

What about the marital residence? Family Law and Foreclosure

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Basic Points for the initial intake

- Family court dockets begin with letters, but supreme court index numbers begin with numbers. Criminal court dockets usually start with County Letters: such as BX for Bronx, NY for Manhattan etc.
- The family court docket letter tells you the type of case:
 - V: custody/visitation
 - O: order of protection
 - N: abuse or neglect
 - F: child or spousal support
- ALWAYS ASK TO SEE THE CLIENT'S COURT DOCUMENTS

Forum Shopping

- You can litigate in family court, supreme court and criminal court, all at the same time.
- One can have an order of protection from any of these courts, all at the same time.
- Sometimes these orders can conflict.
- Family and supreme court handle orders of protection, custody/visitation, child support and spousal support (maintenance).

Differences of Courts

➤ Family Court

- More user-friendly (but overcrowded)
- Clients can file petitions on their own
- Clients more often given free (18B) attorneys
- May take longer for resolution
- Has domestic violence waiting room and child care
- May be there from 9 am until 5 pm
- May have different judges (for custody, support, neglect)
- Person bringing the case is called the Petitioner and the other side is called the Respondent

➤ Supreme Court

- Only place you can get a divorce and divide property and debts
- Should have an attorney for appearances
- Attorney will start case
- Clients entitled to free attorneys for custody, visitation, contempt and orders of protection only
- Does not have child care or DV waiting area
- Usually only there from 9:30 until 1 pm
- One judge hears entire case unless trial sent to Special Referee
- Person bringing the case is called the Plaintiff and the other side is called the Defendant

Assigned Counsel (18B)

- A client is entitled to a free, assigned counsel in family court for the following matters (Family Court Act § 261-262):
 - Child Protective
 - Custody/Visitation
 - PINS (Persons in need of supervision)
 - Orders of Protection or violations of orders
 - Contempt proceedings for support (only respondent)
 - Paternity (only respondent)

Assigned Counsel in Supreme Court

- In a divorce, which is only done in Supreme Court, you have the right to a free attorney for only parts of your case
- You have the right to a free attorney for the custody/visitation and the order of protection aspects only.
- The attorney is paid through the Judiciary Law and not 18B.
- You do not have a right to an attorney for any financial issues such as distribution of property or support

How Family Law and Foreclosure intersect?

- Many aspects of a divorce are connected to the marital residence, whether in foreclosure or not. For example:
 - Judges tend to keep the children in the residence, so custody is linked to occupancy of the residence
 - Judges will not let one spouse stay in a house that they cannot afford, so support is linked
 - Orders of Protection can exclude spouses from the residence, regardless of who is on the deed/lease
 - Judges will consider a foreclosure when distributing property, assets and debts
 - Judges may order a spouse to sign a modification application
 - Judgements may order a house sold, even if there is a liability

Pitfalls of 2 different matters

- Most counties have one judge handling the divorce and one handling the foreclosure
- Frequently neither of them understand what is occurring in the other case
- Divorce lawyers rarely understand real estate and foreclosure advocates rarely understand contested divorces which can lead to impossible rulings

Orders of Protection (OP)

- In Family Court, Article 8 of the FCA governs:
- An order of protection is a document that orders someone to stay away from the petitioner.
- It can also order a respondent/defendant out of the house, and to stay away from petitioner's job and school.
- It can cover the children of the relationship and keep the respondent/defendant away from the child, their school and their day care.
- They vary in length

Who Can Obtain a Civil OP?

➤ Petitioner and Respondent must:

(1) be related by consanguinity (blood) or affinity (marriage)

(2) be (or have been) legally married

(3) have a child in common, and/or

(4) be or have been in an intimate relationship (does not have to be sexual)

OP and the Marital Residence

- An OP (either temporary or permanent) can require someone to leave their house for extended times, sometimes over 5 years
- The person might still be required to pay mortgage, utilities and insurance
- Only the judge who issued the OP can modify it (criminal, family or Supreme)

Custody

- There are several forms of custody, but the main issue is who has physical custody of the child(ren) more time than the other
- In a matrimonial action, custody litigation also involves the finances as the custodial parent receives child support
- Custody is intertwined with who is allowed to stay in the house until it is sold. If the custodial parent can afford to stay in the house after the divorce, the Courts will usually let them until the youngest is 18
- Details regarding who pays the expenses of the house, how it will be sold and when should be in either the Stipulation of Settlement, or the decision (Usually not in the Judgment of Divorce).
- Not all Stipulations are created equal (or properly)

