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Best of the Listserv

Question
Are there any cases out there saying that a judge cannot order a party to refinance the marital home when that is what the court has awarded her? We are arguing that the court lacks the authority because the refinance depends on the approval of a third party, namely, the underwriters at the bank.

Of course, my client has no job outside the home, is totally dependent on Husband to pay her child support and alimony; but the real issue is the court's power to require something that is not in the power of the Wife to accomplish.

Sounds logical, but I sure would like some case law to back it up.

Thanks.
Mark Sullivan

Answer #1:
Such an order is a common part of divorce judgments in Maine. Generally the person who receives the property is ordered to refinance within a reasonable time (e.g. 3-6 months, longer if a rehabilitation period is indicated). If that does not happen as ordered, the court can find contempt only if the person failed to exercise good faith in the effort -- you cannot find someone in contempt because of the actions of the third party. Whether the court can engage in other enforcement actions depend upon the original order -- many courts reserve the right to order the property sold if it is not refinanced.

One avenue you might explore: there are banks in Maine which will ignore the mortgage on the non-receiving spouse's credit report if there has been a significant period of time (e.g. a year) in which that person did not have to pay anything toward the mortgage note. It is then considered a contingent rather than real liability and it does not hinder new credit. This can be turned into a burden-shifting event if you ask the other side to prove any harm associated with not refinancing.

You could also consider offering beefed up "hold harmless" clauses that better protect the other party in the event of default.

Finally, you may argue that the court should not be ordering a party to do anything without high confidence that it can be accomplished. The problem with the argument is that it may result in the house getting sold now, not later.

Best regards,
Stephen T. Hayes
Augusta, ME 04332-1028

Answer #2:

My 2 cents on this one follow up on Steve's comment below. It is an underwriting standard, not really a matter of largesse of individual banks, as set out in the below from Freddie Mac, which might prove useful in making the argument that after a year, the former spouse should not care as much:
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“Single-Family Seller/Servicer guide, Volume 1 / Chs. 37-38: Credit Underwriting (04/-01/97) Chapter 37: Underwriting the Borrower (04/01/97) / 37.17: Contingent Liabilities (04/01/97)

“37.17: Contingent Liabilities (04/01/97)

“If the borrower is a cosigner/guarantor on a debt (which includes mortgage debt) for another person, the Seller should determine who actually makes the payments on the debt when deciding whether the contingent liability should be considered in qualifying the Borrower. The Seller should obtain evidence that timely payments are being made by someone other than the Borrower and may document who makes the payments by obtaining copies of the canceled checks or a statement from the lender. The Seller may document that timely payments are being made through a reference on the Borrowers credit report or by obtaining a payment reference from the lender. The documentation obtained must cover at least the last 12 consecutive months. If someone other than the [Page: 37-47 04/01/97] Borrower is making the payments and the payments have been timely, the Seller may exclude the contingent liability when qualifying the Borrower. If the payments on the contingent liability have not been timely over the last 12 consecutive months, the Seller should include the liability in the monthly debt payment-to-income ratio when qualifying the Borrower.

“If the Borrower is listed as the Borrower on a Mortgage that has been assumed by another, the Seller should determine whether the Borrower still owns the property and who actually makes the payments on the Mortgage. The Seller should obtain a copy of the documents transferring the property and any assumption agreement executed by the transferee, as well as a payment reference on the Mortgage showing that the payments are being made. As long as the Borrower no longer owns the property and the transferee has made timely payments over the last 12 consecutive months, the Seller may disregard the contingent liability when qualifying the Borrower.

“If the obligation to make the payments on a debt of the Borrowers has been assigned to another by court order, such as divorce decree, the Seller should document the order and that the other person has made timely payments for the last 12 consecutive months. The Seller may document who is making the payments by obtaining copies of canceled checks or a statement from the lender. The Seller may document that the payments have been timely by a reference on the borrower’s credit report or by obtaining a payment reference from the lender. If the Seller has documented the court order, that another party is making the payments, and that the payments have been timely, it may disregard the contingent liability when qualifying the Borrower. If the Seller cannot document that payments have been made by someone else or if the payments have not been timely, the contingent liability should be included in the monthly debt payment-to-income ratio when qualifying the Borrower. In all of the above cases, the Seller may obtain documentation of the payments made covering at least the last 12 consecutive months. [Page: 37-48 04/01/97]”

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