

One of the biggest issues facing couples in New York engaged in a divorce is what to do with the marital home. The difficulty is compounded when, as is most often is the case, the residence is encumbered by a mortgage.

There are several possible outcomes with regard to distributing the marital home as part of a divorce; the most common are:

The marital home is sold and the net equity or profit remaining after the sale is split;

One spouse remains in possession of the home for a period of time, i.e., the graduation of a child from high school. The property is then sold and the proceeds distributed; or

One spouse purchases the other's equity in the marital home and the other spouse is removed from both the title and the mortgage.

The first scenario presents no problem as the home would be sold and the mortgage satisfied from the sale proceeds. The second scenario is chock full of problems including who is responsible for making the mortgage payments, maintaining the property and making repairs and improvements to the property.

In the final scenario, the person who moved out of the home will want to pull all of his/her equity from the home and to get his/her name off the mortgage as soon as possible. Even if the parties have sufficient assets to enable a buy-out of the equity (or an exchange against other assets), the mortgage will need to be refinanced, if only to remove the spouse not in possession of the former marital home.

Unless the spouse who moved from the party is removed from the mortgage, he/she will remain legally liable for paying the mortgage. In addition, his/her credit would be damaged in the event the other spouse defaults in timely making payments; the agreement between spouses for one to make the mortgage payments is not binding on the bank. Moreover, the outstanding mortgage loan would limit the credit available to that spouse, possibly preventing him/her from obtaining a mortgage on a new home.

As highlighted in a recent New York Times article, this presents two issues: "whether a spouse who wants to keep the house or apartment can qualify for a mortgage independently. And if so, would that spouse be able to afford all the other expenses associated with living in that home?"

The refinancing of the mortgage may require some divorce planning to qualify the party staying in the home for the mortgage.

Spouses planning to count child support and alimony/maintenance as income for the purposes of qualifying for a mortgage should know that lenders will require proof of at least six months' receipt of that income before closing . . .

In addition . . . Fannie Mae guidelines require at least a three-year continuance of this income from the date of loan application.

Each part of the divorce settlement is dependent on another part. The ability to transfer the marital home and to refinance the mortgage is dependent on the cash flow from the child support and spousal maintenance payments. If you have these issues in your case, contact us so we can help structure your divorce settlement.