

Disclosure Matters: Foreign Owned Assets Must be Fully Disclosed

By Chad R. Johnson

Full disclosure is of critical importance in reaching a just and equitable division of property under the *Matrimonial Property Act*. Complete financial disclosure includes all assets held in Alberta and owned in foreign countries. The importance of the disclosure of all foreign owned assets was recently reinforced by the decision of the Alberta Court of Appeal in the case, *Chikonyora v. Chikonyora*, 2013 ABCA 320 ("*Chikonyora*").

In *Chikonyora*, the parties owned a house in Zimbabwe. The wife, who was self-represented in a Notice to Disclose Application, took the position that the Court in Alberta did not have the authority to deal with the foreign property and that she wasn't required to provide disclosure about it. She allegedly was also receiving rental income from the Zimbabwe property. The disclosure related to this property was ordered by the Court of Queen's Bench, but the wife still refused to provide any information with respect to the property in Africa. The Court of Appeal held that the courts have jurisdiction to compel disclosure of properties outside Alberta under Section 31 of the *Matrimonial Property Act*. Under this section of the *Act*, each spouse is obligated to disclose all particulars of all their property whether situated in Alberta or outside of the province, including property currently owned and one year prior to the date of the Application.

It is important for family lawyers to advise their clients in their financial disclosure to include all assets owned worldwide and to include these foreign assets in Schedule A of a Notice to Disclose. A Respondent may be held in contempt for failure to do so.

Further, if one spouse deliberately does not make full disclosure about financial assets in foreign countries when negotiating a separation agreement, the risk is

that a court may find the contract unfair and therefore unenforceable. Most information is now collected and stored digitally making it possible for the lawyer to conduct online research and perhaps with the assistance of a forensic accountant, uncover any suspected assets hidden in foreign jurisdictions.

Once full disclosure is exchanged, the tax consequences from the ownership of any foreign owned property must be carefully considered as part of any matrimonial settlement. In an equal division of property, there should be a sharing of the sale costs associated with any real properties and consideration given to the taxes resulting from any investments owned outside of Canada. With the recent downturn in the U.S. economy, vacation properties are more often being sold at a loss from their original purchase price. Any resulting tax losses should be adjusted for in the distribution of all the matrimonial property. Correspondingly, as the U.S. real estate markets recover, clients will be facing capital gains from the sale of secondary homes in the U.S. Retaining experts to assess such tax implications is necessary to negotiate a fair settlement, especially with assets outside of the country.

Foreign owned properties are becoming more important in matrimonial settlements as the population ages. We are helping clients in their retirement to preserve their homes outside of Canada. Their children may also have a personal attachment and vested interest in any vacation homes especially with regard to the client's estate planning. To mitigate the future tax liabilities from vacation homes owned in the U.S., as part of a settlement, clients should consider establishing trusts for the ownership of U.S. properties for the benefit of their family.

Most importantly, it is best for clients to consult financial planners in the settlement process to determine which assets are best to retain, especially in retirement, before finalizing the property division. In addition, valuing foreign owned properties or businesses likely necessitates retaining experts outside of Canada. These experts are qualified to review foreign assets, which is beyond the expertise of a family lawyer, resident business valuers, or appraisers in Alberta. Therefore, in reviewing a client's foreign assets, it is essential to consider the team of experts required for the client to fairly divide all their assets within Alberta and outside Canada.

In negotiating settlements, family lawyers must also be cognizant of the use and sharing between the parties of a vacation property pending a sale, and addressing the ongoing maintenance costs. Any rental income from foreign properties or dividends from investments overseas should also be considered in both the property division and in regard to the issue of spousal support, once all such assets have been fully disclosed.

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