

Seasonal Residences as Matrimonial Homes



By **Brian Madigan LL.B.**

Frequently, there is discussion concerning the matter of a seasonal residence and whether it qualifies as a matrimonial home under the *Family Law Act*.

Let's have a look at the definition and the law and then some scenarios.

The Family Law Act

This is the Act which deals with family issues. It focuses upon the partnership created between parties when they choose to live together in a conjugal relationship. At first, it deals with support obligations that arise after a couple have lived together for a certain time. It then deals with property division for both married couples and those couples who are simply living together. The Act also deals with the protection of the family after one of the parties has died.

The general scheme of the Act is to ensure that both parties equally share in the mutual profits made by both of them during the time they were together. Insurance proceeds, settlements from personal injury lawsuits and inheritances do not form part of the family property.

The matrimonial home has its own place in the legislation and is treated differently than other property.

Definitions (Family Property)

4. (1) In this Part, “matrimonial home” means a matrimonial home under section 18 and includes property that is a matrimonial home under that section at the valuation date.

This definition is somewhat circular because it refers to a specific definition that is included in the section of the Act, entitled Part II Matrimonial Home. The valuation date is a defined term. Basically, there are two important dates, the commencement of the relationship and the end of the relationship. The end is called the “valuation date”. It is the date when an accounting is to be taken into consideration. The start is often clear because there was a marriage. When we are

discussing rights concerning matrimonial homes we are only speaking about married spouses, so the date of the marriage is the date of commencement.

Definitions (Matrimonial Home)

17. In this Part, “property” means real or personal property.

The intention here is to provide an extended interpretation to the word property. So, while one would ordinarily think of real property, personal property does not come easily to mind.

But, personal property could be just about anything. So, as long as the property under consideration meets the rest of the requirements, the mere fact that it is not real estate doesn't matter.

So, the first obvious one is a mobile home in Florida. But, it could also be a boat, it doesn't have to be sitting on land, it might just be moored. And, what if it is a cottage sitting on leased land. This time the real property (the lease) and the personal property (the cottage) both qualify. Also, don't forget to consider a time share wherever it may be. If it is set up as a condominium, then it's real estate, and if it's just a contractual agreement, then it's personal property. But, no matter what it is, it is still a matrimonial home.

Matrimonial home

18. (1) Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.

This is the key part of the definition. Let's look at the different parts a little more closely:

1) Every property (number)

So, obviously there can be more than one. In fact, there is no limit on the number.

2) in which a person has an interest (ownership)

There has to be an ownership interest of some kind. One of the spouses either has to own it all, or even just a part of it to qualify. Accordingly, holding property as a joint tenant with another will qualify. Or, one of the parties may simply be a contracting party who has a right of occupation in a timeshare. Nonetheless, they will have to own some interest in something.

3) and that is or, if the spouses have separated, was at the time of separation **(time period)**

This is the time period. So, either now, or on the valuation date. If the couple is together it will apply to current properties. If the couple has separated, it will apply as at the date of the separation. This means of course that prior properties, no longer count. You will need to monitor a change in use.

4) ordinarily occupied by the person and his or her spouse **(utilization)**

There really are two separate concepts here. First, the matter of “ordinarily occupied”. Just what does that mean? And, the qualifier, that is “the person and his or her spouse”.

Obviously, if just one of the parties to the marriage used the property, then it would not meet the definition. You might imagine a fishing hut or camping lodge used by a husband for infrequent fishing or hunting vacations. The fact that the wife remained home and did not attend these expeditions would be sufficient to remove them from the list.

The reference to “ordinarily occupied” only makes sense if it is read together with the next part of the definition, that is “as their family residence”.

However, there is some importance here in the two terms. Ordinarily imports the concept of time. Ordinarily, also imports the concept of purpose. So, when the particular property is used, it is used or “ordinarily occupied” as a family residence. Utilization is the key.

This would take some boats out of the definition and put some boats in the definition. A small fishing boat that is used as a runabout really would not meet the test. However, consider a large cabin cruiser used frequently for weekend vacations. It is obviously in as a matrimonial home.

