

## **What Is The Definition Of Property In Ontario, And Can Ontario Courts Make Orders With Regards To Property Of Married Spouses Located Outside Of Ontario?**

By Glen Schwartz

### ***Definition of Property in Ontario***

It is important to outline what constitutes ‘property’ upon breakdown of the marriage in the context of family law disputes in Ontario. The *Family Law Act*, which is the pertinent legislation in Ontario dealing with proprietary rights in the context of family law, at section 4, defines property as “any interest, present or future, vested or contingent, in real or personal property”. Such property can be located within or outside of the Province of Ontario.

While section 4 of the Act does require the parties to include all interests in property no matter where its located for the purposes of equalization of net family property found in section 5 of the act, the *Family Law Act* does not deal with the actual physical division of any such property. Rather, the legislature intended for the courts to simply divide the *value* of the property each party has an interest in which they accumulated during the marriage wherever such property may situate, and also authorized the courts to help in ascertaining whether a party has an interest in property or not should there be any disagreement.

### ***When Would It Be Required For a Court To Make Orders With Regards to Property?***

Even though Ontario courts do not physically divide property between the parties in the context of family law disputes, they are often asked to determine ownership interests in property, order the sale of property, and determine whether a ‘constructive trust’ claim exists . As a result of such questions being asked of the court, they are required to make orders with regards to property.

### ***Can Ontario Courts Make Orders With Regards To Property Of Married Spouses Located Outside Of Ontario?***

#### ***i) Statue Law***

Section 28 of the *Family Law Act* which is found in Part II of the Act that deals specifically with the matrimonial home states that the courts only have the authority to make orders with regards to matrimonial homes located within the province of Ontario. The *Family Law Act* is silent with regards to other foreign owned marital property as such legislation applies only to property within the province itself, and any order an Ontario court makes with regards to the sale of foreign property may not be enforceable in the foreign jurisdiction.

#### ***ii) Caselaw***

The legal notion that Ontario courts do not have the authority to make an order as against foreign immovable property is founded in caselaw. There have been numerous decisions rendered throughout our Canadian legal system which states that our courts do not have the authority to award any ‘in rem’ proprietary rights with regards to property located outside of its jurisdiction. One leading case on the topic is that of *Tezcan v. Tezcan* [1987], 11 R.F.L. (3d) 113 (B.C. C.A.), whereby the court pronounced that “*The general rule is that the courts of a country have no jurisdiction to adjudicate on the right and title to lands not situated within its borders. Only the courts of the jurisdiction in which lands are situate may adjudicate on the rights and title to such lands*”. This concept was further relied upon in the case of *Macedo v. Macedo* [1996] 19 R.F.L. (4th) 65 (Ontario Court of Justice) whereby Justice Beaulieu stated, “*It is trite law that the only court having jurisdiction to entertain proceedings with respect to immovable property is the court of the situs. Thus, Canadian courts do not have jurisdiction to make an order concerning right, title, or interest, to a foreign immovable*”.

a) *Personal obligation*

With parties accumulating more and more marital assets outside of the provincial jurisdiction, and with caselaw in place stating that Ontario courts do not have the authority to award proprietary rights to immovable property located outside of its jurisdiction, there has been an increasing trend amongst litigants towards attempting to seek equitable relief from our courts through common law principles when dealing with foreign property. Parties are requesting the courts make an award ‘*in personam*’ whereby the courts will compel a personal obligation on an individual with respect to a contractual or equitable obligation involving a foreign immovable. For example, as the courts cannot award the sale of a property located outside of its jurisdiction as it does not have the authority to govern such property as previously explained, the ‘*in personam*’ award can be sought in order to obligate the individual himself/herself to undertake an action which would derive the same result as against the foreign property.

In order for the courts to be able to consider an ‘*in personam*’ right to foreign property, the party seeking such relief must be able to satisfy the following four conditions:

- (1) The court must have jurisdiction over the defendant to be able to force him/her to carry out an obligation.
- (2) There must be some personal obligation running between the parties.
- (3) The jurisdiction cannot be exercised if the local court cannot supervise the execution of the judgment.
- (4) Finally, the court will not exercise jurisdiction if the order would be of no effect where the property is located.

In *Johnston v. Adam* [2011] 5 R.F.L. (7th) 176 (Ont. S.C.J.), the Ontario Superior Court pronounced that the criteria needed in order to succeed in establishing a personal right to foreign

property was met. In this case, the court awarded a construct trust remedy in a property located in the Province of Quebec.

It must be pointed out that all four criteria listed above must be met when seeking such equitable relief, and that the '*in personam*' right only ought to be used in exceptional cases

There seems to be conflicting mindsets as to the court's authority to make orders with regards to foreign property. On the one hand there is the general rule formulated through caselaw that courts cannot deal with property located outside of its jurisdiction as it would be a conflict of laws, however, with the increasing amount of equitable claims being put forward, the court has demonstrated its willingness to grant such '*in personam*' relief in exceptional cases. It would be of much help to the family law bar if the Court of Appeal were to render a decision clarifying the judiciary's authority with regards to making orders against foreign property.

There are no clear cut answers with regards to the Ontario court's authority when handling issues relating to foreign property and it is necessary to seek proper independent legal advice when any related issue associated with foreign property arises.