CASE IN POINT

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Second home always matrimonial home?



You may have concerns about how to divide up your estate if you have children from a first marriage and are now re-married. For example, let's say you have 2 children and you want them to end up with equal shares when you die. Your Will provides that your child who lives in the US will get $200,000 in cash and your other child who lives near you will get the cottage you owned before your second marriage, which is worth $200,000.

What happens if the cottage is considered a matrimonial home and your second spouse contests your Will when you die?

Your Will may provide for your children getting equal value but one may get shortchanged if the cottage has to be sold and part of the sale proceeds paid to your spouse when you die because it was considered a matrimonial home.

All jurisdictions have laws that determine how property, including the matrimonial home, is divided between married spouses when they separate and/or divorce and also when one spouse dies. The matrimonial home usually gets special treatment. For example, the total value of all properties that falls under the definition of matrimonial home may be included in any division of property between spouses on marriage breakdown or when one of the spouses dies. There are also restrictions on dealing with matrimonial property. This makes the determination of which properties are included in the definition of "matrimonial home" very important.



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Peter works with independent advisors and other professionals raising awareness on issues and concerns faced by affluent individuals, professionals and business owners. He supports efforts in researching and developing optimal solutions for clients aimed at improving their financial well-being and supporting their personal wishes and lifestyles. He annually provides 100's of workshops, seminars and technical support throughout the country on tax, retirement income and estate planning issues, concepts and strategies to both advisors and consumers. As a Registered Financial Gerontologist, a good deal of his time is spent on building awareness and educating people of all professions who work with or specialize in the needs, expectations and issues of elders. Comprehensive lifestyle planning is an important element of these processes.

The Sales, Tax, Estate Planning, Underwriting & Product (STEPUP) team provides internal and broker support, including seminars, education, advanced concept illustrations & Client case technical consultations.

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If there is a dispute about whether a property is a matrimonial home, it may become part of a court action. Typically, courts consider whether property was ordinarily used by the spouses as a family residence, but that does not mean they have to live there a large amount of time. If a married couple usually lives at their cottage 2 months every summer, a court may find that it's a matrimonial home. However, if the cottage is rented out for most of the year and used occasionally for a vacation, it may not qualify as a matrimonial home. Sometimes courts do not find that a property owned by one or both of the spouses is a matrimonial home and sometime courts find that a married couple has two or more matrimonial homes, all of which are subject to the rules and limitations pertaining to the matrimonial home.

Typically, the rules in one province about matrimonial homes don't apply to property located in another jurisdiction that is considered a matrimonial home. This may be the case if you are an Ontario resident with a chalet in Quebec or an Alberta resident who owns vacation property in the Okanagan Valley or a Canadian homeowner with a vacation property in the USA.

The vacation property may not qualify as a matrimonial home in the province where you normally live. Strangely, that doesn't mean a court won't make an order about the division of property on marriage breakdown that is meant to include property owned by a spouse in another jurisdiction.

This happened in an Alberta case where one spouse held title to a home purchased in Scottsdale Arizona (T.L.P. v. F.J.P., 2007 ABQB 600 (CanLII)). In that case, the Court decided that it "can order a sale of that property [with the proceeds split evenly between the separating couple] even though it had no jurisdiction to actually make an order or direction with respect to the property itself."

Family Law needs to be considered in effective tax and estate planning and it can be complicated because how it is applied varies depending on the facts.

Let's look at two more examples:

In the case of Ledrew v. Ledrew 1993 O.J. No. 596, the couple spent essentially no time together at the White Cottage in the five year period leading up to their separation. The court found that the cottage ceased to be a matrimonial home.

In another case, that of Oliver Estate v. Goodyear 1990 O.J. No. 29, the couple owned a condo and neither of them spent any significant time there either alone or as a couple. As a result, the court found that the condo was not matrimonial property.

It's important to understand how matrimonial property works when engaged in any planning discussions for retirement and estates, particularly when there may be a concern over a couple remaining together or their respective rights with respect to property while both are alive or when one passes away, especially in second marriage situations.

As I have written before, a best practice approach is to engage the services of specialized lawyers who understand and appreciate not only the nuances of family law but also the highly charged emotional considerations.

Different provinces, states and countries deal with these matters differently. When you have properties in different provinces, states and countries, make sure you retain legal and tax counsel versed in the issues and considerations of those different jurisdictions so they can help you create a comprehensive and effective tax and estate plan.

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