

“When I’m 64”: Family Law issues for the Boomer generation

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Introduction

Many boomers and seniors envisage their retirement as endless days relaxing in the Florida sunshine, however upon a separation many may not be aware of how family law might impact their retirement dreams.

Before I describe the special considerations relating to real estate that boomers and seniors may face, it is important to have a general understanding of how the *Family Law Act* (“FLA”) deals with property after married spouses separate.² It is important to note that the property division regime does not apply to common-law spouses.

Once I have given a brief description of the property division regime, I will focus on three real estate issues that have particular relevance to boomers and seniors including the matrimonial home, trust claims, and inheritances and gifts.

Property Division under the Family Law Act

What is Net Family Property?

Following separation, married spouses equalize their property. This means that each spouse calculates their Net Family Property (NFP) and the spouse with the higher NFP pays an equalization payment in the amount of one half of the difference between the NFPs to the other spouse.

NFP is defined in Section 4(1) the FLA:

Section 4(1) of the FLA provides the definition for Net Family Property (NFP):³

“net family property” means the value of all the property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,

- (a) the spouse’s debts and other liabilities, and
- (b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse’s debts and other liabilities, calculated as of the date of the marriage;

What the above legislation means, is that a spouse’s NFP is the value of all the property they own at the date of separation, after deducting both their debts at

¹ Goldhart & Associates. I acknowledge and thank Haley Gaber-Katz for preparing this paper.

² *Family Law Act* R.S.O. 1990, Chapter F.3 (hereinafter FLA).

³ FLA, s. 4(1).

separation and the net value of their assets at the date of marriage (date of marriage assets minus date of marriage debts).

This can be a tricky mathematical calculation and a simple illustration might help. For example, if a spouse owned in assets \$100,000 at the date of separation, had \$30,000 in debt at separation, owned \$20,000 in assets at the date of marriage, and had \$10,000 in debt at the date of marriage, the spouse's NFP would be \$60,000:

Date of Separation Assets	\$100,000
Date of Separation Debts	- \$30,000
Net Value of Date of Marriage Assets (assets minus debts)	\$20,000 (assets) <u>- \$10,000 (debts)</u> -\$10,000
Total NFP	\$60,000

Calculating a spouse's NFP can actually be quite complicated, as some property, or income from that property, might be excluded from the calculation.

What is Equalization?

The FLA states that an equalization payment is one-half the difference between the spouses NFPs:⁴

5. (1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.

For example, if one spouse, Shane, has an NFP of \$100,000.00 and the other spouse, Molly, has an NFP of \$50,000.00, the difference between the two is \$50,000.00. Therefore, Shane would pay Molly an equalization payment of \$25,000.00. In effect this ensures, in this example, that each spouse leaves the marriage with an equal NFP.

Equalization only equalizes the *value* of property between the spouses; the actual property is not divided. Therefore, each spouse retains the property that is owned in their own name, subject to any sale or transfer of property they are obliged to make in order to meet their equalization payments.

⁴ FLA, s. 5.(1).

Matrimonial Home

What is a Matrimonial Home?

For many people, the family home, or the Matrimonial Home, is their most valuable asset. Not only does it have a monetary value, it often has a significant emotional value. Individuals are attached to their homes for many reasons, often because it provides them with a sense of security and comfort.

Because of this special attachment people have to their homes, the FLA treats the Matrimonial Home differently than other types of real property or financial assets. Under the FLA, the Matrimonial Home is defined as a residence that, at the time of separation, is ordinarily occupied by the spouses as their family home.⁵

Although spouses can only have one principle residence between them, spouses can have more than one Matrimonial Home, such as a home in the city as well as a cottage. Matrimonial Homes can also change use, for example, if one spouse never visits the family cottage, it will cease to be a Matrimonial Home.⁶

Matrimonial Home under the FLA – Married Spouses

There are three main ways in which the Matrimonial Home is treated differently under the FLA. Firstly, if a Matrimonial Home is owned at the date of marriage, and it continues to be a Matrimonial Home at the date of separation, its value cannot be deducted from a spouse's NFP.⁷ Secondly, regardless of who owns the Matrimonial Home, after separation (but before divorce) both spouses have the right to reside in the Matrimonial Home.⁸ Finally, a spouse can not sell or encumber the Matrimonial Home without the other spouse's permission.⁹

Second Marriages

This special treatment of the Matrimonial Home has special implications for boomers and seniors, as many of these individuals may be involved in a relationship that is their second marriage.