Custody

- Custody orders can be done in family or supreme court, and modified in either court (regardless of the original order)
- Custody is usually connected with the marital residence and the custodial parent will receive child support
- Custody and finances are intertwined

Child Support

- Child support can be handled in family court by support magistrates. They are not the same as the judges who handle custody
- Child support can be very easy to calculate if the non-custodial parent has income that is on the books (meaning they are taxed on it and report it on their taxes)
- Once the income is proven, the calculation is done and the child support is set
- It is very difficult to deviate from the calculation
- It is near impossible to reduce or eliminate arrears from a final child support order
- Final award is retroactive to date of filing of petition (unless agreement reached between parties)

The CSSA

- Child support is covered by the Child Support Standards Act. It sets out a calculation to establish basic child support.
- The calculation is as follows: gross income minus FICA, NYC or Yonkers taxes, Medicaid and Social Security equals adjusted gross income (AGI).
- AGI is then multiplied by one of the following percentages, based on the number of children on the order: 17% for one child, 25% for two, 29% for three, 31% for four, 35% for five or more.
- That gives you the base child support amount to be paid.
- Child support ends when the child is 21 if ordered by the court but can go to 22 by parties' agreement.

Complications

- Child support can be difficult to calculate for some of the following reasons:
- Income of non-custodial parent cannot be identified or proven (can try to prove through discovery of bank account and credit card statements to show income and expenditures)
- Non-custodial parent pays child support to other children already
- Both parties' combined income is over \$154,000
- There is joint (shared) physical custody, and each parent has the child 50% of the time
- Mandatory add-ons of contribution for childcare and unreimbursed medical expenses (discretionary: educational expenses)

Spousal Support

- Though it is filed in the same way as child support, and heard by the same support magistrates, it is handled differently.
- It is only available to spouses. If you are already divorced, and it is not mentioned in the divorce, you are not entitled to it.
- If you are not legally married, you are not entitled to it.
- It is formulaic in family court. The formula is the same as in a divorce. But court can deviate if finds presumptive amount is unjust or inappropriate
- Spousal support orders are non-durational and only end when a divorce is granted, or the supreme court modifies the order during a divorce action.
- Clients should be told that the filing of a spousal support matter usually triggers the other spouse to file for divorce.
- OCSS (formerly SCU) will not enforce stand alone spousal support orders

Divorce: Myth vs. Fact

➤ MYTHS

- Common law marriage is recognized in New York
- If we are separated for a number of years, we are automatically divorced.
- If I am served and I do nothing, my spouse cannot divorce me.
- We live apart. We are legally separated.
- We signed a legal agreement a year ago, so we are divorced.

➤ FACTS

- There is no such thing as common law marriage. Living together gives you no rights.
- You must file for and obtain a divorce. It does not happen naturally.
- If you do nothing, your spouse will divorce you.
- You are only legally separated if you have a separation agreement signed and notarized and are living in agreement with it.
- A legal agreement does not get you divorced. A Judgment of Divorce gets you divorced.

Divorce Basics

- Divorces are handled in Supreme Court.
- Divorces are the only legal way to divide marital property and debts and get maintenance (NY version of alimony.)
 - Marital property also includes retirement accounts and bank accounts, not just real property
- Divorces can be done on paper (uncontested) or by going to court (contested).
- Divorces are very complicated and there is much paperwork.
- It may take two years or more to obtain a divorce.
- Marital property is anything purchased during the marriage, or touched during the marriage. It is not just items titled jointly.

Contested vs. Uncontested

Contested Divorce

- Parties are not in agreement over any issue.
- Parties go to court, see a judge and either work out an agreement or go to trial.
- Both parties attend court proceedings.
- This could take from one year to five or more years.

Uncontested Divorce

- Parties are in agreement over all of the issues
- One party files paperwork with the court and the other either consents or does not respond.
- Final paperwork is filed with the court and a Judgment is granted.
- This could take up to nine months.

Issues in a Divorce

- Grounds (NY has seven, one is cruelty, one is abandonment for a year and one is “irretrievable breakdown” a/k/a “no fault”). The filing spouse must be the wronged party except for the no fault ground.
- Jurisdiction: NY has residency requirements that dictate when divorce actions can be filed in NY
- Custody/Visitation (similar to family court)
- Child Support (similar to family court)
- Order of Protection (similar to family court)
- Maintenance (similar to spousal support in family court)
- Equitable Distribution (distribution of all debts and assets of the marriage)
- Counsel and Expert Fees

Maintenance (NY version of Alimony)

- Maintenance is NY's term for alimony, which is money paid by the "monied" spouse for the support of the "non-monied" spouse.
- The court will set temporary maintenance at the beginning of a case, if requested, and then re-evaluate to set final maintenance at the end of a case. The temporary maintenance is based on a formula.
- The length of the award is based on the length of the marriage. There is an advisory schedule for duration based on the length of the marriage, but it is only advisory. It varies from 15%-50% of the length of the marriage.
- The formula for temporary and final maintenance is the same.

