

Dealing with the family home and other properties after separation

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When spouses or common-law partners (“spouses”) separate, one of the issues that needs to be resolved is the division of property (assets and debts) owned by the spouses. This article focuses on “real property,” which generally means land and buildings, and may include a family home, cabin, farmland, or vacant lot.

If spouses own a piece of real property jointly, there are typically two ways that the property can be dealt with:

1. One of the spouses can keep the property. This requires the other spouse to transfer their interest in the property to the spouse that is keeping the property. If there is a joint mortgage registered against the property, this also typically requires the spouse that is keeping the property to obtain a new mortgage to refinance (pay out) the joint mortgage; or
2. The property can be sold. The sale proceeds are used to pay the realty commission, legal fees associated with the sale of the property, joint mortgage, outstanding property taxes, and any judgments or liens registered against the property. The net sale proceeds are divided between the spouses based on their agreement or court order.

If one spouse owns a piece of real property and the other spouse is not an owner of the property, the spouse that owns the property will typically retain ownership of the property. The spouse that retains their solely owned piece of property will still have to account to the other spouse for the value of the property unless the property is not “shareable” between the spouses pursuant to the legislation. The spouse that owns the property in their own name might also transfer ownership of the property to the other spouse as part of their settlement.

Once it has been determined how the real property owned by the separated spouses is going to be dealt with, the real property needs to be accounted for in the family property accounting between the spouses. The legislation states that spouses are entitled to a family property accounting to equalize their net worths. If after the ownership of the real property (and other property) has been sorted out and one spouse has a higher net worth than the other spouse, the spouse with the higher net worth will owe the spouse with the lower net worth an “equalization payment.”

It is common for separated spouses to have questions about their rights and obligations with respect to real property immediately following separation. You should speak with a lawyer for advice on your specific situation, but below are answers to three questions commonly asked by recently separated spouses:

1. My spouse owns our family home. Do I have a right to stay in the home after separation?

Yes. As long as you are married to the owner or qualify as a common-law partner to the owner, you have a homestead right in the property. This means that you can continue to live in the home until it has been properly dealt with as part of the separation proceedings.

2. My spouse and I own our family home jointly. Do I forfeit my right to the family home if I leave?

No. You will continue to be an owner of the home and will be able to access the home until you have transferred your ownership interest in the home or have been court ordered to stay out of the home. You will also continue to be entitled to an accounting or division of the home as part of resolution of the property issues.

3. I have left our jointly owned home. Do I still have to pay for expenses related to the home?

It is common for the spouse that remains living in the home to make the mortgage payments and other payments, but you are still jointly liable to the creditor. This means that if your spouse does not make the payments, the creditors will look to you to do so. For this reason, if possible, it is best to talk to your spouse (directly or through counsel) to make a plan for how the house-related expenses are going to be paid once one spouse moves out so that the necessary payments continue to be paid.

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