of marriage will not be deducted from its net value on the date of separation, if the spouses "ordinarily occupied" the same home when they separated. If only one spouse owns the family home, this could potentially make that spouse's equalization payment much higher than he/she would have to pay without the matrimonial home exception. Again, this exception only applies if the spouses live in the same house when they get married and before they separate. There can also be more than one matrimonial home. A seasonal home might be counted as a matrimonial home, for instance.

There are exceptions to what can be included in a spouse's net family property. For example, property that was inherited by a spouse during the marriage is not included in the calculation, if that property can be clearly identified and has not become part of the matrimonial home's value. There are also circumstances in which the law might allow an unequal division of net family property, meaning that the difference between will not be split equally. This might occur when it would be extremely unfair for one of the spouses if the normal method were used. This is not something that happens very often.

Property division between separated common law spouses is completely different than equalization for married couples. There is no standard method to calculate how much one spouse owes the other after separation. In some cases, each spouse might simply keep their own assets and divide assets that are held jointly. In other cases, particularly where one spouse is the sole owner of some of the family's property, and the other spouse has contributed work and/or money into that property, there may be a case for compensation due to what is called "unjust enrichment". This compensation can

take several forms, one of which is called a “constructive trust”, in which a spouse gains an ownership interest in the asset itself. How property will be divided by a court after common law couples separate is not set in stone and depends upon many factors.

Whether you are married or common law, if you are separated and there are significant assets or debts to divide, it is highly advisable that you seek the advice of a lawyer. If you are going through a separation and would like help understanding your rights or obligations under the law, please feel free to contact Marshall & Mahood.