

Selling the Family Home after Separation

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By Hannah Kazman

Spouses frequently have differing opinions on what to do with the family home after separation. In particular, one spouse will often want to sell the family home while the other spouse wants to retain it. In the event spouses cannot agree and one spouse wants to put the house up for sale, does that spouse have the ability to force the opposing spouse to sell? The short answer is yes.

The Partition Act

In Ontario, section 3(1) of the *Partition Act*, RSO 1990, c. P.4, allows for any individual with an interest in property to apply to the court for an order forcing the sale of the property and section 2 of the *Partition Act* grants the court the power to compel other owners to proceed with the sale. This includes property owned by spouses, such as the family home.

Defining Interests in the Family Home

As the *Partition Act* only allows for spouses with an interest in the property to apply for partition and sale, the first step is to determine whether the spouse bringing the application has an interest in the family home.

If the spouse is registered on title, either by themselves, or with their spouse as a joint tenant or tenant in common, they have an interest in the home and can apply for the sale under the *Partition Act*.

If the spouse is not registered on title, the spouse may still be able to establish an interest in the family home if they can show they should be a beneficial owner of the property due to constructive or resulting trust. However, a trial on the issue of the constructive or resulting trust would likely need to be held before the house could be ordered for sale.

If a spouse cannot establish an interest in the family home, they will be unable to bring a court application forcing the sale. However, this does not mean that a non-owning spouse has no right to any equity of the property. It just means they cannot apply to force the sale of the home.

When Will the Court Force the Sale?

If a spouse with an established interest applies for an order under the *Partition Act* requiring the other spouse to sell the family home, the court is required to compel such a sale unless the opposing spouse can show a reason why the order should not be made (*Afolabi v. Fala*, 2014 ONSC 1713). The opposing party must provide evidence of malicious, vexatious or oppressive conduct on behalf of the spouse who is seeking the sale. If the spouse opposing the sale can establish such conduct, the court has narrow discretion to refuse to order the sale of the family home (*Latcham v. Latcham* (2002), 27 R.F.L. (5th) 358 (Ont. C.A.)).

In the category of oppressive conduct, the court will consider whether the sale of the home would cause hardship to the opposing party or the parties' children. For example, hardship may be found if the opposing party does not have the ability to find somewhere else to live or the children will be deprived of a place to live (*Kaing v. Shaw*, 2017 ONSC 3050).

When determining whether there is any malicious, vexatious or oppressive conduct, the court will look to the reasonableness of the parties' positions and the spouses' circumstances (*Akman v. Burshtein*, [2009] O.J. No. 1499 and *Afolabi v. Fala*)

Purchasing the Other Spouse's Interest

You may be thinking, what if the spouse opposed to selling wants to purchase the other spouse's interest- can the court order the spouse to accept the opposing spouse's offer instead of opening it up to outside buyers?

The court cannot force one spouse to sell their interest in the family home to the other spouse. Spouses do not have a special right to purchase the other spouse's interest in the property and each spouse is entitled to obtain the highest price possible for their interest in the home (*Martin v. Martin*, [1992] W.D.F.L. 589, and *Buttar v. Buttar*, 2013 ONCA 517). The spouse who wishes to retain the property is welcome to bid for the purchase of the family home alongside outside buyers, but if a higher offer is provided by a third party the spouse looking to sell is entitled to accept it.

This is only a quick summary on forcing the sale of the family home.

Navigating issues to do with the family home after separation is never easy. If you or anyone you know has questions about your rights, please contact a member of our family law group for advice.

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