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Special Issue: Foreclosures and Domestic Violence Survivors

Home Is Where the Heart Is . . . Until It Isn't¹

Domestic violence and foreclosures tear families apart, uprooting old certainties and stressing even the basic ability to survive. Distressingly often, foreclosure and domestic violence overlap.² The domestic violence may precipitate the foreclosure, as the abuser cuts off financial support to the household. Or the domestic violence may surge in the wake of the stresses of a threatened foreclosure.

The dual diagnosis of domestic violence and foreclosure presents lawyers with practical and ethical challenges. Must you represent both parties in a foreclosure? Should you? How do you handle conflicts between two homeowners who no longer agree about anything? Where and how do those disputes get resolved? Successful representation in these circumstances requires close cooperation between family law and homeownership specialists, clear communication with clients, and a keen sensitivity to likely conflicts.

There may be two competing cases, a domestic relations case involving the abuser and survivor, and a home defense case, involving the mortgage company. The relief available in domestic relations cases will not resolve foreclosure issues and may hasten a foreclosure if the result is nonpayment of the mortgage or the mortgage company accelerating the mortgage. The pressures for a united front in litigating and settling a foreclosure case can worsen the domestic violence or impede a survivor's willingness to address the domestic violence. Whether there is equity in the house can shape the dynamics. Since most domestic violence occurs in rental housing,³ family law specialists may need education about how the domestic relations case relates to the homeownership case.

Housing advocates also must be mindful of the ways in which domestic violence limits their client's choices. Their physical safety may require abandonment of the home and relocation. Even where the survivor's physical safety can be

secured without abandoning the home, does the survivor have sufficient funds of her own to maintain the home and pay the mortgage? Will the abuser pay court-ordered child support, alimony, or maintenance? If there is no realistic prospect that your client will be able to maintain homeownership, you need to help your client plan an exit from the home. For domestic violence survivors, this planning is both more urgent and difficult than for others abandoning their homes.⁴

Housing attorneys should be sensitive to the possibility of domestic violence. If the relationship comes apart, your clients' goals and their willingness to cooperate with you will change. You may want to interview each partner separately to evaluate any potential conflict in their interests, and then advise the partners of that conflict. If the relationship deteriorates, neither you nor your office will be able to represent either in the domestic relations case, and you may find yourself compelled to withdraw from the homeownership case as well. If you represent only one party in the home defense case, you may hamstring the representation in that case.

If the Abuser Has Stopped Making Mortgage Payments

If the abuser has stopped making mortgage payments, you need to get an order in domestic relations court, ordering the abuser to continue making payments. The problem, of course, is that neither the mortgage holder nor the servicer is bound by the domestic relations order. Until the abuser begins making mortgage payments under the court order (or before a wage garnishment order or other enforcement proceeding takes effect), the servicer may proceed with foreclosure. Just because the abuser was ordered to make the payments doesn't mean that the foreclosure is stayed. The domestic relations order is not enforceable against the mortgage company; they weren't a party to the domestic relations case; they don't have to wait for the abuser to pay.

Some advocates try to bring the mortgage company into the domestic relations case or bring an injunctive action against the mortgage holder on the basis of the domestic relations order. These strategies work best when only a short stay is needed. If the survivor will soon have the financial ability to make the payments or is planning to move from the house and needs a few months to put her affairs in order, a phone call to the servicer's loss mitigation department may give your client the breathing space she needs. Domestic violence without the prospect of payment is unlikely to move lenders, servicers, or judges to halt a foreclosure or modify a mortgage.

Another strategy is for the survivor to file a chapter 13 bankruptcy. The automatic stay stops the foreclosure and pro-

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² See, e.g., B. Jensen, *Foundations and Charities Struggle to Deal with Housing-Foreclosure Crisis*, *The Chronicle of Philanthropy*, News Updates (Feb. 28, 2008) (shelters report increased domestic violence related to increased foreclosures).

³ C. Jennison & S. Welchans, U.S. Dep't of Justice, NCJ 178427, *Intimate Partner Violence 5* (2000), www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf (women in rental housing face physical abuse more than 3 times the rate of those living in family-owned houses and men in rental housing face physical abuse at more than two times the rate of those in family-owned houses).

⁴ See, e.g., Equal Rights Ctr., *No Vacancy: Housing Discrimination Against Survivors of Domestic Violence in the District of Columbia* (2008), www.equalrightscenter.org (65% of domestic violence survivors denied housing or subject to adverse conditions).

vides time to secure payments from the abuser which can fund the survivor's chapter 13 plan and cure any mortgage default.