Maintenance

- It is based on a formula. For parties where no child support is being paid or where the payee is also paying child support, the formula is 30% of the monied spouse's AGI minus 20% of the non-monied spouse's AGI or 40% of combined AGI, whichever is less.
- For parties where child support is being paid to the payee of maintenance, the formula is 25% of the monied spouse's AGI minus 20% of the non-monied spouse's AGI or 40% of combined AGI, whichever is less
- There are caps on income to be included in this calculation

Support and owned property

- Spousal support (maintenance) and child support are to be used to pay for the mortgage, utilities and repairs
- At a divorce, exes do not receive additional monies to pay expenses of a house usually
- During the pendency of the action, a spouse may pay the mortgage, etc., instead of support or a portion of support

Equitable Distribution: What is marital property?

Items considered marital property or issues:

- Marital residence (such as house or rent-stabilized apartment)
- Cars, boats, motor homes
- Bank accounts
- Retirement accounts, pensions, 401(K)s, IRAs
- Businesses
- Debts on credit cards, personal loans
- Jewelry, furniture and other personal items
- Claiming of the children on income tax returns

Marital Property

- Title is not the determining factor in marital property
- Anything bought, used or paid for during the marriage can be considered marital property
- Property transferred from one spouse to another during the marriage is still marital property

Constructive Trusts

- If a party feels the deed was transferred inappropriately to a non-spouse, they can file a constructive trust
- Constructive trust actions will usually be handled by the divorce judge
- If proven, the asset (usually property) will be brought back into the “marital pot” and the judge can order the property to change hands

The Divorce Process

- When initial papers are served, must now include Automatic Orders, which prevent dissipation of assets (including retirement accounts), incurring of unreasonable debts, removal of health insurance coverage for spouse and children, and changes in insurance beneficiaries
- Defendant must respond within 20 days in order to avoid default
 - Notice of Appearance and Demand for Complaint if just served with Summons with Notice
 - Answer and Counterclaims if also served with Complaint
- Early in case, there is a motion to grant interim relief (Pendente Lite Motion). In this motion, certain temporary relief may be granted, such as:
 - Order of Protection
 - Exclusive Use of the Marital Residence
 - Custody and Child Support
 - Temporary Maintenance/paying household expenses
 - Interim Counsel fees

Process Continued

- After all temporary relief is set, the court will set a schedule for the exchange of documents (discovery). Financial documents must be exchanged during a divorce.
- Eventually, all documents will be exchanged and the parties will attempt to settle.
- If the matter can settle, an agreement will be signed and the parties will file the paperwork to finalize the divorce.
- If the matter cannot settle, a trial will be held and the judge will issue a decision. The judge can decide there are no grounds, and the parties will stay married, or the judge can decide to issue a Judgment.

Discovery

- If there is a foreclosure and a divorce occurring simultaneously, it is important for the attorneys to discuss discovery
- Discovery is broad in a divorce and there may be items that are discoverable in the divorce but not in the foreclosure
- Subpoenas are sent out regularly and can be for most any asset or debt of the marriage

Provisions in a Stipulation

- The Stipulation should include:
 - Who pays the mortgage, taxes, utilities
 - When the house goes on the market for sale
 - What happens if the mortgage is not paid
 - Does a payor receive credit for paying the mortgage
 - Who can live in the house until it is sold
 - Who pays for repairs
 - How much each party receives of the net proceeds

Counsel Fees

- Divorce attorneys can place a lien on the marital residence that can only be satisfied by their client's portion (unless the other party is to pay their fees)
- These liens must be court approved
- Divorce attorneys may not finish the case (either be relieved or refuse to file the judgement for signature) if they are not paid
- Judges are sympathetic and rarely force an attorney to continue on a case unpaid
- Judges can order the monied spouse to pay counsel fees for both parties

Factors in equitable distribution of a residence

- Many factors are looked at to decide how much each party receives of the value of a residence. They can be:
 - Pre-marital monies/separate property used to purchase or renovate homes
 - Family members monies used to purchase or renovate homes
 - If one party walked away from the property before the divorce
 - Marital waste
 - Purchase price and value and date of commencement

Foreclosure and Divorce

- Some courts will handle these matters together, but most will not
- Unless both parties agree, the divorce judge cannot sell marital property until the divorce is granted
- Judges can order one party to pay the mortgage. Contempt of court is the only remedy if they fail to do so.

