

Property and Asset Division

When a relationship is over ultimately the question becomes “who gets what?” The division of property is governed by provincial law and therefore varies from one province to another. In British Columbia the *Family Relations Act* governs property division.

What is a family asset?

The definition of property — the stuff to be split between spouses — varies from province to province. In BC only property that qualifies as a “family asset” is subject to division between spouses.

The *Family Relations Act* defines a “family asset” as property owned by one or both spouses and ordinarily used by a spouse or minor children of either spouse for a family purpose.

“Ordinary use” usually means normal use in the course of normal life, rather than the odd occasional or casual use.

A “family asset” may include the following:

- Property owned by corporations
- Transferred property
- Savings accounts
- Pensions and RRSPs
- Business ventures

Property that does not qualify as a family asset may include:

- Assets owned before the marriage
- Assets exempted under a marriage contract
- Assets accumulated after the date of separation
- Gifts or inheritances received during a marriage
- Family heirlooms
- Items of exclusive personal value
- Business assets
- Gifts from one spouse to another
- Proceeds from a life-insurance policy
- Personal injury settlements or court awards
- Traceable property

Whether an asset qualifies as a shareable “family asset” rests on whether it was ordinarily used or was intended to be used for a family purpose.

All of a couple's assets are presumed to be family assets. It is up to the spouse to prove that a particular asset is *not* a family asset.

The kinds of assets that are most frequently questioned as family vs. non-family assets include:

Gifts and Inheritances

Gifts and inheritances given to a specific spouse for his or her own personal use are not generally considered family assets. However, in some cases, such as if an inheritance was used to pay down a mortgage or a family debt, the asset may be classified as a family asset. In general, the longer an inheritance or gift was used for a family purpose the more of the asset will be considered to be a family asset.

Severance Pay

Severance pay or a "buy-out" package is characterized as "future employment income," and thus is not a family asset. It may, however, be considered in deciding what the amount of a spouse's child or spousal support obligation should be.

Dowry Assets

Dowry assets are usually treated as a personal gift and are not shareable, especially where the dowry is received before marriage as a payment for the marriage.

Where the dowry consists of assets brought by a spouse into the marriage and are intended to be used for the benefit of the family or are used for the benefit of the family, they will be treated as shareable family assets.

Pensions

The amount of a pension that accumulates from the date of the marriage until the triggering event is considered a shareable family asset. Contributions made before marriage and after the triggering event, and the interest accruing on those periods of contribution, are, in general, not shareable.

Canada Pension Plan Benefits

CPP credits are normally split between spouses on divorce. BC is one of only a few provinces that allow a couple to choose not to divide their CPP credits. If such is the case, CPP in Ottawa must be notified or they will divide them automatically.

Court Awards

A court award for damages for personal injury or another civil wrong is considered personal to the spouse who receives it and is not generally a family asset. An award containing an allotment for lost wages may have

that part taken into consideration for the purposes of child or spousal support.

Artwork

Art located in the family home and used for the enjoyment of the family and decoration of the home is a shareable family asset.

Jewellery

In general, jewellery is personal in nature and will not be characterized as a family asset. This includes gifts of jewellery made by one spouse to the other. Jewellery given to the family as an asset or a form of savings will be treated as a shareable family asset.

What is a “triggering event”?

A “triggering event” is a selected date following the end of a relationship that:

- a) defines each spouse’s interest in the family assets; and
- b) fixes the pool of family assets to be divided.

A triggering event changes each spouse’s interest in an asset from a shared interest in the whole asset to ownership of the asset as a tenant in common.

The different triggering events defined in the *Family Relations Act* are:

1. the execution of a separation agreement;
2. the pronouncement of a judicial declaration that the spouses have no reasonable prospect of reconciling with each other and resuming married life;
3. the pronouncement of a divorce order; and,
4. the pronouncement of an order that the marriage is a nullity.

Note that #2, 3, and 4 all require a court application.

A triggering event has the effect of giving each spouse a defined one-half interest in a family asset and helps to protect each spouse’s interest in that asset from things like:

- A claim a third-party creditor might have against one spouse in debt.
- The bankruptcy of one spouse and the consequent loss of his or her assets from the pool of family assets available for division.
- A unilateral decision to sell an asset made by one spouse.
- A claim against the estate of a dead spouse.

Assets acquired after the triggering event may not necessarily be “family assets” that can be shared.

How are family assets divided?

The *Family Relations Act* presumes that each spouse ought to share equally in all family assets when their marriage breaks down. It is possible, however, for assets to be divided unequally, or reappportioned.

The court may order, or the spouses may agree, that only a few specific assets rather than all of the family assets should be reappportioned in one spouse's favour.

Factors courts don't usually consider in reappportionment include:

- The conduct of the spouses during the marriage;
- A desire to "punish" a spouse;
- Which spouse actually owns a particular asset; or,
- The spending habits of a spouse during the marriage (but not following separation).

How is the value of the property determined?

When it comes time to divide the property it is the net value of the asset (the value of the asset less any debts against it) that is used in the calculations; e.g. if you own a house worth \$700,000 and there is a mortgage of \$300,000 still outstanding on it, the net value of the house is \$400,000.

The Canada Pension Plan itself splits Canada Pension Plan credits.

Other pensions must be valued first before they can be divided. Both the valuation and the division of pension benefits must follow the rules of the particular pension plan.

RRSPs are divided by filling out a special form from the Canada Revenue Agency, and sending the form to the bank of the spouse who has the RRSPs and having the bank transfer all or some of the RRSP into an RRSP account held in the name of other spouse. You can specify a percentage or a fixed dollar amount that is to be transferred.

What does property division look like?

Either by agreement between the spouses or by a court order property may be divided as follows:

- Certain assets are allotted to each spouse;
- One spouse is required to make a payment to the other to compensate that spouse for his or her share of a particular asset;

- An order is made that an asset, like a home, be sold and the proceeds divided between the spouses; and/or,
- A schedule of payments for the equalization of the assets is made.



How can I protect my “share” of the family assets?

If you suspect that your spouse may try to sell off, or transfer, assets before they can be divided there are several steps you can take to protect yourself:

- Take a careful tally of what each of you owns.
- Get a triggering event.
- Register an interest in real property.
- Protect your interest in those assets from claims made by creditors, third parties, and against the prospect of your spouse’s bankruptcy.
- Obtain an interim order that a share of the family assets be distributed prior to the trial. In general, this sort of interim distribution can only be done by consent or where one of the spouses needs to pay for expert help and otherwise cannot afford to pay the expert. In all cases, there must be some source of liquid assets from which an interim distribution can be made.

Tax considerations

- The transfer of RRSPs between spouses is tax-free.
- A “Special Property Transfer Tax” form allows spouses to transfer the title of property between them without having to pay tax on the transfer, as would normally be the case if the house was sold to a third party purchaser.
- Consult with an accountant for more information regarding taxes.

