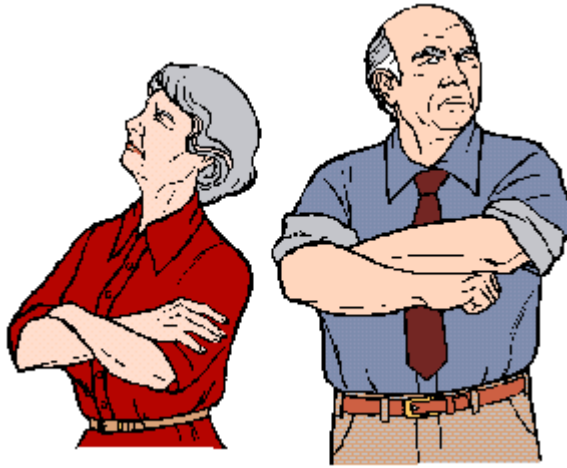


## Matrimonial Home : Special Rights



**By Brian Madigan LL.B.**

There are special considerations that apply with respect to a matrimonial home.

In most cases, people believe that if a couple is married then the house is split 50/50. Others, usually older people think that the wife is entitled to the home. Both are wrong!

The Family Law Act came into force in Ontario in 1978. It changed the previous laws related to the division of property upon marriage breakdown quite drastically. It introduced a scheme of community property which had been popular in many of the States to the south of the border.

So, here are the relevant provisions from the Act:

### **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.

### **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).

### **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.

### **Possession of matrimonial home**

19. (1) Both spouses have an equal right to possession of a matrimonial home.

## **Idem**

(2) When only one of the spouses has an interest in a matrimonial home, the other spouse's right of possession,

(a) is personal as against the first spouse; and

(b) ends when they cease to be spouses, unless a separation agreement or court order provides otherwise. (R.S.O. 1990, c. F.3)

There are of course several principles that may be drawn from these rules:

- The property must be ordinarily occupied by both parties as a family residence
- A cottage in the woods, used by only one of the parties will not count
- Since it says "every property", there can be more than one matrimonial home
- Condos and co-ops count, as do mobile homes
- If you are looking at a farm, it's the farmhouse and not the farmlands
- Both spouses have an "equal right of possession"
- It doesn't matter who actually owns the property
- This right is "personal" against the spouse
- It doesn't affect third parties
- This right ends upon dissolution of the marriage

Now, there are a number of other provisions in the Family Law Act related to the matrimonial home and also related to the division of property, but the important matter is to realize that these are the rules concerning the matrimonial home. There is nothing in the Act that says that it has to be split 50/50, and there is nothing that says that it should go to the wife. Both beliefs are misunderstandings.

Prior to 1978, in many divorce decrees and settlements it was commonplace for the wife, who usually was the non-working spouse to receive the house. That principle which had become somewhat customary was abolished by the Family Law Act, and the 50/50 division of property scheme was introduced. But, the 50/50 arrangement had its limitations:

- It only applied to property acquired during the marriage
- Property acquired before was exempt
- Property acquired after the date of separation was exempt
- The parties could agree to another division of property (90/10 is fine) by way of a marriage contract
- The parties could not however exclude or restrict the "equal right of possession"

## **Equal Right of Possession**

So, just exactly what does this mean? It simply means that regardless of who

owns the property, if the property is a matrimonial home then both parties are entitled to possession and occupation. No one gets to be kicked out. No one gets turfed because they are not on the deed. Naturally, as you might assume either party could make application to Court for an Order of "exclusive possession", but that is a Court decision.

Anyone who owns a matrimonial home may not sell or mortgage it unless the other spouse consents. That could be a problem because the purchaser or the mortgagee will take the property subject to the spouse's interest. Obviously, modern conveyancing practice requires the spouse's signature.

In fact, it is this rule that enforces the spouse's rights. Otherwise, the party having title could just sell the property from underneath the other spouse.

The equal right of possession is no higher a right than the titled spouse's right to the property. So, if the property was legitimately sold prior to the occupation by the non-titled spouse, or if it were subject to a prior mortgage then those rights prevail. Both the registered owner and the non-titled spouse have to give up the property.

In most case involving a mortgage both parties would have signed, so if the mortgage is not being paid, the mortgage can sell the property under power of sale.

One further qualified right should be mentioned. Upon the death of the registered owner, the surviving spouse may continue to occupy the property for a period of 60 days.

So, the only real special right concerning a matrimonial home is the "equal right of possession", and this has absolutely nothing to do with the division of the property.

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