Also, before we leave this part, don't forget about the term “occupied”. If it is never really occupied by both parties, then it won't qualify. Consider a time share in Florida which is rented out for investment purposes. This is not sufficient.

5) as their family residence is their matrimonial home **(residence)**

The last step in the qualifying conditions is the matter of “their family residence”. Note the first word “their”. That means both parties, not just one. So, both parties need to view this property as their family residence. However, you know the obvious issue here. Whoever owned it, now thinks differently after the separation. So, this needs to meet an impartial, third party, objective test.

Now, it is rather interesting that there is no definition of “family” in the Family Law Act. I suppose it’s self-explanatory, or everyone knows what it means; there’s simply no dispute about it. Nevertheless, it’s not defined. That means that there is no special statutory meaning. So, “family” simply means “family”.

The final concept is the term residence. That means “reside”. So, if you really don’t live there, it’s not a residence.

Consider for example a nice commercial property in Niagara-on-the-Lake. It includes a retail store on the main level and a residential unit upstairs. It is very busy during tourist season. At the outset it is owned by Betty who is a thriving artist. She offers her paintings for sale in the retail store and rents out the upstairs to a local resident.

She then gets married to Mick. The tenant moves out and she and Mick often spend weekends in the residential apartment returning to Toronto throughout the week. You can imagine further facts, that increase their use, and decrease their use of this same building over many years.

Is it a matrimonial home, if they were to separate? The key date is the date of separation. It doesn’t really matter, its use when they were newlyweds. Is it ordinarily occupied as a residence or is it used for something else (artist studio)? Is it still used by both parties as a family residence, or just one of the parties? Or, is the use now simply commercial retail on the ground floor with the upstairs rented again.

Ownership of shares

(2) The ownership of a share or shares, or of an interest in a share or shares, of a corporation entitling the owner to occupy a housing unit owned by the corporation shall be deemed to be an interest in the unit for the purposes of subsection (1).

Really, all this means is that co-operatives are included. Of course, condominiums are real estate. Co-operatives are special corporations created by special legislation. The units of ownership are in the form of shares.

Residence on farmland, etc.

(3) If property that includes a matrimonial home is normally used for a purpose other than residential, the matrimonial home is only the part of the property that may reasonably be regarded as necessary to the use and enjoyment of the residence.

The interesting part here is that the reference to farmlands is only in the heading and not in the actual paragraph. In any event, it evidently deals with the matter of

larger parcels of property. When it comes to the 100 acre farm, then only the house and perhaps a reasonable amount of land around it, will be considered as the matrimonial home. The lands clearly used for farming purposes will not be a matrimonial home. There is some importance here because the house may also qualify for exemption from capital gains taxes under the *Income Tax Act*, and there is likely only one deed to the entire 100 acre parcel. There would be significant difficulty in most municipalities to sever the house and one or two acres from the balance of the 100 acre property.

Let's have a look at some seasonal scenarios.

A) a mobile home in Florida

Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.

And, remember it can be personal property, not just real estate.

B) a cabin cruiser moored at lake Joseph in the Muskokas

Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.

Was this cruiser used by both parties as a residence? You are going to need at least one overnight and a change of clothes to be on the safe side.

C) a cottage sitting on leased land

Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.

This time, the real property (the lease) and the personal property (the cottage) both qualify. You just need to meet the rest of the test.

D) a time share apartment in Playa del Carmen, Mexico

Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.

It doesn't limit properties to Ontario, or Canada for that matter. A time share organized as a simple contract will be sufficient anywhere in the world.

You will probably appreciate that most properties will fit within the definition. A common error made by many of those with a cursory understanding of the Act is the application of the couple test. Here, you look first to the relationship between the parties. Where do they spend their time? And, if it doesn't work out to regularly, or frequently or a reasonable amount of time, then how can it be a matrimonial home? But, that isn't the test. You have to look at each property on its own and make the determination. The test is to be applied by looking at each individual property and making a determination of its own merits.

The interesting next question is the replacement property that was just newly acquired but never occupied. We'll leave that one to the law Courts!

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