



Divided in Divorce – Not Always 50/50

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One of the more common misconceptions about divorce is the idea of “half”; the idea that when a couple divorces they will each get “half” of the monies and other belongings, regardless of what they started with.

Upon the dissolution of a marriage, it’s true that spouses go through the process of divvying up their share of belongings, which is why people often believe it is a 50-50 sharing situation.

Belongings are not limited to the house, car, bank accounts and businesses (assets) but also includes the mortgage, line of credit and all other debts. These items are then set out by each spouse on a “Form 13.1: Financial Statement”. The Form 13.1 is accepted by the Family Court’s as a common way for spouses to list their specific assets and liabilities. Each spouse completes their own Form 13.1 often with the assistance of a family law professional (such as a lawyer or financial professional).

These various assets and liabilities are listed by pre-determined categories at three dates: date of marriage, date of separation and the current date.

The purpose of the Form 13.1 is to determine the value of all of the assets and liabilities at each date to determine “net family property” (“NFP”).

Once each spouse determines their respective NFPs, the individual with the higher NFP owes the other a cash payment of half of the difference in their NFPs. This process is called equalization and the payment is referred to as an equalization payment.

Equalization is the method by which each parties NFP is balanced with the other, so neither spouse is made better

or worse off in the dissolution process. Or more simply, the couple shares equally in both the successes (assets) and costs (liabilities) of the marriage (unless there is excluded property).

For example, Spouse A has \$500,000 in their bank account at the date of marriage and no other assets or debts. At the date of separation Spouse A has \$510,000 in their bank account and no other assets or debts. Spouse B had no assets or liabilities at either date. **MISCONCEPTION: Spouse A would owe Spouse B \$255,000 (i.e. half of \$510,000) when they separate.**

Actually: Spouse A's NFP is \$10,000 as they accumulated \$10,000 over the course of the marriage. As a result Spouse A would owe Spouse B half of the **growth** in order to be equalized (i.e. \$5,000).

Using the same example let's assume that Spouse B had \$0 at the date of marriage and \$200,000 at the date of separation. Spouse A's NFP is \$10,000 while Spouse B's NFP is \$200,000. In order to equalize, Spouse B would owe Spouse A \$95,000 (\$200,000-\$10,000/2).

What if Spouse B accumulated more liabilities than assets over the marriage? In this case the Family Law Act specifies that Spouse B's NFP will be deemed to be equal to zero, that is NFP cannot be negative and Spouse A does not have to make up for the shortfall of assets.

In addition, there are special rules for certain assets and liabilities, for example:

- The matrimonial home – the legal ownership may not necessarily be determinative of ownership.

- Property designated as a "gift" from a third party or inheritance during the marriage may be excluded in the NFP calculation; gifts between spouses are not excluded (this can be complicated).
- Life insurance proceeds and/or personal injury awards may also be excluded (again this is complicated).

Generally, NFP can be formulized as follows:

$$\begin{aligned} & \text{(Date of Separation Assets –} \\ & \text{Date of Separation Liabilities)} \\ & \text{Less} \\ & \text{(Date of Marriage Assets – Date} \\ & \text{of Marriage Liabilities)} \\ & \text{Less} \\ & \text{Excluded Property (if any)} \\ & \text{Equals} \\ & \text{Net Family Property} \end{aligned}$$

The equalization process can be complex especially where either Spouse has a direct or indirect interest in a company (such as a small business owner/or is a beneficiary of a Trust). If this is the case, the divorcing parties will often retain a Chartered Business Valuator ("CBV") to determine the value of said business/Trust interest at the relevant dates. CBVs are also

often retained to assist in the preparation of the Form 13.1 and can often provide valued insight as to contingent disposition cost calculations and the excluded property claim.

It is important to note that the Form 13.1 is specifically used when either spouse is making a property and/or support claim. Common-law spouses are currently not entitled/required to receive/pay an equalization payment, but there may be other avenues available to them, if they wish to pursue some form of a property claim.

Regardless, a properly executed marriage/cohabitation agreement may help to reduce any confusion in the division of assets and liabilities in the event of divorce.

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