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THE MATRIMONIAL HOME

By Linda Silver Dranoff

The matrimonial home is often a couple's main asset, and therefore receives special treatment and protection during the marriage and on separation. In general, a spouse is not allowed to sell or mortgage a matrimonial home without the consent of the other spouse or a court order—no matter whose name is on title. As divorce usually ends this limitation, a separated spouse should not wait until after the divorce to register a legal claim.

In most jurisdictions, a married or separated person may (and, if fraud is suspected, should) put potential buyers or mortgage lenders on notice that a property is a matrimonial home by registering a document at the local registry office; thereafter, any dealings with the property will require the consent of both spouses.

Only on separation do many spouses realize the drawback of having permitted a mortgage to be registered against the matrimonial home. They may have agreed for the sake of a loan to benefit the partner's business, which may have no asset value for sharing purposes at the time of separation. Or, perhaps the mortgage was taken to pay off a partner's debts, on the understanding that the partner would be liable to repay the mortgage. However, if the mortgage attaches to the interests of both parties, both are equally liable unless they had an agreement to the contrary, preferably written, or unless the mortgage was signed without benefit of independent legal advice. A spouse who was not advised or not allowed to obtain independent legal advice may be successful in avoiding any obligation, but the victory could be at great expense.

Although most provinces tend to limit the shareable assets to those accumulated during the marriage, a number of jurisdictions provide that the entire value of the matrimonial home is shared—even if one spouse owned it and brought it into the marriage.

Almost all provinces provide the right for a spouse to apply for exclusive possession of the matrimonial home and its contents on separation. British Columbia gives the spouses a one-half interest in the home as tenants-in-

common on separation, irrespective of how title is registered. Newfoundland and Labrador goes even further: Notwithstanding how title is registered, on marriage a matrimonial home is deemed to be held in joint tenancy with rights of survivorship on death, and is not subject to division the way the rest of the assets are.

In a 1994 B.C. case, a woman was successful in retaining a matrimonial home registered in her name for herself and four of her six children still at home. She and her husband had separated in 1988 after a 20-year traditional marriage. It was not long before he stopped paying support, and at the time of the trial was \$18,500 in arrears. The woman worked in a low-paying job and had the sole responsibility for the children, all teenagers. She paid all the expenses for the home, including the \$20,000 mortgage taken out to pay off her husband's business debts. Considering these circumstances, the court ruled that the home, estimated to be worth about \$150,000, should be entirely hers to ensure the security and independence of herself and her children.

C Linda Silver Dranoff 2005