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Marmer Penner Inc. Newsletter

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Principal Residence Clause In A Separation Agreement

Family law practitioners need to remember that a matrimonial home and principal residence are not the same. A taxpayer and a spouse are generally allowed one principal residence designation per each year of marriage between the two of them. The number of matrimonial homes may exceed this. A beneficiary of a trust owning a home may also make a principal residence designation on behalf of a trust. It is beyond this writer's scope of expertise to comment on whether a trust may own a matrimonial home.

Where spouses own more than one residential property, it is important to calculate the present value of income tax on disposition. It is important to remember that with proper tax planning, the principal residence designation is made on the property with the largest accrued taxable capital gain, however the number of years held must also be considered. One must also remember that a property outside Canada may be designated as a principal residence as long the owner or his or her spouse or children habitually reside in that home for each year the designation is made.

While the designation does not have to be made until the property is disposed, a race to make a designation may occur on separation. For example, two spouses separate with one keeping the house and one keeping the cottage. Each property has an accrued gain. If the agreement is silent as to which property may be claimed as the principal residence, it becomes "first come, first served". Whoever disposes of a property first, designating it as the couple's principal residence for all the years it was owned, wins the race.

The loser is unable to claim the principal residence on the remaining property for the common years it was owned.

A non-resident owning property in Canada cannot designate it as a principal residence. However, a Canadian taxpayer may designate a U.S. property as a principal residence. So if the Florida condominium has risen in value more than the Toronto home, consideration should be given to designating the U.S. property as the principal residence. Be careful here giving tax advice. If there is a significant U.S. tax liability on the gain, a Canadian taxpayer may wish to trigger Canadian tax in order to utilize foreign tax credits.