



Torkin|Manes BULLETIN

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FOCUS ON FAMILY LAW

Family law advice for tough times



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The current economic climate has changed the rules for spouses going through or

contemplating a marital separation. The following are a few practical pointers for family law clients and their advisers.

Choose your valuation date strategically

Ontario's *Family Law Act* values property as of the date of marriage breakdown. If you are the titled spouse and you believe the value of your property is likely to increase in value, you may wish to expedite the separation in order to establish an earlier valuation date. Alternatively, if you are the titled spouse and you anticipate that the value of your property will decline, then you may wish to delay the separation until the value has stabilized, or you may consider liquidating the property before there is any further decline in its value. Regardless of the law, parties may agree to use current value, rather than valuation-date value, if the former yields a more

equitable result. Since most family law settlements involve a number of issues, there are often other trade-offs that can be made in exchange for a more equitable division of property.

Co-operate to beat the tax man

In tough times, it is more important than ever to take advantage of every opportunity to reduce taxes. Find the optimum division between child and spousal support to achieve the best income-splitting result. Take advantage of the retroactive support and third-party payment provisions in the *Income Tax Act*. Where the payer of spousal support can't use the spousal-support deduction, paying support through a lump sum that is not taxable/deductible should be considered. If RRSPs have to be cashed to support the family, consider collapsing the RRSPs of the lower-income spouse (and, if necessary, rolling over RRSPs from the higher-income spouse to the lower-income spouse before doing so). Since only support recipients (unlike payers) can deduct legal costs, consider putting more income in the hands of the lower-income spouse against which these deductions can be offset. When dividing property, ensure that capital property is divided so that capital

gains can be offset against capital losses. Finally, consider utilizing split custody rather than shared custody in order to maximize the child-related tax deductions.

Take advantage of ADR options to reduce costs

Parties should take advantage of all alternative dispute resolution options, including collaborative law, mediation or mediation/arbitration. Consider joint retainers of experts (accountants, appraisers, valuers and actuaries) to reduce these costs. Consider agreeing in advance that the decision of the expert will be binding on both parties. Consider having some or all of the expert fees paid by the support recipient in order to permit their tax deductibility.

Use a parenting co-ordinator

Avoid unnecessary legal fees relating to non-legal child-related issues. Parenting co-ordinators are very effective at resolving these matters on a cost-efficient basis. A good parenting co-ordinator will teach the parties how to resolve these disputes between themselves.

Apply to vary support

Where a payer has suffered a significant decline in income, he/she

(continued on reverse)

Tough times *(cont'd.)*

should act promptly to seek a reduction in his/her support obligations. It is difficult to persuade a court to impose a retroactive decrease in support, since the support recipient will have already spent the money. At a minimum, a support payer should give the recipient written notice of his intention to seek a variation, in order to preserve his right to seek a retroactive reduction. Consider naming either a senior family lawyer or a trusted accountant to determine on a summary and cost-effective basis both the payer's income and the amount of future support.

Consider sharing the matrimonial home

It is difficult to settle a family case if you cannot sell the matrimonial home. Consider setting off the value of the house against other assets or permitting one spouse to buy out the other's interest in order to save time and disposition costs. Consider delaying a sale until the real estate market recovers. Consider sharing possession of the house or a "nesting arrangement" in which the children continue to reside in the house and the parents alternate their residence on a weekly basis.

Reconsider your pension valuations

Recent events have significantly affected the valuation and division of pensions. The earlier the date of retirement, the greater the value of the pension. As a result of the significant decline in retirement

portfolios, many spouses are deferring their anticipated retirement dates, thereby reducing the value of their pensions. The reduced solvency of many corporations has put in doubt their ability to fund defined-benefit pension plans. Bill 133 has proposed changes in how pensions are valued and divided. Ensure that all of these factors have been considered.

Review indexing clauses

Many old separation agreements contain indexing clauses that provide that the amount of support adjusts annually, based on changes in the cost of living. Support payers should check their agreements to determine whether an indexing clause may permit them to reduce their support obligations as a result of the recent decline in the consumer price index. The effect of year-over-year deflation may become a significant bargaining chip for the support payer.

Consider economic impact of a separation

Separations are costly: the same income that previously supported one household now has to support two. In many families, there is simply not enough income to go around. Often one spouse has access to all of the family's financial information, while the other has none. As a result, many spouses assume their family's financial situation is rosier than it turns out to be.

Resolving family law cases is particularly challenging in this

economy. Family lawyers will have to be alert to many changes in the legal and economic environment.

Alternative dispute resolution options will play an increasingly significant role, as we seek more creative, more flexible and more cost-efficient methods of resolving these cases.

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