At the time of their second marriage, one of the spouses may own a home, which subsequently becomes a Matrimonial Home. As a result, if the parties separate, this spouse cannot deduct the value of the Matrimonial Home from their NFP even though it was a date of marriage asset. This causes some devastating consequences for many individuals where the Matrimonial Home is their only

⁵ FLA, s. 17.

⁶ *Ledrew v. Ledrew* [1993] O.J. No. 596 (O.C.J.).

⁷ FLA, s. 4(1).

⁸ FLA, s. 19.

⁹ FLA, s. 21.

valuable asset and is meant to be their financial security in retirement or is to provide an inheritance for their children.

In *Hart v. Hart*, the husband owned the matrimonial home prior to his marriage. This was the second marriage for both spouses.¹⁰ Prior to the marriage, the husband transferred title to the matrimonial home to his children, retaining a life interest for himself. This arrangement allowed him to live in the home with his spouse, but he did not 'own' the property. The wife proceeded to trial claiming a constructive trust in the property as well as claiming that the value of the husband's 'life interest' in the matrimonial home should be included in his NFP. The wife was unsuccessful on both claims. This is an interesting example of how individuals arrange their finances in order to maintain separate property in a second marriage.

Due to the provisions in the FLA, even if a spouse owns the Matrimonial Home, it is possible they will be required to vacate it if their spouse is awarded exclusive possession under the FLA. Criteria for being awarded exclusive possession can include the best interests of the children, the financial position of the parties, the availability of other suitable and affordable accommodation, and violence committed by one spouse against the other or the children.¹¹

Domestic Contracts

Many individuals are not aware of how the FLA equalizes property post-separation, particularly the special treatment given to the Matrimonial Home. In situations where parties' are entering into their second (or third, or fourth...) marriage, they may not want to share property with their spouse. Therefore, to protect their interests, it is recommended they enter into a marriage contract.

When parties enter into a marriage contract under the FLA, they can choose how to deal with their affairs following separation or death. The spouses can contract on issues such as the ownership and division of property and support.¹² Therefore, parties can chose not to equalize their property post-separation. This would protect any property, real or otherwise, that an individual owned prior to the marriage.

It is important to note, however, that individuals can not contract out of Part II of the FLA, which deals with possession and alienation (sale or encumbrance) rights of the Matrimonial Home.¹³ This means that even though one spouse may own the Matrimonial Home prior to marriage, and the parties contracted to remain separate as to property, the spouse who does not own the Matrimonial

¹⁰ *Hart v. Hart* [1997] O.J. No. 3662 (O. C. J.).

¹¹ FLA, s. 24(3).

¹² FLA, s. 52(1)

¹³ FLA, s. 52(2)

Home may still be able to get an exclusive possession order to remain in the Matrimonial Home.

Trust Claims

Common-Law Spouses and Matrimonial Home

It is a popular misconception that common-law spouses have the same rights and obligations regarding property division as married spouses. While both common-law (who have been together three years or have a child) and married spouses have the same entitlement to support, their rights with respect to property are entirely different. When common-law spouses separate, each leaves the relationship with the property that is owned in their name and the obligation of the debts that are in their name. Therefore, the special treatment that the Matrimonial Home is given in the FLA does not apply to common-law spouses. This is equally true to the possessory rights of the Matrimonial Home – common-law spouses are not entitled to these either. Notwithstanding the length of a common-law couples relationship, the title partner can eject the other partner from the home immediately on separation.

