



THE CENTER FOR SURVIVOR AGENCY AND JUSTICE

Supplemental Material: July 23 2009 Teleconference

Enhancing Advocacy for Domestic Violence Survivors by Coordinating Domestic Relations and Foreclosure Cases

1) Foreclosure Prevention in the Context of Safety Planning

- a) Know the batterer – partner with the survivor to identify retaliatory risks.
- b) Risk Assessment
 - i) Can she *safely* stay? v. Can she *afford* to stay?
- c) Is foreclosure prevention even possible?
 - i) Sometimes all we can do is to buy the survivor time to get enough assets together to find a new safe place to live.
 - ii) Note: It may be possible to negotiate with the lender for “cash for keys,” i.e., a cash payment in exchange for moving out on a particular date and leaving the home in good condition.

2) What Domestic Relations Attorneys Can Do to Position Survivors Well for the Foreclosure Proceedings

a) Retaining the Property—Out of Court Strategies

- i) Contact Mortgage Company--If survivor wants to keep the property and has the ability to do so, contact the mortgage company as early in the process as possible.
- ii) Work with a housing counselor.
 - (1) To negotiate with lender
 - (a) For more time to make payments
 - (b) For modification of the loan terms.
 - (2) HUD certified housing counseling agencies are free and can be found by visiting HUD's website at <http://www.hud.gov/offices/hsg/sfh/hcc/hccprof14.cfm> or calling HUD at (800) 569-4287.
 - (3) Survivors may be particularly vulnerable to foreclosure rescue scams and should be wary of anyone who asks them to pay a fee in exchange for housing counseling services.
- iii) Remember that many lenders will be unwilling to renegotiate the loan terms unless the survivor can demonstrate that she will have the *capacity* to regularly make the mortgage payments.
- iv) Ways to access financial resources to illustrate future capacity:
 - (1) Spousal Support;
 - (2) Child Support;
 - (3) Government Benefits;
 - (4) Rent;
 - (5) Deferred sale of home order; and
 - (6) Accessing employment.

b) Retaining the Property—Domestic Relations Court Strategies

- i) DV presents unique challenges to ordinary DR strategies--Some options that we would ordinarily consider in cases involving divorce and foreclosure are not feasible for domestic violence survivors.
 - (1) For example, in cases of divorce, it is becoming more common for one spouse to remain in the home and pay the mortgage for a number of years, with some assistance from the other spouse, and sell the home when the market improves.



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However, the dynamics of power and control in domestic violence situations may turn this arrangement into another way for the batterer to assert continued control over the survivor.

- (2) Similarly, it may be impossible for a survivor to obtain voluntary consent from the abuser to modify the loan terms or sell the home.
- ii) Using Domestic Relations Courts to order mortgage payments by the abuser.
 - (1) Jurisdiction of DR Decree: Remember that mortgage companies are not bound by a divorce decree requiring the abuser to make the mortgage payments—only the parties to the divorce are bound. But, see Section 4(a) below.
 - (2) Contempt Motions: In most instances, the survivor can enforce the decree only by suing for contempt of the court's order. *See Waldie v. Waldie*, 748 N.W.2d 683 (N.D. 2008) (finding husband in contempt of court for failing to make mortgage payments as required by interim order).
 - (3) Modification of Decree: The decree may need to be revised in light of new financial circumstances.
 - (a) For example, if the survivor paid the abuser's mortgage payments to avoid foreclosure, she may be entitled to reimbursement from the abuser.
- c) **Selling the Property**
 - i) If the survivor and the batterer own the home together, the survivor will need either:
 - (1) A court order or
 - (2) The batterer's consent
 - ii) Economic Planning for the Sale
 - (1) If selling price does not cover the mortgage, will survivor have ability to pay remaining mortgage balance?
 - (2) Devise strategies for paying remaining balance

3) Working with Foreclosure Defense Attorneys

- a) **Educate Foreclosure Attorneys on the Nature of Domestic Violence and its Impact on Foreclosure**
 - i) Economic Abuse as Critical Factor
 - ii) Share Resources as Advocacy Tools
 - (1) Example: Economic Scale of Abuse
 - iii) Beware of collusion, such as deals between abuser and the lender or a purchaser that fail to include the survivor, who may actually still be in the house.
 - iv) Plan for getting information when it may be in the control of the abuser
 - v) Need to plan for obtaining abuser's consent/authorization when needed in the foreclosure/loss mitigation process
 - vi) Foreclosure attorneys need to beware of conflicts of interest: do they represent one spouse or both?
- b) **Encourage Foreclosure Attorney to Raise DV Early in the Foreclosure Proceeding**
 - i) Timeliness of DV/Undue Influence claims in the litigation (waiting until the litigation has already begun to bring up DV could be fatal to survivor's ability to challenge the foreclosure).
 - ii) Be aware of your jurisdiction's rules/laws regarding the effect of/remedies for breach of fiduciary duty spouses owe each other.



