

How Property is Divided in Family Law

Booklet for Indigenous Women
FAMILY LAW FOR WOMEN IN ONTARIO

All Women.
One Family Law.
Know your Rights.



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 view our webinar on “Looking for a Family Law Lawyer”.

All of these resources are on our website at www.onefamilylaw.ca.

How Property is Divided in Family Law

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.

These rules apply everywhere in Ontario, but there are some exceptions on First Nation Reserves. There are different rules that apply to the family home and other buildings and land on Reserves, and they are explained in this booklet under the heading Rules for Family Property on Reserves.

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.

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:

Spouse A – total property minus debts

Separation Date:	\$120,000
Marriage Date:	\$50,000
Separation – Marriage =	\$70,000

Net Family Property (NFP) for Spouse A = \$70,000

Spouse B – total property minus debts

Separation Date:	\$45,000
Marriage Date:	\$25,000
Separation – Marriage =	\$20,000

Net Family Property (NFP) for Spouse B = \$20,000

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 share the increase in family property

Spouse A NFP =	\$70,000
Spouse B NFP =	\$20,000
Spouse A – Spouse B =	\$50,000

\$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

What Happens When One Spouse Has More Debts than Other Property

Sometimes a spouse ends up with more debts than property with 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 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.

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 your family home is on a First Nations Reserve, special rules apply that are explained below under the heading Rules for Family Property on Reserves.**

When the family home is bought during the marriage, the spouses equally share its value on the date of separation. 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.

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.

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 (**unless you live on Reserve. See the section called Rules for Family Property on Reserves.**)

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, the rules about dividing family property when married 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 part of the value of that property, if one or both of you want to divide it when you separate. This includes the family home.

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. **If your family home is on a First Nations Reserve, special rules apply that are explained below under the heading Rules for Family Property on Reserves.**

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.

Going to Court

You can ask a Court to order your 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. **If your family home is on a First Nations Reserve, special rules apply that are explained below under the heading Rules for Family Property on Reserves.**

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. **If your family home is on a First Nations Reserve, special rules apply. Instead of this section, go to the heading below for Rules for Family Property on Reserves.**

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.

Common-law Couples

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

When there is Abuse

If one spouse is afraid of harm by the other spouse, the person who is afraid can ask a Family Court for an **Exclusive Possession Order**. 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. 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 by an intimate partner, to themselves or their children, 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, if they live together or used to live together, or if they have a child under 18 with the other person. 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.

EXAMPLE:

After 10 years of marriage, Joe and Bev decide to separate. They own a new truck, a car, a boat, and a house in the city of Orillia that they bought 6 years ago, plus all the furniture in it. They have two children, April (9 years) and May (7 years).

The law assumes both Joe and Bev contributed equally to the relationship, financially and in other ways. When the marriage ends, under the law in Ontario, they both have the right to an equal share of the increase in the value of their family property, which will also take into account their debts. Joe and Bev have come to an agreement on how to divide their family property that they think is fair.

They have agreed that Bev will take the car and the furniture, and Joe will take the boat and the truck and will continue to make the loan payments for the truck. They felt the value of the car and furniture was about equal to the value of the truck and boat. This way they both get a vehicle, Joe keeps his boat, and Bev will not have to buy new furniture. But they still owe a lot of money on their house mortgage, and neither one of them can keep making the mortgage payments on their own. Joe and Bev decide to sell the family house, pay off the mortgage and equally share any left over money from the sale of the house. They will have to agree about who will keep living in the house and pay for any repairs and the mortgage payments until the house sells. They will also have to agree on the selling price for the family home, to be able to sell it.

It would be a good idea for Joe and Bev to write out all the details of their agreement, and for each of them to get advice from a lawyer. They don't have to go to court, but a lawyer can give advice about anything they may have forgotten, how the law would calculate their Net Family Property, and if one should pay the other an equalization payment. This will help to decide whether they feel the way they have agreed to divide their family property is fair. If they can't agree, their lawyers may be able to help them with a new agreement.

Bev and Joe will also have to agree about how they will continue to raise and care for their children. They can agree to an arrangement that will ensure their children are looked after, and it is a good idea to also ask the lawyer about child custody and access. They can go to court to only decide the issues about their children, or the court can settle the division of family property and child custody at the same time.

Rules for Family Property on Reserves

Ontario's family law rules do not apply to land, homes and buildings on First Nations Reserves. There are different rules that can apply on Reserves, for this kind of family property, and to get a Court order when there is family abuse.

The federal government law, called the *Indian Act*, deals with "real estate" property (such as land and buildings) on Reserves. But there is nothing in the *Indian Act* that says what should happen to this family property on Reserves, when couples separate.

Since 2014, a new federal law deals with the land and buildings on a Reserve when a couple has a Certificate of Possession for that property, unless a Band has passed its own rules for their Reserve.

To find out whether the federal rules apply to your community, you can visit the [government's website](#), or talk to a lawyer who knows about Indigenous law.