While a common-law spouse is not entitled to a division of net family property following separation, in certain circumstances they may be entitled to a trust interest in property owned by the other common-law spouse. Trust remedies are designed to redress unjust enrichment by the other spouse where a monetary award is not sufficient.¹⁴

Trust Remedies

Where a person confers a benefit or enrichment on another; suffers a corresponding deprivation as a result of the contribution which he or she has made; and there is no juristic reason for the enrichment, a trust may be imposed.¹⁵ For example, a trust may be imposed where one common-law spouse contributes financially, or through household and child care services, to the home or other property owned by the other spouse. A trust remedy ensures that where a common-law spouse has contributed to the property owned by the other common-law spouse, they will have some entitlement to the property, even if they are not entitled to equalization of net family properties under the FLA.

For a trust remedy to be imposed, the contribution must be directly related to the property. In *Kroetsch v. Menard*, a trust was imposed on the Matrimonial Home

¹⁴ See *Wylie v. Leclair* 64 O.R. (3d) 782 (O.C.A.) where it was found that a monetary award was sufficient to redress the unjust enrichment.

¹⁵ See *Peter v. Beblow* [1993] 1 S.C.R. 980 and *Petkus v. Becker* [1980] 2 S.C.R. 834.

in favour of the stay-at-home common-law spouse (the mother).¹⁶ As the father still had a child support obligation, the court decided a monetary award might interfere with his ability to pay support. As a result, the court imposed a constructive trust in the Matrimonial Home to be paid out when the father sold the home or when the youngest child was no longer a dependant.

Traditionally, trust remedies were used to protect the stay-at-home spouse, typically the woman. For boomers and seniors who have never married, or who are on a second marriage, a trust remedy may be a useful mechanism to obtain a right to property owned by the other common-law spouse throughout the relationship.

Most often trust remedies are imposed on real property, usually the matrimonial home, however recent caselaw has examples of trust claims being made against investment properties, RRSPs and pensions. *Fox v. Fox*, a constructive trust was imposed on the husband's inheritance in favour of the wife who had helped him in the recovery of the inheritance.¹⁷ In *Belvedere v. Brittain Estate*, a spouse was successful in making a constructive trust claim in her spouse's RRSPs.¹⁸ As the legislature has not addressed the inequities between common-law and married spouses with respect to property division, judges may impose a trust to ensure an equitable result.

Inheritances, Gifts and Equalization

Inheritances and Gifts

When a married spouse inherits property, real or personal, during the marriage the FLA allows this property to be excluded from equalization.¹⁹ Inheritances and gifts, however, can not be excluded if:

- (a) the inherited or gifted property is the Matrimonial Home;
- (b) the inherited or gifted property was used to purchase, renovate or discharge debt on the Matrimonial Home.

Many individuals are not aware of these provisions in the FLA. Often when spouses inherit property, their first instinct is to pay down the family mortgage or renovate the home. The unexpected result is that, upon marriage breakdown, the value of the inheritance or gift can not be excluded from the spouse's NFP.

¹⁶ *Kroetsch v. Menard* [2006] O.J. No. 2794 (Ont. Sup. Ct.). See also *Parrington v. Mead* [2007] O.J. No. 1881 (Ont. Sup. Ct.).

¹⁷ *Fox v. Fox* [2006] O.J. No. 616 (Ont. Sup. Ct.).

¹⁸ *Belvedere v. Brittain Estate* [2007] O.J. No. 3067 (Ont. Sup. Ct.)

¹⁹ FLA, s. 4(2). See *Allgeier v. Allgeier* [1996] O. J. No. 3956 where the wife unsuccessfully argued that a condominium in Florida purchased by the husband with his inheritance was a matrimonial home and should not be excluded from his NFP.

For married spouses, the only ways to avoid this problem is to execute a marriage contract which protects the gift or inheritance or to keep the gift or inheritance completely separate in an account in only that spouse's name.

Income from Gifts and Inheritances

Income from gifted or inherited property is also not excluded from a spouse's NFP unless the donor or testator expressly states it is to be excluded. For example, if a spouse inherits a rental property, the rental income will only be excluded from the spouse's NFP, if the testator has expressly stated the rental income is to be excluded.²⁰

For an aging population that might be drafting wills, or gifting property to the next generation, this is an important provision to be aware of. The donor or testator must expressly state in the Deed of Gift or Will that the income from the gifted/inherited property is to be excluded.

