

BERMAN'S EQUALIZATION REPORTER

Wealth Preservation Strategies

The legal professionals at Berman Barristers have developed and successfully used several strategies to help our clients achieve mutually satisfying and fair Equalizations of Net Family Property and to preserve their wealth upon marital breakdown. This week's strategy is:

Pursuant to s. 4(1)(a) of the *Family Law Act*, in calculating a spouse's Net Family Property, one deducts the value of his or her debts and other liabilities on the valuation date from the value of the property that he or she owned on the valuation date. Further, pursuant to s. 4(2)(1)(a), the value of any property received as a gift or inheritance from a third person after the marriage is excluded from the calculation of that spouse's Net Family Property.

The strategy is to characterize monies received from a parent during the marriage as either a gift or a loan (debt), depending on which suits the receiving spouse's advantage.

The Courts have set out a number of relevant considerations when determining if monies advanced within a marriage are a loan or a gift. Those considerations are as follows:

- (a) whether there were any contemporaneous documents evidencing a loan;
- (b) whether the manner for repayment is specified;
- (c) whether there is security held for the loan;
- (d) whether there are advances to one child or others, or advances of unequal amounts to various children;
- (e) whether there was any demand for payment before the separation of the parties;
- (f) whether there has been any partial repayment;
- (g) whether there was any expectation, or likelihood, of repayment;
- (h) whether there was disclosure of the loan by the spouse asserting the loan to the other spouse;
and
- (i) whether there was disclosure of the loan to others, such as in credit applications.

Epstein and Madsen have compiled these propositions from three British Columbia cases, *Malinowski v. Malinowski*, 2000 CarswellBC 985 (S.C.), *Locke v. Locke*, 2000 CarswellBC 1856 (S.C.) and *Buddingh v. Pilon*, 2002 CarswellBC 1829 (S.C.). It is a. The case *Kurytnik v. Javid*, 2006 CarswellBC 2682 (S.C.) lists all of the cases in which the Court has found the monies to be a debt. See also: *Poole v. Poole*, 16 R.F.L. (5th) 397 (Ont. S.C.J.), and *LeVan v. LeVan* (2006), 2006 CarswellOnt 5393 (S.C.J.).

Property Equalization Cases

We ensure that we keep up with the latest court decisions in this area. The following are some of the leading, most interesting and most recent Property Equalization cases.

***Lowe v. Lowe* (2006), 22 R.F.L. (6th) 438 (Ont. C.A.)**

The Ontario Court of Appeal ruled that disability benefits, in this case Workers Compensation Benefits, are not property for purposes of equalization and are better considered income stream replacement for the purposes of support.

***LeVan v. LeVan* (2006), 2006 CarswellOnt 5393 (S.C.J.) and (2006), 2006 CarswellOnt 7334 (S.C.J.)**

Mr. LeVan sought to have the equalization payment payable over ten years, with no interest owing. Justice Backhouse found that Mr. LeVan had the ability to pay the equalization payment in stages as requested by the wife, such that the full amount would be paid by October 1, 2008. Post-judgment interest was to accrue, absent which the amount owing to the wife would effectively have been altered. In addition, a restraining order was granted, preventing the husband from encumbering or selling his assets without the wife's consent or a court order before the equalization payment was made in full.

Million \$ debt discounted to zero.

***Kurytnik v. Javid*, 2006 CarswellBC 2682 (S.C.)**

In this case (and because it is British Columbia), it was necessary for the court to determine whether the debt was valid. Here, the Court found that there was a valid debt. This was a clear finding of fact by the trial judge that will surely stand the test of an appellate review.

***Strobele v. Strobele* (2006), 2006 CarswellOnt 7209 (C.A.)**

The parties had a marriage contract, found by the trial judge to be valid and binding, that allowed the husband to deduct the value of the matrimonial home, notwithstanding that it would not normally be deductible under the *Family Law Act*. The parties tore down the old home and decided to build a new one. The contractor estimated that it would cost about \$600,000, but the renovation/rebuild ended up costing the parties \$1.8 million.

The difficulty is that the parties ended up spending more rebuilding the home than what it was on the date of trial, being \$1.1 million. The trial judge attempted to be creative. The wife had contributed \$240,000 to the construction of the new home, and, absent a creative award, the wife would lose her contribution because the husband's Net Family Property was zero and the home was registered in her name. Accordingly, the trial judge departed from the strict application of the statute, awarding the wife \$160,000 if the husband remained in the matrimonial home, and, in the event the husband sold the home, the trial judge determined that the standard Equalization

Process should be followed.

The Court of Appeal did not agree with the creative approach taken by the trial judge. The Court stated that absent an appropriate claim for unequal division by reason of unconscionability, a trial judge has no right to depart from the Equalization provisions of the *Family Law Act*. In any event, the Section 5.6 claim would not have assisted the wife as the husband's Net Family Property was zero.

The wife argued that the Court should value the property based on the cost to build the home rather than its fair market value. However, the only option available to the Court was to value the house based on its fair market value. Unfortunately, this meant that the wife lost the \$240,000.00 she had contributed to the home.