The federal law deals with division of the value of that family property, who can stay in the family home after separation and in emergencies of family violence. The law for this family property on Reserves applies to both **married spouses, as well as common-law partners who have been in a relationship for one year or more, as long as one person in the couple is a member of a First Nation or a "Status Indian"**.

The federal rules apply to both Indigenous and non-Indigenous women who live on or have family property on a Reserve.

The federal law includes rules about three main issues:

1. Sharing the Value of Family Property on Reserve

- Unless partners have signed an agreement that says something different, both partners have a right to half the value of the family home, land and buildings that increased during the relationship.
- A partner can apply to the Court for an Order to share in the value of family property up to 3 years after the couple stops living together. You can ask the court for help after 3 years, if you did not know about your rights, or could not apply for reasons out of your control.
- Both partners must give their written permission before selling the family home.
- The federal law does not allow non-Indigenous people to own or sell a property on a Reserve. The Court cannot force the sale of property on a Reserve. If one partner is non-Indigenous, and the family property is on a Reserve, the Indigenous partner may have to make a payment to the other partner for the amount of half of the property's value.

2. Staying in the Family Home on Reserve

- Both partners have the right to live in the home during the relationship. It does not matter whose name is on the Certificate of Possession for the property.
- After a couple separates, or if one partner dies, a Court can make an **Exclusive Occupation Order** that means one of the partners has the right to continue living in the family home for up to 180 days. It does not matter if the partner's name is on the Certificate of Possession for the home.
- A judge has to make this decision taking into account many

factors, including the best interests of any children, any history of family violence, the medical and financial situations of both partners, the availability of other places to live, and the collective interests of the First Nation members, among other factors.

3. Protection in Situations of Family Violence on Reserve

- If there has been violence between married spouses, or common-law partners (who have been living together for a year or more), or violence against another family member, and there is an emergency need 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, and the violent partner must stay away.
- You can apply for a Protection Order whether or not you are currently living in the home. It does not matter which partner's name is on the Certificate of Possession for the home. It could also be a home that you are renting.

All of the rules about family property on Reserve apply no matter whose name is on the legal documents to the property. As long as one of the partners is a member of a First Nation or a "Status Indian", the rules apply to both Indigenous and non-Indigenous women living on reserve, who are married, or living in a common-law relationship of one year or longer.

The rules for dividing family property on Reserve can be very complicated. If you are in this situation, it is recommended that you get legal advice from a family law lawyer who also has expertise in Indigenous law.

EXAMPLE:

After living together for 5 years, Jake and Nicole are breaking up. They live on the Moose Cree First Nation Reserve. Jake is a Band member and has a Certificate of Possession for the house they have been living in and an acre of land around it. Only his name is on the Certificate. He wants to sell the house, but if he does, Nicole will have nowhere to live.

Federal laws apply to family property on Reserves, unless Jake's Band has its own rules about the division of property. Under the federal rules, Jake cannot sell the house or land without Nicole's permission, even though the land is not in her name.

If she moves out, he has to pay her half of the value of the house and property that has increased since they started living in the home as a couple. If they agree to sell the property, the law says each of them gets half of the profit, after all of the debts and fees are paid. A Court could also grant Nicole an Exclusive Occupation Order allowing her to stay in the home without Jake, for up to 180 days, in certain situations, such as if there was violence in the relationship, or to give children or an elderly relative a chance to stay living in the home while Nicole is looking for a new place to live.

For more information about family property on Reserves. You may also view our webinar, "Protecting Women's Rights to the Family Home on Reserve" on our website at www.onefamilylaw.ca.

We call upon the earth, our planet home, with its beautiful depths and soaring heights, its vitality and abundance of life and together we ask that it- Teach us and show us the way.

We call upon the mountains, the Cascades, and the Olympics, the high green valleys and meadows filled with wild flowers, the snows that never melt, the summits of intense silence, and we ask that they – Teach us and show us the way.

We call upon the forests, the great trees reaching strongly to the sky with earth in their roots and the heavens in their branches, the fir and the pine and the cedar, and we ask them to – Teach us, and show us the way.

We call upon the creatures of the fields and forests and the seas, our brothers and sisters the wolves and deer, the eagle and dove, the great whales and the dolphin, the beautiful Orca and salmon who share the Northwest home, and we ask them to – Teach us, and show us the way.

We all upon all those who have lived on this earth, our ancestors and our friends, who dreamed the best for future generations, and upon whose lives our lives are built, and with thanksgiving, we call upon them to – Teach us, and show us the way.

And lastly, we call upon all that we hold most sacred, the presence and power of the Great Spirit of love and truth which flows through all the universe, to be with us to –Teach us, and show us the way.

-Chinook prayer Ceremony

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

While financially supported by the Law Foundation of Ontario, the content of this publication does not necessarily reflect the views of the Foundation.

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 or 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)
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Please see www.onefamilylaw.ca for more information. You can also find additional materials on the website to help you understand your family law rights.