

BFLG'S SUMMARY ON OCCUPATION RENT

It is common for spouses to separate while still co-owning the matrimonial home. In those cases, one spouse typically occupies the home while the other spouse rents elsewhere. Sometimes, this can last for months, and maybe even years. In those cases, the spouse who did not occupy the home may ask for compensation. That compensation is called "Occupation Rent".

So what is the law on Occupation Rent?

In Little v. Little, 2024 ONSC 3771 (CanLII), the court noted that a claim for occupation rent is brought under section 122(2) of the Courts of Justice Act that states:

"An action for an accounting may be brought by a joint tenant in common, or his or her personal representative, against a co-tenant for receiving more than the co-tenant's just share".

In Griffiths v. Zambosco (2001), 2001 CanLII 24097, it was held that a trial judge has the equitable jurisdiction to order occupation rent in circumstances where the parties jointly owned property and where it was reasonable and equitable to do so. Likewise, the Court of Appeal noted that, where occupation rent is ordered, the paying spouse may be entitled to deduct from the occupation rent the amounts paid towards the matrimonial home. To provide even more defined criteria, the Ontario Court of Appeal set out the factors to be considered in determining whether occupation should be ordered as between separating spouses as follows:

- a. The timing of the claim for occupation rent
- b. The duration of the occupancy
- c. The inability of the non-resident spouse to realize on his or her equity in the property
- d. Any reasonable credits to be set off against occupation rent, and
- e. Any other competing claims in the litigation.

In Irrsak v. Irrsak 1978 (CanLII) 2158, the Ontario Court of Appeal recognized that where one spouse has had exclusive possession of the matrimonial home after the date of separation, the other spouse may be entitled to receive compensation to reflect this fact. This amount is usually one-half of the value of the rent that the spouses could have received had they rented the home, less one-half the costs of carrying the home.

In McColl v. McColl 1995 (CanLII) 7343, the court stated that occupation rent must be considered within the totality of the circumstances of the case.

In Higgins v. Higgins, 2001 (CanLII) 28223, the court held that post-separation payments by an occupying spouse of the matrimonial home should be addressed within section 5(6) of the Family Law Act that calls for an unequal division of the spouses' net family properties. In that regard, the question to be addressed is whether it would be unconscionable in all the circumstances to allow the non-occupying spouse to reap the benefits of post-separation payments.

In Little v. Little, 2024 ONSC 3771 (CanLII), the court determined the market rent to be \$2,750 per month and granted the non-occupying spouse one-half that amount minus one-half the expenses the occupying spouse paid towards the matrimonial home. In that case, it was \$23,762 (\$63,250 minus \$39,487).

CASE LINK:

<https://www.canlii.org/en/on/onsc/doc/2024/2024onsc3771/2024onsc3771.html?resultIndex=1&resultId=a09dc9a9a7964a50bbe3b2b496e9526c&searchId=2024-08-21T19:14:59:845/3043457f038c498cbb921aa07eeeb039&searchUrlHash=AAAAAQAFbGFuY2UAAAAAAAAQ>

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