

# The Adviser



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## PITFALLS OF THE FAMILY LAW ACT, 1986

All lawyers practising in Ontario should be aware of the implications of the Family Law Act, 1986 which was proclaimed in force on March 1, 1986. The Act applies to many aspects of law and is of concern not only to lawyers practising in the area of family law, but also to lawyers practising in the areas of real estate law, corporate-commercial law, estates and trusts law, and insurance law. Members are cautioned that there is a greater need now for independent legal advice, if not independent representation, which should not be just a friendly arrangement between law offices.

Because of the significant changes in the law and procedures embodied therein, and the limitations on the capacity of the Practice Advisory Service to respond to any volume of calls for guidance, we ask members who have questions to seek the assistance and advice of members who are knowledgeable concerning the Act.

This material is an outline of some of the significant points raised by the legislation, however, by necessity, it is by no means exhaustive; accordingly, members are cautioned to refer to the Act as well as the Continuing Legal Education materials prepared jointly by the Law Society of Upper Canada and the Canadian Bar Association - Ontario on the subject.

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### FAMILY LAW

1. The Act has retroactive effect, and applies unless an application for division of assets under section 4 of the Family Law Reform Act was settled or adjudicated before June 4, 1985.

2. The division of assets between spouses on separation, divorce, after declaration of the nullity of a marriage, or on an application for a declaration that a spouse is 'improvidently depleting' his or her assets, will apply to virtually all assets owned by the spouses, and is no longer limited to their 'family assets' or 'non family assets'.

3. On the happening of the earliest of any of the events referred to in paragraph 2 (called the 'valuation date'), each spouse must calculate his or her 'net family property'. Net family property is a defined term under the Act which, in general, permits a deduction for the spouse's debts and liabilities, and for the value of property a spouse owned at the date of the marriage, less debts and liabilities, and excludes the full value of property inherited or received by way of gift, damage awards, and insurance proceeds, acquired after the date of marriage. In order to be excluded from the spouse's net family property, the property must still exist on the valuation date or must be traceable into another asset existing at that time. The net family properties of the two spouses are compared, and the values of the net family properties must be equalized between the spouses. The concept of tracing is an important one, and in certain situations, solicitors may have an obligation to warn clients receiving property which may be excluded property under the Act to protect such property by keeping it separate from other property or by being able to trace it into other property.

4. A matrimonial home receives special treatment, and cannot be deducted or excluded from the net family property of the owning spouse regardless of the way in which it was acquired. For example, if the husband has a house but sells it before the marriage for \$100,000, and brings that sum into the marriage in cash, on separation the \$100,000 would be deducted from the calculation of his net family property. But if the husband had brought the house itself into the marriage, no deduction



would be permitted.

5. The court can order an unequal division of the values of the net family properties only if the equal division would be 'unconscionable' and meets one of the other criteria set out in the Act.

6. An application for the equalization of property must be brought before the earliest of :

- two years after the marriage is terminated by divorce or a judgment of nullity;
- six years after the spouses separate without a reasonable prospect of the resumption of cohabitation;
- six months after the first spouse's death.

For spouses who have already been separated for six years or longer, the application must be brought not later than August 31, 1986.

7. An application for support cannot be brought after two years after the spouses separate, or, if a separation agreement between the spouses provided for support, after two years after default under the agreement has subsisted.

8. Support obligations now arise in common law situations where the period of cohabitation is not less than three years, or where the common law spouses live in a relationship of some permanence and are the natural or adoptive parents of a child.

9. A court application may be brought to have any support order, even one made under the Family Law Reform Act or prior to March 31, 1978, indexed according to the Consumer Price Index. Separation agreements may also be filed with the appropriate court to be enforced or indexed.

10. Spouses can contract out of most of the effects of the Act by a domestic contract. Some of the provisions spouses cannot contract out of are:

- the right to possession of the matrimonial home;
- the right to set aside support provisions in a domestic contract;
- the right to file a domestic contract with the court and have it enforced; and
- the right to set aside a domestic contract or a provision in it for failure to make financial disclosure.

The right to bring an application to set aside a domestic contract or a provision in it on the ground of insufficient financial disclosure may apply to domestic contracts validly made before the Act came into force.

## REAL ESTATE LAW

1. The Act prohibits distribution in the administration of a deceased spouse's estate within six months of the spouse's death or after the executor or administrator of the estate has notice of an application under Part I of the Act, unless the surviving spouse or applicant has given a written consent to the distribution or the court has approved the distribution. Solicitors acting for purchasers of real estate owned by a deceased spouse must exercise caution to ensure that the sale is a permitted one.

2. If a matrimonial home was owned by the deceased spouse as a joint tenant with a person other than the surviving spouse, the joint tenancy is deemed to be severed immediately before the time of death. This will apply to the death of a spouse on or after March 1, 1986. The surviving joint tenant will become a tenant in common, and the identity of the other tenant or tenants in common will depend on the terms of the deceased spouse's will or the members of his or her family, if there was no will. Solicitors must ensure that full title can be given by the vendor.

3. A surviving spouse who has no interest in a matrimonial home he or she is occupying at the time of the deceased spouse's death has a right to retain possession against the deceased spouse's estate, rent free, for a period of sixty days after the deceased spouse's death. This right must be taken



into consideration if the property is to be sold.

4. Either spouse, or both spouses, may file a written designation of a property as a matrimonial home. If such a notice is filed by one spouse, it would constitute notice to a purchaser that the property is a matrimonial home and presumably prevent the sale of the property without the appropriate consent.

