



Q&A By John T. Syrtash, Associate, Garfin Zeidenberg LLP
Answers to pressing questions on Family Law.

Who Gets the House upon Separation?

Question: My spouse is not Canadian. She still has no status in this country, but I bought a house anyway. Does it automatically become hers too? What happens if we separate? Who would stay in the house?

Answer: The fact that your spouse is not Canadian and has no status is completely irrelevant. She has the same rights under Ontario's Family Law Act as if she were born here. Let's assume that this was your only asset and you had no debts. Let's also assume that she had no net worth of her own. Once married, the equity in the house in which you both resided, even if solely registered in your name, could be divided between you on a 50/50 basis, so long as you both continued to have resided in that home until the day you separated. Then again, a court may not grant a court order to divide the equity on a 50/50 basis if you lived together for under five years, particularly if you lived together for a short time, like under one year. Moreover, if your spouse's net worth equaled the same or more than the value of your home combined with the net worth of your other property, then there would be no payment to her whatsoever. Say, for instance, that when you separated the equity in your home in which you both resided equaled \$500,000, but her own net worth totaled \$540,000.

Well, even though you both lived in the same home registered in your name, her net worth actually exceeded yours by \$40,000. She therefore owes you \$20,000 to equalize your respective net-worth positions. The solution appears to be a marriage contract in which she agrees not to make any claims on your house if you separate. But how do you get her out of your house? The Family Law Act makes it clear that, absent violent behavior, a spouse has an absolute right of possession; i.e. the right to stay in the matrimonial home. A spouse cannot even waive that right in a marriage contract. And if you put the house into someone else's name, you face capital gains tax consequences since only the person living in the house can profit from its sale tax-free under the Income Tax Act. The only possible solution is for both spouses to consent to a court order by which she must leave in the event of a separation. The Family Law Act appears only to prohibit waiving rights to possession in marriage contracts, not in court orders.

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