If the Lender or Servicer Refuses Payments from the Survivor Whose Name Is on the Note and Mortgage

Where the lender or servicer refuses payments from a survivor whose name is on the note and mortgage, seek injunctive relief against the lender, if no judicial foreclosure has been filed, or move to dismiss a judicial foreclosure. So long as the survivor's name is on the note, the lender can't refuse to accept the payments, even if it would prefer to deal with two parties. The lender's refusal to accept payments may bar a foreclosure⁵ or extend a statutory reinstatement period.⁶ The lender's conduct may be a breach of the contractual duty of good faith and fair dealing, may violate the Housing Act,⁷ and may be retaliatory in violation of public policy.⁸

If the Survivor's Name Is on the Mortgage, Not the Note

Another scenario is where the lender or servicer refuses payments from the survivor, but where the survivor's name is only on the mortgage, not the note. A survivor wishing to remain in the house should seek a domestic relations order transferring the rights and obligations of the note to the survivor. (In any event, she certainly has a right to redeem the entire mortgage, perhaps by refinancing.⁹)

How easily she can assume the responsibilities of the note depends on the servicer and on the legal relationship between abuser and survivor. Address this matter proactively with the servicer to ensure that the servicer does not make a side deal with the abuser. Many uniform instruments permit the mortgagee and borrower to modify the note without informing co-owners¹⁰; this can be disastrous for a survivor wishing to stay in the home. If an order cannot be obtained promptly and the servicer refuses to stop a foreclosure, the survivor can force the servicer to accept payments by filing a chapter 13 bankruptcy. An owner that is not personally liable on the loan note generally has the right to cure a default on the mortgaged property in chapter 13.¹¹

If the House Is in the Abuser's Name Alone

If a house is only in the abuser's name, a domestic relations order can transfer to the survivor the home's ownership and the rights and responsibilities of the mortgage. There is

no question that a domestic relations order can transfer title of the home as between the abuser and the survivor. The domestic relations court may either order the abuser to quit claim the property to the survivor or issue a judicial deed. The survivor should make sure to record the deed, pay any transfer tax due (transfer from one spouse to another is usually exempt from a transfer tax), and provide the servicer with a copy of the order.

If the Court Will Not Transfer the Abuser's Interest to the Survivor

Particularly when the parties are not married, but own property jointly, some courts may be reluctant, as beyond their authority in an order of protection proceeding, to divide the real property. In these cases, a proceeding for partition is essential. The result may be a forced sale.

Getting the Servicer to Honor a Court Order Transferring the House to the Survivor

In getting the servicer to honor the court order transferring the house to the survivor, the best approach is just to ask it. Most mortgages have a clause that forbids transfer of ownership or even of the mortgage responsibilities from one person to another without the mortgage holder's consent. Some servicers may grant this consent readily; others may need to be persuaded; still others may respond to the notice of the domestic relations orders by accelerating the mortgage.

Where the Servicer Accelerates the Mortgage in Response to the Transfer of the Mortgage or House to the Survivor

If the servicer responds by accelerating the mortgage, seek injunctive relief against the servicer and holder. In most cases involving domestic violence, either contract law or federal law prevents mortgage acceleration on the basis of a transfer of interest from the abuser to the survivor.

Some standard mortgage contracts do not authorize acceleration in the event of assignment unless the assignment is accompanied by a transfer of ownership.¹² While this is not an express grant of the right of mortgage assignment from one co-owner to another, it should prevent acceleration, as a matter of contract law, if the survivor always had an ownership interest in the property and the abuser's ownership interest is not transferred to the survivor. Even if the abuser's interest is transferred to the survivor (provided that the survivor was on the mortgage, even if not on the note), a servicer's failure to permit the assumption of the mortgage by the survivor in these circumstances could be construed as a breach of the duty of good faith and fair dealing.

If the abuser and the survivor were married, the Garn-St. Germain Depository Act of 1982 specifically forbids acceleration when the property is transferred from one spouse to another.¹³ One might be able to bootstrap the Garn-St. Germain protections to unmarried couples, using the Equal Credit Opportunity Act's (ECOA) prohibition against discrimination on the basis of marital status.¹⁴ Since the servicer could not accelerate upon transfer in a legal separation

⁵ See, e.g., *Federal Nat'l Mortgage Ass'n v. Bryant*, 378 N.E.2d 333, 336 (Ill. App. Ct. 1978).