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c) Assist in Gathering Documents for Foreclosure Defense

- i) Loan documents
- ii) Mortgage statement
- iii) Title papers
- iv) Notice of default or other documents from loan servicers
- v) Accurate household income
- vi) Court order regarding property at issue
- vii) If the survivor does not have the documents:
 - (1) On-line resources- Westlaw, Lexis
 - (2) Local County Recorder's Office
 - (3) Data Quick
 - (4) Discovery Requests
 - (5) Consider pro bono attorneys where resources are limited

d) Inform Foreclosure Defense Lawyers on Domestic Relations Proceedings and Opportunities to Litigate Claims

- i) DR as leverage for foreclosure case: A domestic relations case can be used to establish the economic abuse and apportion the blame. Orders may be of use in a foreclosure case or in negotiating with the servicer.
 - (1) Constructive Notice Issues
- ii) Courts have broader powers in domestic relations than in civil litigation.
- iii) Law of Property Division
 - (1) Basic rule is the divide debts and assets equally.
 - (2) But, court can deviate when there is a showing of undue influence, fraud, collusion, mistake, accident, or waste.
 - (a) *Lawson v. Lawson*, 228 S.W.3d 18 (Ky. Ct. App. 2007) (assigning to husband total remaining debt on marital residence following foreclosure where husband's own misconduct caused him to cease making mortgage payments);
 - (b) *Porath v. Porath*, 855 N.E. 2d 511 (Ohio Ct. App. 2006) (finding equal distribution of property inequitable where wife thwarted husband's attempt to avoid foreclosure of marital home and had lost assets that husband had set aside to make mortgage payments);
 - (c) *In re Marriage of Cook*, 453 N.E.2d 1357 (Ill. App. Ct. 1983) (awarding majority of marital assets to wife where husband dissipated marital assets by failing to keep up the mortgage payments on the family home).

4) Out-of-the-Box Creative Strategies

a) Motion for Joinder of Third Parties

- i) *See Glade v. Glade*, 45 Cal. Rptr. 2d 695 (Cal. Ct. App. Oct. 4, 1995) (holding that once divorce proceeding was underway, family law court acquired jurisdiction over community property in the hands of third parties and could properly order their joinder).

b) Compelling Signature

- i) Anticipate abuser will fail to sign necessary docs – seek relief up front by pleading for evidentiary or financial sanctions for non-compliance, or for an order authorizing the court clerk to sign in abuser's stead.



- c) Temporary Restraining Orders**
 - i) TRO to stay sale of home, to allow survivor to participate in financial decision-making, to freeze assets, to control financial accounts, lis pendens.
 - ii) *See Watega v. Watega*, 146 P.3d 658 (Alaska 2006) (rescinding sale of home to husband's friends pending a divorce where foreclosure proceedings could have been stopped by bringing payments current, sale failed to result in any gain to the estate, and wife was willing to take risk her credit would be harmed by foreclosure).

- d) Order Sale of Home**
 - i) Order sale of home to prevent foreclosure process if it's obvious that parties don't have the financial resources to keep the home.
 - ii) This may spare the survivor's credit rating, which is essential to renting an apartment, getting a job, school loans, etc.
 - iii) *See Toles v. Guaranty Fed. Bank, F.S.B.*, 2002 WL 1372535 (Tex. App. June 26, 2002) (holding that where divorce court ordered sale of home, divorce court's order was not subject to collateral attack by homeowner in suit against bank after bank attempted foreclosure and home was sold).
 - iv) *Bonilla v. Bonilla*, 739 So. 2d 108 (Fla. Dist. Ct. App. 1999) (exigent circumstances created by foreclosure proceedings justified order requiring former husband and wife to list property for sale effective immediately).

- e) Use DR Courts to Authorize the Survivor**
 - i) If the survivor is not on the title to the home, title and the responsibilities under the mortgage can be transferred to the survivor via a domestic relations order. This order should grant the survivor authority to negotiate with the lender and/or negotiate the sale of the home.

- f) Motion to Set Aside Agreement**
 - i) Is there a need to get relief from a prejudicial stipulated agreement that was based on fraud, collusion, mistake or accident? File motion to set aside.

- g) Partition Action**
 - i) If parties never married, what about a partition action?

- h) Filing Bankruptcy with an Adversary Proceeding to deal with the foreclosure (based on valid claims like Truth-In-Lending violations, etc.)**
 - i. Is there sufficient monthly income to make a reasonable monthly mortgage payment based on a reduced principle amount (because can reduce the loan principal in a rescission action)?
 - ii. Remember that the bankruptcy filing will cause the immediate stay of the domestic relation court's jurisdiction over any property issues in the domestic relations action.
 - iii. See Chapter 6 of the NCLC Truth-in-Lending practice guide for more information.