THE PROBLEM OF THE HYPOTHETICAL BROKERAGE FEE

In an equitable distribution case, once the values of all the matrimonial assets are fixed and the respective shares of the parties determined, one spouse, frequently the wife (particularly if there are children involved), will continue to live in the marital home. Courts will often encourage this result as being in the interests of the children.

Rather than paying the husband the monetary value of his share of the marital residence, the wife will receive the entire house in lieu of other assets. Stated another way, a credit is given to the husband representing the value of his share in the marital residence - a credit toward what he would otherwise pay the wife.

By way of example, let us assume that the husband's share in a marital residence with a fair market value of $100,000 has been fixed at 50 percent, or $50,000. For purposes of simplicity, there is no mortgage, no closing costs and no other fees. Rather than pay the husband the $50,000 - which would probably necessitate a sale of the house - the husband will be given a credit representing the value of his share against what he would have to pay the wife out of assets he is holding.

HOW MUCH CREDIT?

The problem: What should be the amount of the credit? The obvious answer appears to be 50 percent of the fair market value, or $50,000. But what happens when the wife goes to sell the house? She will not realize $100,000. She will have to pay a brokerage commission of - let us assume - 6 percent, or $6,000. The real value of the home to her is $94,000 - the net proceeds that will be realized upon sale. In fixing the husband's credit, shouldn't the hypothetical brokerage commission be subtracted?

Some courts have said yes; others have said no.

In 1972, the California Court of Appeal affirmed the trial court's award of the family residence to the wife and deducted a nominal real estate commission to determine the current market value and the value of the husband's share. In re Marriage of Drivon, 28 Cal. App. 3d 896, 105 Cal.Rptr. 124 (Cal. App. 1972).

In Drivon, the parties were indebted to the wife's father for loans, payable upon demand. After determining that the residence would have to be sold if the loans were to be repaid, the court explained:

Inclusion of the commission is not more speculative than setting the gross price of the property today, where there is no showing of a current buyer or of a current interest to sell.

Four years later, the same court took the opposite approach, awarding the husband the home he had brought into the marriage. The wife was not allowed any credit for a real estate commission because, unlike Drivon, there was no indication that the husband

would have to sell the house to pay debts. In re Marriage of Stratton, 46 Cal. App. 2d 173, 119 Cal. Rptr. 929 (Ct. App. 1975).

In 1981, the California Court of Appeal again denied the credit for a hypothetical broker's commission, even if the house was to be sold immediately. In Re Marriage of Denney, 115 Cal. App. 3d 543, 171 Cal. Rptr. 440 (1981).

In Rossum v. Rossum, 483 P.2d 410 (Nev. App. 1971), the Nevada court refused to uphold the allowance of a real estate commission deduction by the lower court, on the ground that it was speculative and was not a reasonably foreseeable expense incident to the present or future disposition of the property.

N.J. COURT OFFERS SENSIBLE PATH

Most recently, a New Jersey appellate court revised a lower court's deduction of a hypothetical real estate commission when it directed one party's interest to be transferred to the other without ordering the property to be sold. The Court stated:

In our view, the better position is that a hypothetical brokerage commission should not be charged in the absence of evidence that the property will be sold to a third person. We find nothing in the record to support the hypothesis that a real estate commission constitutes a reasonably foreseeable expense incident to the present and future disposition of the property. Clearly, plaintiff's acquisition from defendant, as apparently envisioned by the trial judge, involves no commission. The record is barren of anything which would indicate that she intends to sell the property in the future or, if she does sell, she will sustain a real estate commission as an expense of the sale. The record supports the inference that plaintiff will be able to purchase defendant's interest in the property from funds available to her. Thus, to assume such an expense is pure conjecture. We discern no reason why defendant should be charged with the speculative cost of a speculative sale to a third party. Wadlow v. Wadlow, 200 N.J. Super. 372 (1985).

The reasoning of the New Jersey court offers the more recent view, as well as a sensible path through the maze of cases on this point. If a sale is more than speculative, and arises from particular and demonstrable facts (such as the necessity to sell to pay off indebtedness), one should prove those facts to the court, and receive credit for the brokerage fee. Otherwise, the court is likely to consider the deduction as too speculative, and deny any credit.

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