5. The prescribed statement by a person making a disposition or encumbrance of a property constitutes sufficient proof that the property is not a matrimonial home unless the person to whom the disposition or encumbrance is made has notice to the contrary. Actual notice is no longer required. Accordingly, solicitors acting for purchasers and mortgagees are cautioned to enquire of their clients as to whether they have knowledge of facts which may indicate the property is a matrimonial home.

6. The decision as to whether the matrimonial home is to be put into the wife's or the husband's name or joint names is of great significance, as the calculation of the spouses' net family properties will use the title as a starting point, and depending on the assets each spouse brought into the marriage, the spouse without legal title may end up with less than an equitable amount. For example, assume that the husband brought \$100,000 cash into the marriage which was then used to purchase a matrimonial home in his name, and that the value of the house had risen to \$150,000 by the time of the separation. Assume also that there are no other assets involved and that the marriage had lasted for more than five years. The husband's net family property would be \$150,000 minus \$100,000, or \$50,000, of which the wife would be entitled to one-half, or \$25,000. If the house had been put into the wife's name, her net family property would be \$150,000, the husband's net family property would be nil, as net family property cannot be less than zero, and the wife would have to give \$75,000 of the value of the house to the husband and could keep the remaining \$75,000 in value. If the house had been put into the names of both spouses, whether as joint tenants or as tenants in common, both of which are presumed to mean an equal ownership between the spouses, the husband's net family property would again be zero (\$75,000 minus \$100,000, but increased to zero by the Act), the wife's net family property would be \$75,000, and on separation, the wife would have to share her \$75,000 equally with the husband. The husband would thus end up with \$37,500 from the wife's share of the house in addition to his own \$75,000 share of the house; the wife would end up with only \$37,500.

## WILLS AND ESTATES LAW

1. For the first time, there is a right to an equalization of property between spouses on the death of one of the spouses, if the deceased spouse had the greater net family property, and died on or after March 1, 1986. The surviving spouse must elect whether to take the entitlement under the Act, or the benefits under a will or on intestacy. The election must be made and filed in the office of the Surrogate Clerk for Ontario within six months of the date of the spouse's death. A failure to file the election will mean a deemed election against the entitlement under the Act.

2. An election in favour of the entitlement under the Act will be deemed to mean a disclaimer of benefits under the will, under an insurance policy, and under a pension or similar plan providing a payment on the death of the spouse. A will must then be read as if the surviving spouse had predeceased the deceased spouse, unless the will expressly provides otherwise.

3. Because the Act permits the surviving spouse to choose between the benefits under the will and the entitlement under the Act, the provisions of a will which does not contain benefits at least equal to the entitlement under the Act may be upset by the election. A will leaving the entire estate to the surviving spouse is not likely to be upset as the surviving spouse could not obtain a greater sum under the Act than under the will.

4. A will or deed of gift can expressly provide that the income on an inheritance or gift does



not form part of the net family property of the beneficiary spouse.

5. There are limitations on the distributions that an executor or administrator can make from an estate during certain periods (see 1. under Real Estate Law). Personal liability can result from improper distributions.

6. An order for support binds the estate of the supporting spouse unless the order provides otherwise.

## INSURANCE LAW

1. If the surviving spouse elects to take the entitlement under the Act, he or she is deemed to have disclaimed the right to receive payment under a policy of insurance on the life of the deceased spouse. Insurance companies and their counsel must therefore ensure that a surviving spouse is entitled to the benefits of any insurance policy before payment is made.

2. If an insured wishes his or her spouse to receive the payment under the insurance policy whether or not the spouse chooses the entitlement under the Act, a special form of written designation must be made by the insured.

## CORPORATE AND COMMERCIAL LAW

1. Because life insurance proceeds and any traceable property bought with the life insurance proceeds do not form part of a spouse's net family property, the way in which life insurance is owned pursuant to a shareholders' buy-sell agreement may have a significant impact on the net family property of the surviving shareholder. For example, if the life insurance used to fund a buy-sell agreement is owned personally by A and B, the two shareholders of the operating corporation, on A's death, B would receive the proceeds of the insurance personally and would use them to purchase the shares of the operating company previously owned by A. Because of the exclusions permitted by the Act, the shares purchased from A's estate would not form part of B's net family property, and would not be subject to sharing with B's spouse. If, on the other hand, the life insurance is owned by the operating corporation, on the death of shareholder A, the proceeds of the insurance policy would be paid to the corporation, and whether the corporation then redeemed A's shares or B purchased A's shares and then paid the proceeds of insurance out to himself by way of dividend to fund the purchase, B would not receive the insurance proceeds personally. The proceeds would not then be traceable into the shares acquired from A, and would not be an exclusion from B's net family property.

2. Although it is the 'value' of assets which must be equalized between the spouses on separation, etc., and not the assets themselves, an attempt to equalize values will almost always involve the transfer of assets or the need to mortgage or pledge assets in order to have enough cash to satisfy the obligation. The court may order that the obligation may be paid out over a period of up to ten years, or that all or part of the obligation may be deferred for a period of up to ten years. This ten year period cannot be extended.

3. An order made in connection with the equalizing of net family properties or in connection with the title or right to possession of any property is not to be made so as to cause serious harm to, or the sale of, an operating business 'unless there is no reasonable alternative method of satisfying the award'.