

III DIVISION OF MARITAL PROPERTY

TRANSFERS OF PROPERTY AND EQUALIZATION PAYMENTS

- Ontario's property regime calls for an "equalization of net family property" upon a marriage breakdown
- The equalization payment is an amount equal to one-half the difference between the value of each spouse's net family property
- The equalization payment is purely a capital payment. If satisfied by a cash payment, there is no tax consequence to either spouse.

THE BASIC REQUIREMENTS

- The basic requirements are established by s. 73(1) of the *Income Tax Act*. C.C.R.A.'s position is set out in I.T. – 325R2.
- Applies to transfers of:
 - a) capital property,
 - b) between spouses or common law partners or former spouses and former common law partners in settlement of rights arising out of the marriage or common law partnership; and
 - c) if both parties are Canadian residents at the time of the transfer

- Can also apply to certain spousal trusts.

THE ROLLOVER

If the 3 requirements are met (capital property, relationship, and residency), the transfer is a rollover. The transferee acquires the property at:

- a) the transferor's adjusted cost base
 - b) the transferor's undepreciated capital cost
- the effect is that the transfer is
- a) free of immediate tax consequence to the transferor;
 - b) the tax consequence will be deferred until the transferor disposes of the property.

ELECTING OUT

- the transferor can "elect out" of the rollover by filing an election that s. 73 not apply
- effect of election is that
- property is deemed to be transferred at fair market value
- immediate tax consequences are triggered
- only the transferor may elect, May do so irrespective of the consent of the transferee.

- Transferor will elect if:
 - a) to avail himself or herself of capital gains exemption, or
 - b) to set off against accrued capital losses.

ATTRIBUTION

If the 3 requirements are met (capital property, relationship, and residency), there will be NO ATTRIBUTION OF INCOME

- the non attribution of income applies whether there is a rollover or an election by transferor
- if the requirements are not met, there will be income attribution.

Income attribution will occur if property is transferred between

1. spouses
2. common law partners
3. persons who later become spouses or common law partners
4. minors who do not stand at arm's length to the transferor
(eg. children)
5. property transferred to a spousal or partner trust
6. income from substituted property for the transferred property.

- capital gains are treated differently. There will be no capital gains attribution between former spouses or common law partners. To avoid attribution, both parties must sign a s. 74.5(3) election. The joint election may be filed for any taxation year ending after the separation.

SUMMARY OF TRANSFERS BETWEEN SPOUSES AND FORMER SPOUSES

Rollover on Transfer

No Rollover on Transfer

	Separated Spouses	Former Spouses	Separated or Former Spouses
Proceeds of Disposition to transferor	adjusted cost base	adjusted cost base	fair market value at date of transfer
Adjusted Cost Base of recipient	Inherits a.c.b. of transferor	Inherits a.c.b. of transferor	f.m.v. at date of transfer
Who pays tax on capital gain triggered by transfer	No capital gain is triggered	No capital gain is triggered	Transferor
Who pays tax on subsequent income	Recipient	Recipient	Recipient
Who pays tax on subsequent capital gain	recipient – if election is filed transferor – if no election is filed	Recipient	Recipient

A Cautionary Note – U.S. Property

If U.S. real estate is transferred between spouses pursuant to the terms of an order or agreement, and the recipient spouse is neither a U.S. resident or citizen, the transferring spouse will be subject to U.S. tax, in the absence of other U.S. exemptions.

In any event, the transferor must file federal and state tax returns reporting the disposition and may be required to remit 10% withholding tax.