

CASE IN POINT

Sales Tax Estate Planning Underwriting & Product Newsletter

The Cottage: Included as a matrimonial home



I inherited a cottage from my parent. I registered it in my name. My spouse and I are splitting up. I know that our home is part of net family property and we get to share equally in the total value of the matrimonial home. Surely that doesn't include the cottage, right? I want the value of my cottage to go to my brother and his family. Can't I do as I please?

An Ontario case dealt with just such a situation.

In the case of *MacFarland v. MacFarland*, [2009] O.J. No. 2149, Mr. MacFarland owned a cottage, inherited from his mother which he registered in his own name. He and his wife both put time, effort and money into renovating the cottage.

The Ontario Family Law Act defines a matrimonial home as:

"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". (section 18(1) of the Ontario Family Law Act).



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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 has provided 1000s 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 an accredited 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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A property, in this case, the cottage, does not have to be habitually used as a family residence to qualify as a matrimonial home. The MacFarland family initially spent a lot of time at the cottage, including winters, and they spent the last two holidays at the cottage before Mr. and Mrs. MacFarland separated. Granted, Mr. MacFarland spent more time at the cottage in the later years, partially due to Mrs. MacFarland's inflexible work schedule, and partially because the marriage was breaking down.

The Court stated that there was no requirement that spouses occupy the cottage together or at the same time for it to be a matrimonial home. The spouses and/ or family need to demonstrate that they had been ordinarily using the cottage as a family residence up to the separation date. This may be mainly for summer weekends with little or no winter use. The fact that a couple breaks up in the winter wouldn't change the classification of the cottage as a matrimonial home.

The bottom line is that in this case, as was the decision in another case, namely, *Durakovic v. Durakovic*, 2008 Carswell Ont 5329, the courts decided that a couple doesn't need to occupy a home together at the time of separation for it to be a matrimonial home. A couple's normal use of a property like a cottage, treated as a family residence is key. A cottage in Ontario at least, can qualify as a matrimonial home, even if there is another matrimonial home. As demonstrated in the MacFarland case, it doesn't matter whose name is on the deed or if the property was inherited.

You may not be able to do as you please with certain property, particularly if it is classified as a matrimonial home. 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 that can help you in your tax and estate planning.

Life insurance may help equalize an estate and/or deal with tax issues. First you need to understand the size and complexity of the underlying issues you are facing.

October 2022

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