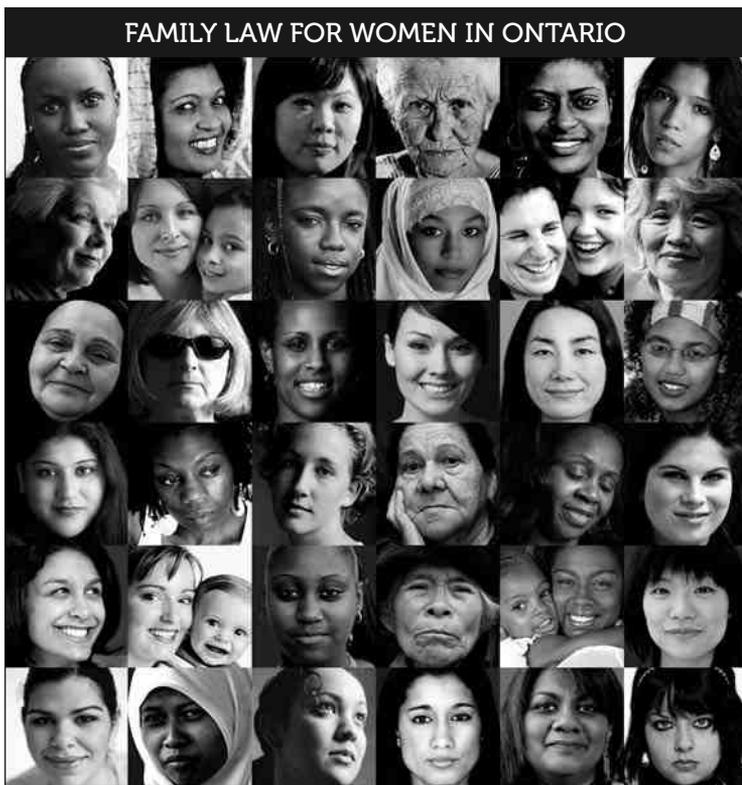


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## How Property is Divided in Family Law

ENG 010



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# How Property is Divided in Family Law

*This booklet is meant to give you a basic understanding of legal issues. It is not a substitute for individual legal advice and assistance. If you are dealing with family law issues, it is recommended that you get legal advice as soon as possible to understand your options and to protect your rights. For more information about how to find and pay for a family law lawyer, see our booklet on "Finding Help with your Family Law Problem". You may also want to read our booklet on "Domestic Contracts", and view our webinars on "Looking for a Family Law Lawyer", "Property Rights and Obligations of Married and Co-habiting Partners", and on other family law topics. All of these resources are on our website at [www.onefamilylaw.ca](http://www.onefamilylaw.ca).*

When you and your partner separate, you will have to divide who gets what property that you had as a family. **Property** means anything a person owns, such as a home, car, personal and household items, pensions, bank accounts and any other investments. Property also includes **debts**. A debt is a promise to pay back money that was borrowed. Debts can include a mortgage on a house, a car lease and a loan.

The value of some property can change over time, such as land, a business, bank accounts and investments. When couples are dividing family property, the property value they usually use is the amount of money the property was worth on the date that the partners separated and knew they would not get back together.

When partners separate, there are legal rules for dividing the property that they had during their relationship. The rules for dividing family property can

be very complicated. If you are in this situation, it is recommended that you get legal advice from a family law lawyer.

In Ontario, when partners separate, the way their property is divided depends on whether or not they are legally married. Married couples automatically share the value of the family property if they separate. Couples who live together, but are not legally married, may have some rights to shared property, but they do not automatically have this right and the Court may have to decide.

## **How Property is Divided for Married Couples**

The law sees marriage as an economic partnership and assumes that each married spouse has contributed equally to the relationship, financially and in other ways. When married couples separate, the general rule is that spouses must equally share the value of any property that was gained during the marriage and which they still own at separation. Usually each spouse keeps their own property, but they must share any increase in the value of their property that built up during the marriage, no matter who paid for it or whose name is legally on the property. To do this, one spouse usually must pay the other spouse money, called an **“equalization payment”**. The steps to figure out the equalization payment are explained below.

## **What is the Process for Dividing Family Property?**

For couples who married, the process of dividing family property between the spouses is called **equalization**. There are two main steps in the equalization process.

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**Step 1: Calculate Net Family Property (NFP)**

Each spouse must calculate what all of their own property minus debts is worth, which is called a person's **Net Family Property (NFP)**.

To do this, each spouse adds up the value of their property minus their debts, first on the date of their marriage, and then on the date of their separation. To finish the calculation of Net Family Property, you take the value of all property minus debts at the date of separation and subtract the value of all property minus debts at the date of marriage. For example:

<b>Spouse A – total property minus debts</b>	
Separation Date:	\$120,000
Marriage Date:	\$50,000
Separation – Marriage =	\$70,000
<b>Net Family Property (NFP) for Spouse A = \$70,000</b>	

<b>Spouse B – total property minus debts</b>	
Separation Date:	\$45,000
Marriage Date:	\$25,000
Separation – Marriage =	\$20,000
<b>Net Family Property (NFP) for Spouse B = \$20,000</b>	

**Step 2: Share the increase in family property equally**

After each spouse calculates their own Net Family Property (NFP), the spouse with the higher NFP has to share some of it with the other spouse. In this example, Spouse A with \$70,000 NFP must share some of it with Spouse B whose NFP is \$20,000.

