

Wills, Trusts & Estates

Planning for succession of a cottage or vacation home: Matrimonial issues

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(June 13, 2018, 8:46 AM EDT) -- Owners of cottages or vacation homes often have concerns and worries when it comes to succession issues. Alleviating or minimizing these concerns requires a review of three main types of considerations: personal and emotional, tax and matrimonial issues.

Our last two articles dealt with personal and tax matters. Matrimonial law issues are the third set of considerations to be discussed when planning for a cottage or vacation home.

Under the *Family Law Act* (Ontario), the post-marriage increase in the value of gifts and inheritances and income arising from gifts or inheritances, including an interest in a vacation home, *which have been received prior to the date of the marriage* and is owned on the date of a marriage breakdown or death is included in the calculation of the value of each spouse's assets for equalization purposes, unless a domestic contract excludes it.

The capital value of gifts and inheritances received *during marriage*, but with the exception of a matrimonial home, is excluded in the equalization calculation, unless this exclusion is lost, as discussed below. As well, the increase in value of gifts or inheritances received during marriage and the income arising from such gifts or inheritances if the person who has made the gift has stipulated that the gains and income is to be excluded in a deed of gift or in his or her will, is excluded. For this reason, it is common practice in Ontario for wills and deeds of gift to include a special clause for this purpose.

The *Family Law Act* accords special treatment to Ontario matrimonial homes, which include not only a primary residence, but also cottages and other vacation homes, if such properties are occupied by spouses or by a spouse and their children as a family residence and at least one of the spouses has an "interest" in the property. Accordingly, anyone with an ownership interest in multiple residences can have more than one matrimonial home. An indirect ownership interest in a vacation home, including through a corporation or trust, may be enough of an interest to bring a property within the definition of "matrimonial home" in Ontario in some circumstances.

The *value* of a matrimonial home (not the property itself), net of liabilities, is subject to equalization upon marriage breakdown. A matrimonial home owned by one spouse at the date of marriage, and which is also owned on the date of termination of the marriage, is included in the calculation of the value of that spouse's assets and is *not* deducted from the value of his or her property along with other property owned by the spouse at the date of the marriage. As well, a matrimonial home which was gifted or inherited during the marriage and is owned on termination of the marriage or its sale proceeds is *not* excluded from the calculation of the value of a spouse's property on termination of the marriage, even though it is a gift or inheritance.

Matrimonial homes are also subject to claims for possession, particularly where there are minor children or dependent children and the matrimonial home is regularly used as a family residence.

Of course, different jurisdictions have different matrimonial regimes. Whether Ontario's matrimonial laws will apply in relation to a vacation home owned in another jurisdiction is a complex question

requiring a thorough review of the facts and law of the jurisdiction in which the vacation home is located. In addition, as noted in our last article, many jurisdictions have legal regimes which dictate who must inherit property or that married spouses hold all property in common and therefore that a spouse cannot leave property to anyone they wish.

Because of the complexities of these issues, care must be taken in planning for succession to avoid a property being exposed to matrimonial claims.

For example, joint ownership with a child or children may make sense from a personal or tax perspective, but it can expose the property to claims by the joint or new owner's spouse. A first step in planning for these issues is to discuss the personal circumstances of the beneficiaries and all of the possible matrimonial claims which might arise in regards to the cottage or vacation property.

As for all estate planning and succession matters, expert advice is key.

This is the third in a three part series. Read part one here, part two here.

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