WHICH SPOUSE SHOULD GET THE FAMILY RESIDENCE FOLLOWING DIVORCE:

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The principal community asset to be divided in a divorce is typically the family residence. Along with child custody and support, it is probably the most litigated issue in the divorce process due to the psychological attachment divorcing couples have to the family residence. It is typically the home where the family has resided during most of the years of the marriage. It is also the home of the children in the neighborhood where they attend their schools, have their activities and play with their friends. Therefore, to win custody, couples feel that they must fight equally as hard to keep the family residence to try to maintain this broken family as intact as possible. When looking at the economics only, however, forgetting about the emotionality, there should be very little fighting between the spouses on this particular subject since it is usually always better, especially in a declining market, for one spouse to allow the other to keep the family residence in return for being bought out. The following are the reasons why:

THE REMAINING SPOUSE WILL TYPICALLY OVERPAY FOR THE LEAVING SPOUSE'S INTEREST.

The current real estate market is a declining one. Most studies say that it is not anticipated to turn around until 2009 or 2010, at the earliest. Therefore, couples remember what their house was once worth and therefore don't undertake the necessary studies of comparable sales to accept the fact their house is now worth much less. As a result, the spouse who wants to keep the house will overpay for the leaving spouse's one-half interest. The remaining spouse typically refinances the mortgage, draws upon an existing line of credit or borrows money for one-half of the equity and pays this to the leaving spouse in cash. The remaining spouse then has a higher payment whereas the leaving spouse is able to put these funds in a conservative investment such as double tax free municipal bonds and earn 5% per annum which, depending upon the tax bracket, could be equal to a taxable investment of up to 8% per annum. The leaving spouse is then able to rent a comparable residence for far less than what the remaining spouse is required to pay on the increased mortgage the remaining spouse was forced to take out to pay the leaving spouse's one-half equity. Then, the leaving spouse is able to wait for the real estate market to depress further in approximately one to two years and use those same proceeds to buy a residence at the bottom of the market with a lower debt service. At the end of the day, therefore, the leaving spouse has obtained a windfall whereas the remaining spouse is saddled with the additional debt burden taken on as a result of their decision to remain.

NO COMMISSIONS OR SELLING COSTS

Another advantage to being bought the excess costs the remaining spouse will eventually pay when the remaining spouse sells the family residence. In these transactions, the leaving spouse is paid one-half of the existing equity, without deduction for selling costs or commissions. Typically, a sale of a family residence involves payment of real estate commissions, escrow fees, title charges and related costs which could constitute 8% of the sales price. For a $600,000 house, this would be $48,000 right off the top. The leaving spouse receives his or her one-half share of the equity without this deduction. However, in the divorce situation, the remaining spouse, doesn't deduct this from the amount paid to the leaving spouse when purchasing the one-half equity. If the house were sold as a consequence of the divorce, **both parties** would be bearing this expense whereas in the above scenario where the remaining spouse stays and buys out the leaving spouse, the remaining spouse pays 100% of these costs with the leaving spouse paying nothing.

THE PROCEEDS ARE PAID TAX-FREE

Anther advantage is the remaining spouse pays one-half of the equity to the leaving spouse without any tax deduction to the remaining spouse and said proceeds are tax-free to the leaving spouse. This is IRC§1041.

CONCLUSION:

Based thereon, in a declining real estate market such as the one we have now, it is almost always better, without exception, to be bought out of this depreciating asset.

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