

CAN PROPERTY BE LEFT OUT OF A PROPERTY SETTLEMENT?

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At the start of a relationship you might own property, whatever it may be – house, car, shares, inheritance. If a separation and property division should happen, would that initial property be left out? What if that asset has dramatically increased in value?

What property is in?

The short answer is that, in the *Family Law Act*, “property” has a very wide definition so essentially “all” **property** is included. There would need to be very unique reasons why any asset was treated differently.

Agreement to leave asset out:

The only way an asset can (definitely) be left out is if it is included in a Financial Agreement (like a pre-nuptial agreement).

Determining a property settlement:

At the time a relationship breaks down and in the absence of a Binding Financial Agreement setting out the parties’ respective property settlement entitlements, the parties’ entitlements are determined in accordance with the provisions of the *Family Law Act*. Part of the exercise in determining property settlement entitlements includes a consideration of financial contributions made to the acquisition, conservation or improvement of property.

RECENT CASE:

Recently, the court considered a wife’s appeal case. The husband had made a contribution of property at the commencement of the relationship in 1988 having an imprecise but modest value of about \$105,000. The parties purchased the other half of the parcel of land in 1999. The property was subsequently “rezoned” and at the time of trial, had a value of \$10,350,000. The husband contended for a significant adjustment in his favour on the basis of his contribution. At trial, the Judge ordered that the husband receive a significant adjustment on the



particular item of property when assessing contributions holistically over a long marriage and when considering the assets of the parties on a global basis.

In considering the Appeal, the court reiterated its position regarding the correct method for the assessment of contributions which included the following principles:

1. Where the asset pool consists of property that has risen significantly in value as a result of market forces, it is appropriate to give recognition to its value as at the time of hearing or the time it was realised... but in doing so, it is equally important to give recognition to the myriad of other contributions that each party makes during the course of the relationship. In this regard, the court stated that the trial judge **had overstated** the importance of the increase in value of a piece of property at the expense of the many other contributions made during the course of the relationship.
2. The “justice and equity” of a case may derive from the fact a property was retained, while market value increased, because of “joint efforts of wage earning, homemaking and parenting, and mutual support”. Therefore, an increase in capital value may well result, from these “joint efforts”.
3. A rapidly accelerated value of property due to rezoning was a mere windfall to which neither party had a greater or lesser claim.
4. In the case of a lottery win, the court noted that who purchased the winning ticket does not determine the issue. Where the marriage is predicated upon the basis of each contributing their income towards the joint partnership constituted by marriage, the purchase of the ticket is regarded as a purchase from joint funds.
5. No category of contributions needs to be quarantined and applied solely to particular assets.

The court is required to look at the totality of what the parties have contributed in a financial and non-financial sense, including contributions to the welfare of the family and to the acquisition, conservation and improvement of assets.