

## PUBLICATION

### Dividing Property in Divorce Proceedings: What is excluded?

Asher M. Macdonald

December 20, 2016

#### Dividing Property in Divorce Proceedings: What is excluded?

Before dividing marital assets in a divorce, any possible exemptions must be identified as described in the *Matrimonial Property Act* (the Act). An exemption is property that is not equally divided as part of a matrimonial settlement.

The *Matrimonial Property Act* requires the Court to distribute property in a just and equitable fashion, taking into consideration several factors that determine if there are any exemptions. Exemptions described in the Act include:

- third party gifts (meaning not from the husband or wife);
- inheritances;
- pre-marital assets;
- individual tort damage settlements; and
- individual non-property related insurance proceeds, such as a settlement from a motor vehicle accident.

At first glance, these exemptions seem straight-forward. For example, if you bought a house before you married, you may think the house is exempt from division but the Act and Court interpretation suggest otherwise.

We therefore must turn to the underlying theme of 'just and equitable division' under the Act. The Act provides a long list of matters to be considered to determine what is just and equitable, ranging from:

- duration of the marriage and income earning capacity;
- contributions made during the marriage, directly or indirectly; and
- any other facts or circumstances that are relevant.

Ultimately, the Court determines what matrimonial property should not be equally divided. However, most property acquired during the marriage will be equally divided except for exempt property.

Take the division of a house for example: You purchased your home for \$200,000 before marriage and the value remained \$200,000 when you married. Throughout your 10 years of marriage, your spouse stayed at home to raise the children and the house appreciated to \$1,000,000. Assuming there is no mortgage:

- Will the home be divided equally, with \$500,000 going to each spouse?
- Will the spouse who originally purchased the home be entitled to the first \$200,000 out of the total value of the home? Then, the each spouse receives 50% of the remaining \$800,000?
- Will the entire value of the home be exempt from division and go to the original spouse who bought the home prior to marriage?
- Or will the Court make a just and equitable division from the options above?

These are the types of questions asked in divorce proceedings and there are many factors and situations that complicate matters further, such as:

- Situations where a couple is not married living as Adult Interdependent Partners;
- Mortgage payments made by a spouse who is not on the property title; and
- Using a line of credit to finance one spouse's corporate interests.

For further information, please contact any member of our Family Law Group.