

# When Foreclosure Follows Divorce

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*“Divorce on its own can be a harrowing experience; facing a foreclosure lawsuit with your former spouse can be equally traumatic, especially if it is unexpected.”*

> At the conclusion of a divorce, most individuals expect a measure of closure. However, many people find themselves back in court, fighting a foreclosure lawsuit on a home they do not own, alongside the last person they probably want to see— their ex-spouse.

Marital Homes are usually the greatest asset and the greatest liability at stake in a divorce. In good times, dealing with the marital home is much easier than in the current real estate market. Generally when a home has equity, divorcing couples may either sell the home and divide the profits, or they may refinance the home and remove the other spouse from the note and mortgage. In the current housing market where many homes are underwater, couples have limited choices when dealing with the marital home in a divorce. Couples cannot simply sell the home, because they would owe money at the closing. Couples also are finding it is very difficult to refinance a home that is underwater.

At present, in many divorces one spouse will quit claim their interest in the marital home to the other spouse. Perhaps out of wishful thinking, denial, or simply bad legal advice, many people hope that by executing a quitclaim deed and surrendering ownership in the home to their spouse, they will be relieved from liability. Unfortunately for homeowners, when a bank sues for foreclosure, the bank is not interested in how a divorce settlement panned out, or whose name is on the deed, the bank is interested



in collecting money. The bank attempts to collect money by filing foreclosure and forcing the sale of the home at auction. After the auction, the bank may pursue borrowers for a deficiency judgment, which is the difference between the amount of the loan and the value of the home. Because the bank will pursue anyone obligated under a note regardless of a divorce or settlement, unsuspecting individuals often find themselves facing foreclosure after divorce on a home they neither live in, nor own.

Many divorce settlements require the spouse receiving the property to refinance the property in their name alone, thus releasing the other spouse from future liability. While refinancing is a promising idea, the reality too often is that refinancing is simply not an option because of a variety of factors. Some of the factors that prevent refinancing include the house being underwater, or the borrower’s credit score or income being too low. When dealing with an upside down property, couples should examine other options or create contingencies that will trigger automatically in the event that the house cannot be refinanced.

One option to deal with an upside down property is requiring the parties to engage in loss mitigation like a deed-in-lieu of foreclosure, where the bank accepts a deed in lieu of foreclosure and releases the parties from some or all liability. Another option is requiring the property be listed for short sale. In a short sale, the bank generally accepts less than is owed on the property at

sale. Property owners should never close on a short sale without understanding their liability to the bank following the sale.

In the event that the bank pursues a foreclosure on the property, another type of loss mitigation is a consent judgment. In a consent judgment, the bank generally releases the parties from liability and obtains an in rem judgment, which is a judgment against the property itself rather than the borrowers. The parties should also address potential tax liability relating to any debt forgiveness by the bank.

Divorce on its own can be a harrowing experience; facing a foreclosure lawsuit with your former spouse can be equally as traumatic, especially if it is unexpected. This trauma is avoidable by working with an experienced attorney and planning ahead. Planning ahead insures against devastating surprises, reduces the opportunity for future conflict between spouses, and provides contingencies to protect against future liability. <

Steven D. Kramer advises and represents numerous individuals, small businesses and major corporations as managing partner of the Kramer Law Firm. In addition to his Juris Doctor, Mr. Kramer earned a Certificate in Intellectual Property from the University of Florida Levin College of Law and a Certificate in Small Business Leadership from Harvard Business School. Mr. Kramer was recently included in Florida’s Best Lawyers (2013 Ed.) and in the Best Lawyers in America (Woodward/White 2012, 2013).