Spouse A must pay half of the difference between the two amounts to Spouse B. This is the **equalization payment:**

**Equalization Payment – spouses equally share the increase in family property**

Spouse A NFP = \$70,000

Spouse B NFP = \$20,000

Spouse A – Spouse B = \$50,000 is the increase in family property

\$50,000 divided in half = \$25,000

**Spouse A must pay Spouse B \$25,000 in an equalization payment.**

In some cases, the Court can order a different equalization payment if the equalization amount is unfair. For example, the Court could order a spouse to pay more money if that person hid large debts at the time of marriage, or if a spouse built up a large amount of debt on purpose.

## **Exceptions to the General Rules**

### **i) What Happens When One Spouse Has More Debts than Other Property?**

Sometimes a spouse ends up with more debts than property with a positive value (also called assets). At the end of the marriage, this can mean they don't have enough money to pay off their debts.

Sometimes the positive value of all of a spouse's property decreases over the course of the marriage. This can mean they have less property at the end of the marriage than when they got married.

When either of these situations happens, the calculation for that spouse's Net Family Property (NFP) ends up

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being zero or less (which would be a negative number).

To calculate the equalization payment in such situations, the spouse with zero or a negative NFP has a zero (\$0) NFP for the equalization payment (instead of a negative number). This way, the spouse who has more property does not end up helping to repay the other spouse's debts, and does not have to pay an unfair equalization payment.

## ii) The Family Home

A married couple's family home is treated differently than all other property. The family home, also called the **matrimonial home**, is the home where your family had been regularly living at the time you separated.

If the spouses bought the family home during the marriage, they equally share its value on the date of separation. When married couples separate, both spouses have the right to share the full value of the family home at the date of separation, no matter whose name is on the legal title to the property.

The only time the value of the family home would not be part of the equalization payment is if you and your spouse have signed an agreement (a marriage contract or separation agreement) that says the home will be kept out of the equalization process.

But if one spouse owned the home before marriage and it was the family home on the date of separation, special rules apply. The spouse who owned the home before marriage includes the value of the home at the date of separation in the calculation of his or her Net Family Property (NFP), but does not include the value of the home in property owned on the date of marriage.

This means that if one spouse brought the home into the marriage and still owns the home on the date of separation, his or her NFP will include the entire value of the home, not just the change in value during the marriage. This can have a big impact on the calculation of the equalization payment.

### **iii) Excluded Property -- Gifts and Inheritances**

There are also some exceptions to the general rules for dividing family property for special gifts and money. Some examples of exceptions are: gifts or money that a spouse receives from a person other than their spouse; the benefits from another person's life insurance; and an inheritance. An inheritance is something that a person wills or leaves to you after they die.

These kinds of property that you received during the marriage are usually "**excluded property**", which means they are **not included** in the spouse's Net Family Property (NFP) calculation. If you spend the money from such gifts, life insurance or an inheritance during the marriage, then the money often becomes hard to trace, and then the amount that was spent cannot be excluded from that person's NFP calculation.

But it is important to know that if a gift or inheritance is used towards buying or improving the family home, then it becomes part of the value of the family home, which is included in the NFP calculation.

## **How Property is Divided for Common-law Couples**

Partners who live together in a relationship but choose not to get legally married are sometimes called "**common-law**" partners. Even though the law recognizes common-law relationships in many ways,

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the rules about dividing family property when couples separate do not apply to common-law couples living in Ontario.

In a common-law relationship, each of you owns whatever property you brought into the relationship and whatever you bought with your own money while you were together. If you and your partner separate, there is no automatic right to divide or share the increased value of any property.

However, property that you and your partner bought together is owned by both of you jointly. Both people who jointly own property have the right to some of the value of that property, if one or both of you want to divide it when you separate. This includes the family home.

### **i) The Family Home**

Partners in common-law relationships do not have the same automatic rights to share in the value of the family home. The home that you lived in as a couple belongs to the person whose name is on the legal title.

### **ii) Cohabitation Agreements**

You and your common-law partner could write a cohabitation agreement to set out how you will deal with property and debts if you separate. A **cohabitation agreement** is a legal contract if it is in writing, signed by both partners and signed by someone who watches or witnesses when the partners sign. It is a good idea to talk to a lawyer before signing a cohabitation agreement.

### **iii) Going to Court**

You can ask a Court to order your common-law partner to follow the terms of a cohabitation agreement. If you do not have a cohabitation agreement and you cannot agree about how to divide your property, either one of you can go to Court. You can ask a judge to award you a share of what you bought as a couple, or a share of the amount that the property increased during the relationship.

