

DIVORCING IN THIS ECONOMY: IS THERE REALLY A DIFFERENCE?

Stacie R. Glazman, LL.B., LL.M., CBV, C.S.
Barrister & Solicitor and Chartered Business Valuator
PHONE: (416)922-9393 FAX: (416) 922-9388
sglazman@sympatico.ca

I - Introduction:

The theme of today's conference is Financial Planning in Difficult Economic Times. With respect to family law and divorce, the main question lingering in everyone's mind is whether or not the recent drastic economic downturn has had an impact on the rights and claims of spouses in matrimonial proceedings. The areas for discussion to be canvassed in my presentation are as follows:

1. Decreases in property values post-separation and the recent decision of the Ontario Court of Appeal in *Serra v. Serra*, 2009 CarswellOnt 513
2. Changes to support orders as a result of job loss or reduction in income
3. Protecting the Second Generation Spouse

II – Decreases in Property Values Post-Separation:

- Property division is one-time division of assets based on the net worth of each spouse at date of separation (“valuation date”)
- Valuation date is a finding of fact based on “living separate and apart with no reasonable prospect of reconciliation”
- Calculation for property division is governed in Ontario by the *Family Law Act*, RSO 1990, c. F. 3 through a formula for equalization of net family properties
- Typically, it is very difficult for a non-titled spouse to share in the growth of an asset after date of separation, unless it can be shown that it would be

- “unconscionable”, or unless the spouse can claim a constructive trust as against that particular asset
- Similarly, it is very difficult for the titled spouse to require the non-titled spouse to take part in the reduction of value of an asset after date of separation
 - Discussion of *Serra* decision – does this open the floodgates?

III – Changes in Income and Support Obligations:

- Most existing support agreements or orders are subject to a “material change in circumstances” clause which allows one spouse to apply for a variation of support
- There is a high volume of recent job losses and reductions in income in Ontario, yet the payor spouse continues to pay either child support or spousal support or both based on historic income
- Motions to change support can be very costly and unaffordable, therefore putting payors in a difficult position
- Enforcement of support arrears owing under existing agreements continue until new agreement or Order is in place

IV – Protecting the Second Generation Spouse:

- Whether the economy is healthy or not, it is important for parents to protect the second generation and to plan ahead
- The net family property division regime referred to above allows a recipient spouse to exclude certain assets and prevent the sharing of same with the other spouse if certain tests are met
- If a spouse is going to receive an inheritance or gift from a family member during the marriage, both the recipient spouse and the donor parent will want to protect that asset from the other spouse in the event of a separation

- The spouse who is trying to avoid sharing with the other spouse of gifted or inherited funds has the onus of proving it
- There are some useful tips to keep in mind and to pass onto clients in this situation:
 1. Recipient spouses should not give gifts to the other spouse unless they intend for him or her to keep it;
 2. Recipient spouses should not transfer assets into the other spouse's name to defeat or protect against creditors unless they intend for the spouse to benefit from it;
 3. Gifts or inheritances *prior* to marriage are protected as with other assets owned at date of marriage, and the spouse will only share in the growth (except matrimonial homes);
 4. If your client receives a gift or inheritance during the marriage, tell the client to:
 - a. keep it in a separate account;
 - b. do not spend it on vacations, groceries, clothing, etc.
 - c. do not pay down the mortgage or do renovations on the home;
 - d. Do not place it into a joint account or put the other spouse's name on the account; and,
 - e. keep proper documents so that if the funds are invested, they can be traced from one asset to the other. A proper paper trail is key to protecting the assets.
 5. These rules only apply to those who are married; generally, a common law spouse will have an uphill battle to make a claim on these assets.

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