

Short Sale After Divorce

A potential client comes to my office for a consultation. He wants to discuss options for his primary residence, which is underwater. He advises that he is divorced and shows me a copy of the Divorce decree. I learn that there is a mortgage on the home and that both he and his ex wife remain on the mortgage. The Deed, which was put in joint names as community property, is now in his name alone. His ex wife deeded the property to him as part of the divorce settlement. He lives in the home and is required to pay the mortgage and all expenses related to the home. He explains that his income has decreased and he can no longer afford the mortgage payments. After a lengthy discussion of the pros and cons of each option, he decides that his first choice is to short sale the home.

Can He Remove His Ex Wife's Name From The Mortgage?

The only way he can remove her from the mortgage is by assumption or refinance. In divorce and death situations, many lenders have a procedure for one spouse to assume the loan. Requirements regarding qualification vary. Refinance can be difficult if the property is underwater. The loan must qualify for HARP 2.0 or refinance under the National Mortgage Settlement. HARP 2.0 is for loans owned by Freddie Mac and Fannie Mae. The National Mortgage Settlement only involves Bank of America, Chase, GMAC, Citi and Wells Fargo. Not all loans serviced by these five banks will qualify for refinance. The loans have to be owned by the bank in addition to being serviced by the bank. It is often difficult to find out who owns the loan. You have to rely on the bank to tell you. These banks have a recent history of giving out inaccurate information, so relying on them is not something most people are comfortable with.

Does His Ex Wife Have To Submit Financials For The Short Sale?

The lender does not have to follow the divorce decree because the lender is not a party to the divorce. That document is only binding on the husband and wife. Many times, the spouse that had deeded the property to the other thinks they are no longer responsible for the mortgage. That is not the law. The lender can pursue any party on the promissory note for payments. Therefore, the lender can require that the ex wife, in the above scenario, submit the same financial information as the husband. This can be a sticky situation because the ex wife may not feel comfortable doing that. If she does not cooperate, the husband must keep the property or foreclose. If he forecloses, it will negatively impact the ex wife's credit as well as the husband's. The husband may be able to modify the loan without the ex wife's cooperation. Some lenders allow this if the ex wife is no longer living in the house. The husband also has the option of asking the family court to order a sale. That can cost a lot of money in legal fees and will take more time.

Can I Represent the Husband and Ex Wife For the Short Sale?

This can be tricky. The good news is that they both want the short sale to be successful and to be released from deficiency liability. In order to negotiate the short sale, proper disclosure is required. Both must know that the same lawyer is representing them and that their confidentiality will be protected.

This will require that their financial documents will be kept separate and not disclosed to each other. I must determine, by meeting with each of them, that they qualify for the short sale. Most lenders view divorce as sufficient hardship for short sale. If there has been reduced income in addition, that will make the hardship stronger. The spouses can decide that they each want to be represented by different attorneys for the short sale. They are not required to be represented by the same attorney.

What If The Ex Wife Is On The Deed Of Trust But Not On The Promissory Note

It is possible for only one spouse to be responsible on the Promissory Note and both to be liable on the Deed of Trust. In this case, the financials required to be submitted to the lender for the short sale will only be required from the spouse that signed the Promissory Note. The spouse that signed the Deed of Trust will not have to cooperate in the short sale. However, the lender will be required to give both spouses notice of a trustee sale or judicial foreclosure. It is not unusual for one spouse to be liable on the first mortgage and both spouses to be liable on the second mortgage or home equity line of credit. In this case, both spouses will be required to submit financials to the second mortgage. It is important to make sure the approval letter is addressed to all parties that signed the Promissory Note, whether married, divorced or not related to each other. If someone is on the Deed of Trust but not the Promissory Note, they will not be addressed in the approval letter. They only need a release of the lien.

What If The Property Is In An LLC?

It is rare to see a residential loan in the name of the LLC. It is almost always the case that the loan is in the name of husband and wife and the property is placed in the LLC after the close of escrow. Since the property was purchased in the name the married couple and the loan was applied for and approved in the name of the married couple, it is those individuals that remain liable on the loan. They do not receive protection from liability for the loan payments because they put the property in an LLC. For a short sale, the lender can require that the purchase contract be in the name of the husband and wife and can also require that the property be placed back into their names before it is transferred to a third party buyer. The lender wants the title to be consistent with the way they took title at the close of escrow. If the loan is in the name of the LLC, only the assets in the LLC are required to pay the loan. If the only asset in the LLC is the home that is underwater, there is nothing the lender can do to collect the money for the mortgage except to foreclose. If however, someone signed a personal guaranty for the loan made to the LLC, the lender can collect from that person.

What If The Divorce Decree States That The Husband Will Indemnify The Ex Wife On The Mortgage

The lender is not bound by the indemnification because the lender is not a party to the divorce. The lender has recourse against the ex wife. If the lender collects against the ex wife, she can take the husband to Family Court to request reimbursement for monies she paid because the husband was required to indemnify her. She can request attorney's fees and costs in addition to the monies she was forced to pay to the lender. It is important to review this and the other issues discussed above when considering a short sale, loan modification, deed in lieu of foreclosure, refinance, etc.

Laura Bramnick is a partner in the law firm of Berens, Kozub, Kloberdanz & Blonstein, PLC, located at 7047 E. Greenway Pkwy, #140, Scottsdale, AZ 85254. She can be reached at 480-624-2777, or by email at lbramnick@bkl-az.com.