Trust Decision Uncovers Gap in Matrimonial Home Legislation

A decision of the Ontario Court of Appeal has exposed a significant gap in the statutory protections for matrimonial homes in this province. Where a married couple share a matrimonial home there are many legislated protections for the spouse who is not the owner or the named tenant of the home. Both spouses have rights to possession of the home while they are married unless a court orders otherwise. A spouse who owns a matrimonial home at the date of marriage and owns the same property at the date of separation or at death cannot claim a deduction for the value of bringing the home into the marriage. A spouse who receives a matrimonial home as an inheritance or gift from a third party or uses an inheritance or gift from a third party to purchase a matrimonial home cannot claim an exclusion for the value of this property at the date of separation or at death. In other words, the owner of the matrimonial home must share its value with the other spouse. During a marriage both spouses must consent to the sale of a matrimonial home or to the home being mortgaged. These rights do not arise with every family home. "Matrimonial home" is not synonymous with "family home". "Matrimonial home" has a very specific definition under the *Family Law Act*. The Ontario Court of Appeal's decision in *Spencer v. Riesberry* highlights the limitations of that definition.

The *Family Law Act* defines a matrimonial home as a property in which a spouse has an interest and which is ordinarily occupied by the spouses as their family residence at the time that they separated. The *Act* adds that if a spouse owns shares in a company that owns the home and is entitled to live in the property because of the share ownership, then that qualifies as an interest in the property. The Court of Appeal has had no difficulty in previous decisions in finding that where a company controlled by a spouse owns a family home that property qualifies as a matrimonial home. In *Spencer v. Reisberry* the Court of Appeal considered a situation in which the family home was owned by a trust of which the wife was both one of the trustees and one of the beneficiaries. The Court of Appeal held that the wife does not have an interest in the house and, as a consequence, the property is not a matrimonial home. The implications of that for the husband are: he has no right of occupancy in the property, he has no rights to be advised or give his consent to the home being mortgaged or sold, and his wife can claim a deduction for the value of her beneficial interest in the trust as of the date of marriage or may exclude the value of her beneficial interest in the trust even if a large portion of the value relates to the family home.

The Court of Appeal's analysis of the case is very straightforward. The Court reviewed and applied classic trust principles to find that a person who is the beneficiary of a trust does not have an interest in any particular asset of the trust. A trustee of the trust actually has legal ownership of the underlying assets, in this case including a family home, however even though the wife in this case was a trustee she did not hold the home for her own benefit but for that of the beneficiaries to whom she owes fiduciary duties. The Court did not accept an analogy between a family home being owned by a corporation in which a spouse has an interest, which manifestly is a matrimonial home, and a family home being owned by a trust in which a spouse is a trustee and beneficiary. The Court of Appeal noted that the sole reason that a property owned by a corporation qualifies as a matrimonial home is because the legislation expressly addresses that situation.

This is not the first court decision in Ontario to find that a home held by a trust is not a matrimonial home but it is the first high profile decision. The case has significant implications for married spouses in this province. Absent a successful appeal to the Supreme Court of Canada or new legislation, spouses now have a means to avoid the special rights and protections for matrimonial homes. This can be done unilaterally without the non- beneficiary spouse having any say in the matter. In effect, the trust vehicle can be used as a one-sided marriage contract to exempt a family home from the restrictions imposed on matrimonial homes. Presumably if the trust is a sham it would be possible for the non-beneficiary spouse to apply to a court to find that there is no valid trust and the underlying assets belong to the non-beneficiary. That may discourage manipulation of this gap in the statute to some extent. However in *Spencer v. Riesberry* it appears clear that the trust had been settled by the wife's mother with an eye to protecting the underlying assets from being included in any division of family property by her children's spouses. This did not deter the Court of Appeal. The trust in this case was entirely legitimate, not a sham at all, yet devised at least in part for the purpose of keeping assets out of the category of those for which value is shared under our provincial family property legislation.

There are real questions about the application of matrimonial home provisions in the *Family Law Act*. It is an area in which there have been calls for reform for many years. To impose statutory protections for homes held through corporations, but not for those held through trust vehicles, is not particularly consistent. It sets an even greater need for legislative reform in this area. In the meantime, no doubt trusts will appeal to some as an alternative to the cost and awkwardness of negotiating marriage contracts relating to family homes.