

FAMILY LAW ACT

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IN ONTARIO there is unlikely to be an adult who is not in some way affected by the *Family Law Act* of 1986. That Act came into force on March 1, 1986 and was made retroactive in its application to June 1, 1985. It significantly altered the property rights of spouses. It also changed the rights of business partners and the freedom of individuals to dispose of their property on death.

While this article outlines some of the basic changes introduced by the *Family Law Act* and explains its application to businesses, it is not and cannot be comprehensive. Readers should consult competent counsel for specific advice about it.

Under the *Family Law Reform Act*, which preceded the *Family Law Act*, spouses generally shared the value of "family assets" equally upon marriage breakdown. Family assets included the matrimonial home, its contents and the family car. Spouses did not equally share in non-family assets, such as businesses, unless the non-owner spouse could demonstrate a contribution in money or monies worth.

The *Family Law Act*, which treats marriage as a partnership in a very literal sense, eliminates the distinction between family and non-family assets. It seeks to equalize the financial position of both spouses, not only when a marriage breaks down, but also upon the death of one spouse. The date of divorce, separation or death becomes a valuation date for the purpose of such equalization. Spouses share in the value of *all* assets acquired during marriage and the value of the matrimonial home, even if it was purchased by one of them before marriage.

If the net value of one spouse's property exceeds that of the other, he or she will be required to transfer one-half of the excess value to the other so that both positions become equal.

The general rule of equal sharing will be departed from only if it can be shown that it would be "unconscionable" or shocking to the conscience to impose equality. The onus is on the spouse seeking an unequal division to prove this.

It is important for readers to appreciate, however, that this equal sharing regime can be avoided by means of a domestic contract. The domestic contract must comply with the requirements of the *Family Law Act*. Independent legal representation for each spouse is critical. Complete and accurate disclosure among spouses is also necessary. Otherwise, the Court may decline to enforce the contract at a future date.

Unless spouses exempt business property from the equal sharing regime by means of a valid domestic contract, potential problems exist for business partners whether the business is carried on through a partnership or a corporation. The *Family Law Act* invests the Court with far reaching powers to enable it to bring about the equal sharing on separation, divorce or death. Among other things, the Court can order that one spouse sell, transfer or mortgage his or her property in order to make an equalization payment. Business property can readily be the subject of such a Court order and this is not desirable for the other partners. Your partner's husband or wife may become your new partner when you never had any intention of doing business with them.

An agreement among partners or shareholders may provide some protection but such an agreement does not qualify as a domestic contract under the *Family Law Act* and so it cannot give assurance that a business will not be disrupted by *Family Law Act* claims. The partner's spouse must waive his or her interest directly by means of a valid domestic contract.

The practical problem for which none of the legislators suggest a solution is, how do partners of existing businesses persuade their spouses to waive their interests in the business *now*? If you think about it, the *Family Law Act* potentially promotes less family harmony than its drafters intended. ●

REGULATION TO AMEND ONTARIO REGULATION 221/81 MADE UNDER THE SURVEYS ACT

1. Section 5 of Ontario Regulation 221/81 is amended by adding thereto the following subsection:

(2) Notwithstanding subsection (1), where a survey is made for the purpose of defining, locating or describing the boundaries of an easement lying wholly within the boundaries of an existing easement, the boundaries of the new easement may be defined by the existing easement survey line if,

- (a) the boundaries of the new easement are parallel to the existing easement;
- (b) the existing easement survey line monumentation complies with subsection (1); and
- (c) monuments on the existing survey line are intervisible with at least one other monument on the survey line.

O.Reg. 96/87, s. 1