
Exclusive Possession of the Matrimonial Home

Under section 24 of the Family Law Act, the court has the power to grant a married spouse exclusive possession of a matrimonial home regardless of which spouse has actual ownership of the home. This power is only available to a court where the parties are married. An unmarried spouse has no common law or statutory right to occupy his or her spouse's property when the relationship ends.

Section 24 (3) of the Family Law Act, sets out the criteria that the court shall consider in deciding whether to make an order for exclusive possession:

- a) the best interests of the children affected;
- b) any existing orders under Part I (Family Property) and any existing support orders;
- c) the financial position of the spouses;
- d) any written agreement between the parties;
- e) the availability of other suitable and affordable accommodation; and
- f) any violence committed by a spouse against the other spouse or children

In determining the best interests of a child, section 24(4) of the Family Law Act, directs the court to consider:

- a) the possible disruptive effects on the child of a move to other accommodation; and
- b) the child's view and preferences, if they can reasonably be ascertained.

A recent Ontario Superior Court decision of Justice Horkins, *Leckman v. Ortaaslan* [2013] O.J. No. 2606, examined the Family Law Act criteria in determining a Wife's motion for interim exclusive possession of the matrimonial home. The Husband

disputed the motion, seeking instead an order that the parties and the children remain together in the matrimonial home pending a final resolution of the court application.

In this case, the parties had been married in 1996 and were separated in 2012. They had two children, 16 year old Anna and 12 year old Garen. Both spouses were well educated and high income earners. The matrimonial home, worth an estimated 1.5 million, was in the Wife's name alone and had no mortgage.

In this case Justice Horkins, analysed the applicable criteria set out in the Family Law Act. Justice Horkins acknowledged that both parties had sound financial positions and therefore rejected the Husband's claim that he did not have the resources to afford alternate accommodations.

In assessing the issue of whether violence had been committed by a spouse, Justice Horkins confirmed that the violence referred to in s.24(3)(f) is not restricted to physical violence. Citing the court in *Hill v. Hill* [1987] O.J. No. 2297, Justice Horkins stated that, "violence includes a psychological assault upon the sensibilities of (another) to a degree which renders continued sharing of the matrimonial dwelling impractical." Where the conduct is calculated to produce and does produce an anxiety state which puts a person in fear of the other's behaviour and impinges on that person's mental and physical health, violence has been done to his or her emotion equilibrium as if he or she had been struck by a physical blow.

In the present case, Justice Horkins found that the situation in the matrimonial home was tense and that it was a difficult time for all and in particular for the children. The Wife described a home situation where the children felt like prisoners in their own home. She advised the court that when the Husband was home, he would give the children the silent treatment. This evidence was



supported by a report from the oldest daughter's psychotherapist which revealed that Anna constantly felt like she was "walking on egg shells" when her father was in the house. The Husband's actions caused Anna stress, anxiety and depression.

Justice Horkins concluded that the Husband had verbally and emotionally abused both the Wife and Anna and that the Husband's behaviour amounted to a psychological assault. Justice Horkins was not convinced that the children's relationship would suffer if their father were to move out of the home.

Additionally, the court acknowledged that the children had lived in the matrimonial home for many years and that it was close to their school.

Noting the risks associated with the current living situation, Justice Horkins found that a decision regarding exclusive possession could not be adjourned or wait until trial as the situation was too dire. While the court generally prefers to make a final decision based on viva voce evidence that has been tested through cross-examination, in this case Justice Horkins found that it was in the best interest of the children to grant the Wife an interim order for exclusive possession of the home.

This case makes clear that although an order for interim exclusive possession of a matrimonial home should not be made lightly as it will have the effect of forcing one spouse out of the home, where evidence can be presented that there is much conflict in the home, a spouse with custody may receive an order for exclusive possession of the matrimonial home.

About the Author Jennifer Black, B.A. (Hons), LL.B.

Jennifer Black is a lawyer in the family law group at Sorbara, Schumacher, McCann LLP, one of the largest and most respected regional firms in Ontario.

Practice Groups:

Family Law, Mediation, Collaborative Family Law

This article is intended only to inform and educate. It is **not legal advice**. Be sure to contact a lawyer to obtain legal advice on any specific matter.