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Parental gift up for grabs in divorce

Courts often rule spouse gets share

Matrimonial home must be divided

With the phenomenal increase in housing costs in recent years, more and more singles and couples are looking to their parents for financial help in buying a house or cottage.

A common problem for many parents is how they can give money to their grown children without the child's spouse getting half of it in the event they separate or divorce.

This increasingly frequent problem was the subject of an excellent article in the summer edition of Deadbeat, the newsletter of the Trusts and Estates section of the Ontario Bar Association. Titled "Advice on how to gift a home to a child and not to their spouse," the article was written by Susan J. Heakes, of Heenan Blaikie LLP, in Toronto.

Heakes notes that the first thing parents should be told is that, unlike other gifts, the matrimonial home is shared equally, even if it was acquired directly or indirectly through a gift or inheritance.

Under the common law, an advance of money from a parent to a child is presumed to be a gift, and if it is used for the purchase of a family home, the Family Law Act says it is divided with a separated or divorced spouse.

According to Heakes, there are three common strategies that can be used by parents so that a substantial gift for a home is not subject to a later division if the relationship fails.

The strategies are:

►A marriage contract.

►Characterizing the gift as a loan.

►Various ownership solutions.

A "fully loaded" marriage contract, Heakes says, will achieve the parent's goal of ensuring that the child retains the matrimonial home in the event of a separation or death.

But the rules for creating an iron-clad pre-nuptial agreement, in which the spouse waives his or her rights to the matrimonial home, are fairly strict. They include:

►Willing and able participants (not easy for newlyweds: "Don't you trust me?").

►Full financial disclosure by both spouses.

►Independent legal advice to the other spouse.

►Clear language releasing any claim to the matrimonial home or replacement homes.

►Adding the parent as a party to the agreement.

►Making the contract irrevocable.

Heakes also advises that the lawyer who drafts the marriage contract should practise in the area of family law, so that the client will have full and up-to-date advice.

Calling the gift a loan is, of course, a complete fiction but is a device commonly used by many parents when helping a child buy a home.

In order for the "loan" arrangement to be most effective, the house should be registered only in the name of the child.

Both spouses should be required to sign a loan agreement, and the arrangement should be secured by the registration of a mortgage on title.

Again, before consenting to the registration of the mortgage on title, the non-titled spouse should receive independent legal advice.

In the absence of a mortgage, a promissory note signed by both spouses is recommended.

Unfortunately, there are two problems with this type of solution.

The non-titled spouse could argue that the subsequent conduct of the gifting parent amounted to a forgiveness of the loan.

A more serious problem can occur if 10 years or more have elapsed since the last payment was made on the mortgage. If no payments are made during this period, the mortgage claim expires under the Real Property Limitations Act.

That's exactly what happened in the 2005 case of *Cioccio v. Cioccio*.

In 1983, the wife and husband signed a mortgage in favour of the husband's parents. The mortgage was registered against the couple's first home and payments were made.

In 1988, a new house was purchased and the parents' mortgage was replaced with a new one, but no payments were ever made on it.

Last year, Justice Sherrill M. Rogers, of the Ontario Superior Court of Justice in Newmarket, ruled that the mortgage was void since no payments had been made for more than 10 years.

Even if the mortgage was payable on demand without fixed payments, in a similar case in 2004, it was ruled that the limitation period starts when the mortgage is signed, not when the first demand for payment is made.

A third option is for the "gifting" parent to retain ownership of the home but leave it to the child in his or her will.

This may or may not work, but it doesn't solve the problem if the marriage breaks down after the parent dies. In that case, the house would be split between both spouses.

Putting the property in the name of a trust, which would hold registered title, is a possible solution.

But it creates income tax and estate planning challenges. As well, it is a relatively expensive mechanism to avoid sharing ownership of a home with a spouse.

In her article, Heakes suggests that a family law judge might well ignore the trust and declare the property to be a matrimonial home, subject to having its value divided with the spouse.

Heakes concludes that there is no bullet-proof, cost-effective solution to this problem.

All of the suggested solutions are expensive if carried out carefully, and there are no guarantees that a family law judge will find the mechanism chosen by the gifting parent to be effective.

The marriage contract is probably the most effective, but the least likely to obtain because of the "Don't you trust me?" scenario between the spouses.

The mortgage solution is risky because of the limitations issues, and the ownership solutions are transparent and expensive.

Ultimately, Heakes advises that parents who want to gift or loan money to a child for the matrimonial home face a significant risk that the home's value will be shared with the former in-law if the marriage ends in divorce.

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