THE FAMILY HOME IN A TOPSY TURVY MARKET

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Unless you recently arrived from afar, you have noticed the dramatic rise in Saskatchewan real estate prices these last three years. In January 2010, the Regina Leader Post reported, “two or three years ago, Regina was among the most affordable cities in the world.” Today, Regina is on par with the average Canadian city as being “moderately unaffordable” while Saskatoon was reported as “seriously unaffordable.” For many families, the home now represents a surprise treasure in their net worth; and net worth, of course, is the fuel in family property litigation.

If a family property case is destined for trial, it is common that the trial is held two or more years after the date the court proceedings were commenced (the petition date). In several recent trial cases, there was a three-year lag (Busse v. Gadd, 2009 SKQB 99, Riley v. Riley, 2009 SKQB 98). Consequently, a dramatic change in the-value of the family home between those two dates is common. Moreover, section 2 of The Family Property Act, the genesis of the legal valuation debate, empowers the court to choose either of the two dates, “whichever the court thinks fit”. Such words are music to any creative legal mind.

In the last three years, a trend has emerged where Saskatchewan courts have valued the family home as at trial date and not at the earlier petition date. This was noted by Mr. Justice R.S. Smith in Williams v. Williams, 2008 SKQB 390 writing, “Generally, in this jurisdiction, when dealing with real estate, the Court has been inclined to use the date of adjudication for valuation as realty can, and in the last three or four years has, increased substantially by reason of market forces.” Mr. Justice Smith cites a useful list of cases including: Ouellet v. Ouellet, 2007 SKQB 298, Dobson y. Dobson, 2005 SKCA 136; Ioanidis v. Ioanidis, 2007 SKQB 233; and Zawada v: Zawada, 2007 SKQB 35.

In Zawada v. Zawada, supra (Wright, M-E, J.) the court explained the rationale for trial-date home valuation stating, “There is no compelling reason that should preclude the respondent from sharing in the increase in the value of the family home between the time of application and the time of trial.” Many cases refer to the increase in the real estate value as a “windfall” to be shared equally between the spouses. This is arguably more appropriate regarding the family home, as opposed to other assets, because the family home is to be divided equally except in extraordinary circumstances. As Mr. Justice MacLeod once stated, perhaps with tongue in cheek, “[the legislation] directs that family property will be divided equally except for the family home which will be divided more equally.”

Some may now contend that there is a general rule for valuing the family home at trial date with little latitude to avoid such a verdict, but as Mr. Justice Smith in William v. Williams, supra, smartly noted, “General rules are referred to as general because they are not absolute.” A few cases, therefore, have bucked this trial-date trend.

In Staudt v. Staudt, 2009 SKQB 7 (Zarzeczny J.) various factors persuaded the court to choose the petition date as the house valuation date notwithstanding expert evidence about the growth in value leading up to trial. The court noted the wife's need of the house for the child, her inability to buy out the equity, and also noted that the husband had purchased a house after petition date which had similarly risen in value; the husband "benefitted by the 49% increase in the value of his Regina home," the court observed.

Williams v. Williams, supra, was another case that went against the tide of opinion for trial-date valuation. In that case the court valued the house at the earlier petition day and awarded one spouse the entire benefit of the market growth to trial. In that case, the court described the influential trial facts stating, "In this case, 1 am satisfied that it would be inequitable for Mr. Williams to share.in the increase in value in the family home. He has contributed nothing to the family finances since 1998 and but for the petitioner there would be no family home."

In that same vein, Judges have opined that where one party undertakes significant renovations after petition date, or pays all the house-related costs, those factors too could lead to an earlier valuation date for the benefit of one spouse (Ioanidis v. loanidis, supra, Zawada v. Zawada, supra). Similarly, the discretionary factors under section 21 (3) of The Family Property Act provide ammunition for other debates for an earlier valuation date. Those factors include length of time that the spouses cohabited, duration that the spouses have lived apart, and date when the property was acquired. It rests on the trial lawyer to find the facts and issues to persuade a trial judge one way or the other on valuation date and there is potential return for such an effort. As Chicoine, J. stated, "... the appellate level decisions vest in a trial judge considerable discretionary power in selecting a date of valuation .. ." (Riley v. Riley, supra.

The rising price in real estate has also changed the ability of one spouse to buy out the other. Prior to 2006, Saskatchewan residents were accustomed to inexpensive housing which almost any working person could afford. In previous years, one spouse would commonly buy out the other and only rarely were both spouses unable to afford paying out half the equity. But rising prices have caused a quantum shift in the buy-out option. For example in Mang v. Hyshka, 2009 SKQB 164 (Dovell J.), the court ordered a sale of the house where neither spouse could afford to purchase the equity-rich home. This will be, it seems, a more common disposition in these high-price times. Pennies are tight when spouses split and their incomes are then stretched to support two households. At such a time, they are least able to muster more financing for a buyout of $100,000 or more.

The rise in home prices in Saskatchewan is being echoed in many parts of Canada. In February 2010, Maclean's magazine reported, "After barely pausing to acknowledge the financial crisis, Canada's residential real estate market has roared back to life, reaching record highs in recent months." That same article, however, quotes economists warning of a dire future with one American economist stating, "Canada is in for a housing bust worse than ours." Such speculation begs the question: If we have a real estate bust in Saskatchewan, what will be the legal fallout over the family home?

One need only look to the U.S. to find jurisdictions that have experienced the sad inverse of Saskatchewan's real estate boom. In December 2009 the Wall Street Journal discussed the U.S. housing crash in relation to divorce. In the U.S., the fall in housing prices means that, currently, 31.8% of persons with a first mortgage have negative equity — or the house is worth less than the mortgage owing. The article reports, “It used to be that couples fought over the house...Now everyone wants to run from it.” The Wall Street Journal lists a menu of unattractive options for the negative-equity home upon divorce including selling it at a loss or renting it out. Oddly, perhaps, the article reports falling divorce rates in the U.S. because couples are staying together longer waiting “until the market rebounds.”

Back in Saskatchewan, and for the time being, the U.S. family home dilemma seems far away. Few business people want to talk about the word that comes after boom. In the coming years, however, Saskatchewan lawyers may be reviving cases like Medernach v. Medernach (1985); 40 Sask. R. 269 which discusses valuation of family real estate in a declining market.