Joint Tenancy v. Tenants in Common

Many individuals are not aware of the difference between holding real estate as joint tenants or tenants in common. The most significant difference is that when property is held as a joint tenant, and the other joint tenant dies, their share of the property automatically transfers to the surviving joint tenant by the right of survivorship. When property is held by individuals as tenants in common, and one owner dies, their portion of the property passes to their estate, and the other owner retains only their share of the property.

In second marriages how title to real property (particularly the Matrimonial Home) is held is very important as those spouses will often want to benefit their children from their previous marriage rather than their new spouses. Most often a marriage contract makes the most sense to ensure each spouse's intentions are clear.

How property is held can make a significant difference for individuals. It is important when advising clients that they are well aware of these differences and chose the option that is best suited to their needs.

The FLA tries to protect individuals whose spouses own the Matrimonial Home with a third party as tenants in common. In this situations, s. 26 of the FLA states that upon the death of the spouse who owns the Matrimonial Home, the joint tenancy will be severed. This allows for the deceased spouse's interest in the Matrimonial Home to be included in their estate. This exception to the right of survivorship does not apply to other jointly held property.²¹

²⁰ FLA, s. 4(2)2.

²¹ *Clarke v. Read Estate* [2000] O.J. No. 4155 (Ont. Sup. Ct.).

Wills, Intestacy and Equalization

Pursuant to the FLA, when a spouse dies, the surviving spouse has the option to elect to receive their entitlement to the deceased spouse's property under the will or through an equalization of net family property.²² If the deceased spouse does not have a will, the surviving spouse can elect for equalization or to receive their entitlement to property under Part II of the *Succession Law Reform Act* (SLRA).²³ These provisions under the FLA only apply to married spouses.

If the surviving spouse does not make an election within six months, they will be deemed to take under the will or under Part II of the SLRA.²⁴

For boomers and seniors, understanding this option under the FLA is important. There may be some circumstances where it is more advantageous to equalize the NFP, particularly where the deceased spouse has not adequately provided for the surviving spouse under the will. Furthermore, when individuals are doing estate planning it is important to know that their surviving spouse is entitled to equalization, even if the intent of the parties was to be separate as to property when they were married. If a client does not want to equalize their property with their spouse, even upon death, and only wants to inherit what is provided for in the will, they must execute a marriage contract that limits the surviving spouse's rights to property division under s. 6 of the FLA.

Common-Law Spouses

Since common-law spouses are not entitled to equalization under the FLA, or inheritance under the SLRA if their spouse dies intestate, it is very important for common-law spouses to make wills that protect their spouse.

If the spouses are living together in a home owned by the deceased spouse, and that spouse dies intestate, the surviving spouse will not have any rights under the FLA to that property (subject to trust claims which are time consuming and expensive to pursue). It is particularly important for common-law spouses to clarify their wishes as the law does not provide the same protection to them as it does to married spouses.

Conclusion

Many provisions in the FLA were designed to address inequities arising in a marital relationship, and these provisions are necessary, particularly in 'traditional' relationships where one spouse was the primary wage earner and the other spouse was responsible for the children and home.

²² FLA, s. 6(1).

²³ FLA, s. 6(2).

²⁴ FLA, s. 6(8).

When clients are older, and perhaps marrying for second time to an individual who is not the parent to their children, some of the FLA provisions no longer make sense. Many individuals who marry would prefer to be separate as to property so that their children, not their second spouse, can benefit from the wealthy they have amassed over their life time.

On the other hand, long-term common-law relationships are not recognized under the FLA, and in these circumstances, the spouse who does not own the property may have an onerous trust claim to prove they are entitled to property.

Not knowing the state of the law is not a proper justification to a different property regime than currently exists. Lawyers should urge their clients to inform themselves of their rights and obligations under the FLA so they can structure their finances that best fits their circumstances.