Timing of Foreclosure and Divorce

- Many judges will adjourn the divorce to see how the foreclosure is playing out
- Judges can order parties to sign applications, but usually will not order them to sign a modification (issues of marital debt liabilities)
- Judges see a foreclosure as a reason to sell a marital residence immediately (if there is equity) as the parties cannot afford it
- Judges may assign the debt of the foreclosure to one party if they are seeming as obstructing a sale

Mortgages and Divorce

- Many divorce attorneys do not understand how to remove a lien holder so stipulations can be confusing for foreclosure advocates
- Judges will not order marital residences sold if children are under 18 and mortgages can be paid
- Many stipulations transfer deeds without removing the name from the mortgage (improperly)
- Equity could be tied up in a marital home until the youngest child turns 18
- Judges do not usually force a party to sign a modification taking on more debt on a house with no equity (though they can force the application to get signed)
- Many monied spouses suddenly cannot pay the mortgage once a divorce is started

Foreclosure and Equitable Distribution

- If one party fails to pay the mortgage, judges could hold that party liable for all the foreclosure expenses
- Courts may distribute the property unequally based on foreclosure debts
- Courts may order a property sold, even if one party has to pay deficiencies
- Courts can decide parties could walk away and not try to save a house

Division of Property post Divorce

- If the property is mentioned in the divorce decree or stipulation of settlement, follow this. If one party is not following the agreement, you can file an Enforcement action, which could seek contempt of court
- If the property is not mentioned, and only one party is on the deed/lease, then only that party is the owner (no recourse for non-titled party without vacating the divorce)

Enforcement Actions

- Client can bring an enforcement action, usually by motion, to make sure other spouse follows the stipulation or judgment
- Remedies include payments, contempt of court (and jail), sanctions, counsel fees and receivership
- Only mechanism to enforce a judgment or stipulation is to bring this post judgement enforcement action in the court where the divorce occurred

What if the ex will not sign a deed?

- If the divorce grants that property must change hands and the other party will not sign the transfer documents, the divorce judge can order a receivership.
- The receiver will act as the ex and sign the documents so the property can be transferred
- One must prove the ex will not sign before filing this motion

What if the divorce does not include the marital residence?

- If the divorce does not mention the marital residence (could be lawyer or client issue) then the title reverts to either Tenants in Common or sole ownership of person on the deed
- To then divide the property, one must file a partition action (if co-owned) or if there is a sole owner, the other person is out of luck
- Can consult a divorce attorney to see if divorce could be vacated

Partition Action

- If the property is not disposed of in the divorce and both parties own it, recourse is either partition or maybe a vacatur of the divorce
- Partition actions do not consider same contributions as a divorce. For example, they only consider monetary contributions, not un-paid work (such as homemaker contributions)

Quiet Title

- These actions can be used after a party is divorced but the title was fraudulently transferred, or the other spouse took out an inappropriate lien
- They are usually not heard by the divorce judge, and are usually not part of the divorce
- They can be used in conjunction with a motion to vacate the divorce

Vacating a Divorce

- If one party defaulted, or was not properly served and it has not been over a year since they found out they were divorced, you can try to vacate a divorce
- If the party was involved in the case, and there was a trial only option is appeal
- If a stipulation was signed, and one party now feels it was unfair, the can try to set aside the stipulation and vacate the divorce

Plenary Actions

- If a party signed a stipulation and then decides they want to try to invalidate it, then must file a plenary action plus a motion to vacate
- A stipulation is a contract, so it can only be set aside (invalidated) by showing fraud, duress, unconscionability
- The standard is quite high, and stipulations are rarely set aside

What if the parties own property jointly but are not married?

- There is no legal action in family law to divide assets if the parties are not married
- Only option is a partition action
- This also must be done if the marital residence is owned by additional parties (such as family members)
- Some courts will handle the partition and divorce together (if they are married)

The Stipulation of Settlement

- If there is a stipulation, it must be reviewed with the judgment. Not all terms of the stip are in the judgment.
- Both are enforceable, but the stipulation will assist in understanding why each party received certain assets.
- For example, many people trade assets, so one might keep their pension and one might keep the house.

Good luck.

Thank you.

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