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Who keeps the house in a divorce?



Andrew Seale – 21 hours ago



[Splitting assets in a divorce isn't easy, and determining who gets the house is one of the toughest to determine.]

The current housing market is creating some tricky conditions for Canadians going through a divorce who are trying to decide who keeps the house. In the past, a partner who wasn't named on the title to the house as an owner was still typically entitled to half via equalization of net family property, a process that adds up the couples' assets and debts at the point of separation. But with the rapid rise in housing prices – the [average price](#) of Canadian homes rose 1.5 per cent alone, just in August –

dividing the family home is becoming a contentious issue.

“This kind of real estate market it makes a huge difference because if I'm on title of the home and the house goes up in value before we make a deal but after separation, the starting point is I get all that increased value,” explains Andrew Feldstein, founder and senior partner of the Feldstein Family Law Group in Markham, Ont. “The non-titled spouse doesn't get anything.”

In effect, the market conditions could create some lopsided divorce settlements. A Vancouver divorcee [recently tried](#) to use the housing market and the rise in the value of his wife's primary asset – he kept the RRSPs and she kept their Vancouver home – to have his spousal support payments dropped. Unfortunately for him, the judge didn't take his side.

“The increase of the value of the house does not change the present day financial circumstances of the wife in the slightest,” wrote Justice Frits Verhoeven in a decision released in March. “No argument is made that she could or should sell it. It is her residence and that of the two children of the parties. It is the same modest house the parties bought together in 2004. The value is in the land, not the house.”

The scenario is one of several outliers that arise in Canada's otherwise relatively straightforward approach to deciding who gets to keep the house in a divorce. While there are some [provincial quirks](#), divorce in Canada is governed by the federal divorce law. When it comes to deciding who keeps the house – often called the matrimonial home – there are three main scenarios.

The first is sole possession, which usually results in one partner buying out the other.

“Frequently people will negotiate a buy-out with their spouse because maybe they want their kids to stay in the house,” says Feldstein adding that an appraisal is done on the current or fair market value of the home. It has the benefit of allowing one partner to get their money in 30 to 60 days without the headache of trying to sell the home.

Co-ownership is another option. In this case, partners in an amicable divorce can both remain responsible for payments and when the home sells, both get half the funds. Of course, there's also the caveat that while both parties are responsible for capital gains on their share of the profit, the spouse who stuck around living in the house might be able to tap into a capital gains exemption.

Then there's the sell option where the house is listed and both parties split the profits, even if they're common law married.

“(But) if they're common law and they're not on title then the spouse who isn't has to make an argument to say that they have a beneficial interest in the home in order to get any money,” explains Feldstein. In the case of common law, partners aren't entitled to equalization automatically, which means they'll need to build a case around what they've contributed to the home in terms of “sweat equity” as part of a trust claim. If successful, that partner can recoup some of the benefits of sharing a home during their marriage even if they weren't an official owner.

It all comes down to negotiation. And the decisions made during the marriage can create challenges in the event of a divorce.

“It's really a question of if you want to be on title because being on title gives you a better advantage,” says Feldstein. “A lot of self-employed people don't want to be on title and when they separate they need to fight to have a beneficial interest in the home.”