To get this kind of award, you must be able to prove that you contributed to the maintenance or increase in the value of the property. For example, you may get some money if you can prove that you paid some of the bills on your partner's home, or that you added to the value of his or her business by doing some work for the business for free. It is important to talk to a lawyer if you are thinking about going to Court.

### **Staying in the Family Home**

The rules about who gets to stay in the family home, and who can sell it, also depend on whether the partners were legally married or in a common-law relationship.

#### **i) Married Couples**

Both married spouses have an equal right to stay in the family home until it is sold or until there is a Court Order or agreement, no matter whose name is on the lease or legal title to the property. Neither spouse can change the locks, sell, mortgage, rent or sublet the home without the other spouse's permission.

#### **ii) Common-law Couples**

The rules about family homes do not apply to common-law partners. A common-law partner does

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not automatically have the right to stay in the family home if her or his name is not on the lease or legal title to the property. If only one partner owns the property, that person can change the locks, sell, mortgage, rent or sublet the home without the other partner's permission. If you are renting a house or apartment, only the tenants who have signed the lease have the right to continue living there.

### **iii) When there is Abuse**

When a couple is legally **married**, if one spouse is afraid of harm by the other spouse, the person who is afraid can ask a Family Court for an **Order for Exclusive Possession** of the family home. Exclusive Possession means that only one spouse has the right to stay in the family home, and can change the locks. The other spouse loses the right to enter the family home.

Exclusive Possession Orders usually apply to the family home that the couple owns. The Order does not change the right that both spouses have to share the value of the family home. An Exclusive Possession Order usually applies until there is a decision to resolve the ownership and shared value of the family home.

A partner in a common-law relationship cannot get an order for exclusive possession of the family home.

A person who is afraid of harm to themselves or their children by an intimate partner, whether they are married or not, can ask the Family Court for a Restraining Order. A **Restraining Order** can say that the abusive partner is not allowed to contact or go near the other partner or children. This can include staying away from the family home, as well

as workplace, school, and other places that the protected partner and children usually go.

A person can get a Restraining Order against an abusive partner if they are or were married, or if they live together or used to live together. It does not matter if they own or rent a home, and it does not matter whose name is on the legal title for the property. A Restraining Order does not affect who owns the family home, or how the value of the home will be shared.

### **Rules for Family Property on Reserves**

Family law passed by the Ontario government does not apply to land, homes and buildings on **First Nations Reserves**. But there is law passed by the federal government that applies to family property on Reserves, unless a Band has passed its own rules for their Reserve.

The federal law applies to married spouses, and also to common-law partners who have been in a relationship for one year or more. **It is important for both Indigenous and non-Indigenous women who live on or have family property on a Reserve.**

The federal law says:

- both partners have a right to half the value of the family home, land and buildings that increased during the relationship;
- a Court can make an **Exclusive Occupation Order** that one partner has the right to live in the family home after the couple separates, whether or not the partner owns the home;

- if there has been violence between intimate partners or in the home, and there is an emergency to protect a person in the home from harm, a Court can make an **Emergency Protection Order** that says one partner has the right to live in the family home for 90 days, whether or not the partner owns the home, and the other partner must stay away.

*For more information about family property on Reserves, see the FLEW booklet for Indigenous Women, "How Property is Divided in Family Law". You may also view our webinar, "Protecting Women's Rights to the Family Home on Reserve". These resources are on our website at [www.onefamilylaw.ca](http://www.onefamilylaw.ca).*

The views expressed in these materials are the views of FLEW and do not necessarily reflect those of the Province.

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**There is a greater risk of violence when an intimate relationship is ending. If you are in immediate danger, call 911. If you or someone you know is at risk, visit the FLEW website for information on getting support.**

If you are a francophone woman living in Ontario, you have the right to access French language services in family law court proceedings. For more information regarding your rights, contact a lawyer, a community legal clinic, or the support line Femaide at 1-877-336-2433, TTY 1-866-860-7082.

You can find more information on how to access services in French on our website at [www.onefamilylaw.ca](http://www.onefamilylaw.ca) or [www.undroitdefamille.ca](http://www.undroitdefamille.ca).

## Family Law topics available in English\*

1. Alternative Dispute Resolution and Family Law (ENG 001)
2. Child Protection and Family Law (ENG 002)
3. Child Support (ENG 003)
4. Criminal and Family Law (ENG 004)
5. Child Custody and Access (ENG 005)
6. Domestic Contracts (ENG 006)
7. Family Law Arbitration (ENG 007)
8. Family Law Issues for Immigrant, Refugee and Non-status Women (ENG 008)
9. Finding Help with your Family Law Problem (ENG 009)
- 10. How Property is Divided in Family Law (ENG 010)**
11. Marriage and Divorce (ENG 011)
12. Spousal Support (ENG 012)

*\* This booklet is available in multiple formats and languages. Please see [www.onefamilylaw.ca](http://www.onefamilylaw.ca) for more information. You can also find additional materials on the website to help you understand your family law rights.*

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