



Best of the Listserv

Question:

I represent husband in a divorce. Husband makes substantially more than wife and they have 2 minor children. The major marital asset is a house that has a first and a second mortgage. Due to wife's low monthly income I have to believe it is doubtful that she will be able to refinance the loan in her own name; she might be able to get someone to co-sign.

My question to my colleagues is this: Absent a need/desire by husband to avoid going to trial, if you represented H wouldn't you, like I intend to do, refuse to allow H to quitclaim his interest in the home unless he is first removed as an obligor on all financing instruments? Also, wouldn't a very fair counter-offer be something along the lines of having wife retain possession of the home, having H pay the mortgage UNTIL such time as the youngest child turns 18 or completes high school at which time the wife would refinance within 60 days or, if that is not possible, the parties sell the house and split the net sale proceeds. (There would be 3-4 years of mortgage payments based on children's ages.)

What are some other approaches for handling the disposition of a martial home under these circumstances, i.e., disparate income and existence of second mortgage? I am trying to keep the disposition section of the settlement agreement simple and fair but I can see that it could become a complex provision filled with various conditions precedent, such as wife wanting a refinance only on certain interest rate terms.

Thomas M. Federico
Cartersville, Georgia

.....

Answers:

You sure come up with some good questions.

My analysis is this: 1) identify the risk that husband is taking. 2) determine how he can adequately cover those risks.

The risks appear to be primarily husband's contingent liability if wife fails to pay home mortgage, his ability to obtain financing during the time he's also contingently liable for the marital residence and capital gains arising from the sale of the house years later, if the equity is to be split then.

Both my partner, Ron Nelson, and I have researched this issue. And it is an issue that's handled by banking regulations. Generally speaking, banking regulations require anyone who is seeking financing that has a liability such as husband would have to be able to show that whoever is the primary debtor on this obligation has been making timely payments (usually for one year) if they are, then it is only considered a contingent liability and does not go against husband's ability to obtain financing. These banking regulations are generally dealing with home loans and smaller

loans may not enjoy the same deference to a contingent liability. But the banking regulations simply consider this a contingent liability no different from cosigning on someone else's loan.

As such, we make sure that the agreement includes a requirement that the payments must be made on a timely basis and if any single payment is greater than 30 days late, then the house must be placed on the market. Otherwise, whatever secondary termination point such as the year that the children finish high school, remarriage, cohabitation, a reversal of primary residency of the minor children of the marriage, or other contingencies that are important to your fact situation become the trigger event that releases husband from any responsibility on the mortgage.

Generally speaking, we try to keep the need to release husband's responsibility for the home mortgage(s) separate from other issues such as when wife will be responsible to repay husband his share of the equity. If you're trying to balance too many needs of the same time you get a cumbersome and unworkable agreement.

Finally, because the cap is so high, we almost always forget that the increase in the value of the marital residence is a capital gain. The cap is \$250,000 per person. And the requirement is that over the last five-year period there had been a two-year period of ownership, and a two-year period of occupation. (Those two-year periods can occur simultaneously or at different times). It is generally accepted that even if husband has not resided in the house for the last five years he still gets the same tax shelter by virtue of the agreement and would not be taxed on anything less than \$250,000 in gain as long as this building had been his primary residence before the divorce.

In short, the risk of having one's name on a home mortgage and leaving their ex-spouse responsible for paying the mortgage is not nearly as severe as it first appears. The issue, is resolved by equipping the court with valid contractual remedies post-divorce.

Joseph W. Booth
Overland Park, Kansas

You're looking at the situation properly. There DOES come a time by which H ought to be entitled to free up his credit from the liability represented by the house mortgage, and it is likely that after a trial the house would be sold. So, in a settlement, W ought reasonably to be expected to be willing to set a deadline by which to get H off the house, either by refi, by removal with lender consent, or if all else fails by sale of house.

That all being said, your initial comment about refusing to convey the house w/o removal from the mortgage is a good approach, and commonly done, but as a practical matter it needn't be -- it's just "security" for W's not doing anything else with/to the title while H remains on the mortgage, or toward whatever payout H may have bargained for from the equity, if any. When I represent H I ALWAYS take the same position that you do. In a current case I'm handling, though, we are considering deeding the residence to W w/o such a release, cuz we want W to stay near where H got a rental so he can get to see the children more readily. The quid pro quo in this case, tho, is finding an agreeable time by which W MUST get H off the mortgage.

Douglas J. Sanderson
Fairfax, Virginia

All lawyer members of the Section may subscribe to the famlawesq listserv to discuss current topics in family law, share ideas, provide and receive referrals and network. Student members are invited to join the famlawstudents listserv and all Section members may subscribe to the famlaw listserv for general topics in family law. To subscribe to a discussion list, please send your email address, full name and ABA ID to familylaw@abanet.org with the discussion list you wish to join in the subject line. For tips on using Outlook to send discussion list emails directly to a specified folder, see this month's [Committee Corner](#) from the Technology Committee.