⁶ See *Lomas & Nettleton v. Humphries*, 703 F. Supp. 757 (N.D. Ill. 1989).

⁷ 42 U.S.C. § 3601. Cf. *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675 (D. Vt. 2005) (tenant who received eviction notice day after she obtained restraining order against her husband stated a prima facie case for violations of the Fair Housing Act on the basis of gender). Cf. also *Lewis v. North End Village*, Case No. 2:07-cv-10757 (E.D. Mich. Feb. 26, 2008) (entering settlement of case alleging Fair Housing Act violation on basis of gender where landlord moved to evict tenant for damages caused by abuser; tenant had an order of protection against the abuser and had informed management of the order of protection); *Warren v. Ypsilanti Housing Commission*, Case No. 4:02-cv-40034 (E.D. Mich. 2003) (order entering settlement of Fair Housing Act case where defendant had a policy of evicting domestic violence survivors); *Alvera v. C.B.M. Group*, Case No. 01-857 (D. Or. Nov. 5, 2001) (entering consent decree in case alleging Fair Housing Act violations where landlord sought to evict survivor for violence caused by abuser).

⁸ See, e.g., *Wood v. Wood*, 672 N.E.2d 385 (Ill. App. Ct. 1996).

⁹ See *Loughran v. Lemmon*, 19 App. D.C. 141 (D.C. Cir. 1901) (widow-mortgagor had right to redeem mortgage securing husband's debt).

¹⁰ See, e.g., *Fannie Mae/Freddie Mac, Form 3005, Uniform California Deed of Trust*, ¶ 13, available at www.freddiemac.com/uniform/unifsecurity.html.

¹¹ *In re Rosa*, 261 B.R. 136 (Bankr. D.N.J. 2001); *In re Rutledge*, 208 B.R. 624 (Bankr. E.D.N.Y. 1997); *In re Wilcox*, 209 B.R. 181 (Bankr. E.D.N.Y. 1996).

¹² See, e.g., *Fannie Mae/Freddie Mac, Form 3005, Uniform California Deed of Trust*, ¶ 18, available at www.freddiemac.com/uniform/unifsecurity.html.

¹³ 12 U.S.C. §1701j-3(d)(6) (2008) (transfer from borrower to spouse or children); 12 U.S.C. §1701j-3(d)(6) (2008) (transfer to spouse pursuant to divorce decree or legal separation agreement).

¹⁴ 15 U.S.C. § 1691(a)(1). See generally NCLC's Credit Discrimination § 3.4.1 (4th ed. 2005 and Supp.).

from one spouse to another, the servicer should not be able to discriminate against unmarried couples by accelerating the mortgage upon assignment of the mortgage in a domestic relations case or transfer of ownership as part of a partition case. Without a showing of business necessity, creditors are not justified in treating similarly situated unmarried couples differently from married couples.¹⁵ This argument would not apply to acceleration based on another, facially neutral cause, such as nonpayment, even if the nonpayment is caused by the abuser's departure from the home. A similar argument could be based on state fair housing laws that cover marital status and sexual orientation as protected classes. Since the ECOA prohibits discrimination both on the basis of gender and on the basis of marital status, couples should be treated the same by creditors whether they are married, unmarried, of the same gender or of different genders.¹⁶

Finally, foreclosure is equitable relief, not legal relief, and equitable defenses can be raised to a foreclosure. It is hard to imagine that a foreclosure of a domestic violence survivor's homestead, when payments are current, on the sole basis that a court of competent jurisdiction transferred ownership of the property from the abuser to the survivor, would pass most courts' weighing of the equities.¹⁷

Where the Abuser Used the Mortgage to Pull Equity Out of the Home Without the Survivor's Knowledge

Where an abuser pulls equity out of the home without the survivor's knowledge, use the domestic relations case to document the financial abuse and apportion the blame. Those orders can then be used in the foreclosure case or with the servicer to help establish the survivor's innocence.

Some equity stripping can be prevented by filing a *lis pendens* at the commencement of the domestic relations case and seeking an order in the domestic relations case barring the abuser from transferring or encumbering the property without the court's consent. Such orders should explicitly forbid the abuser from withdrawing additional funds on any open home equity lines of credit, as well as generically forbidding "new debt." Practitioners should provide holders of home equity lines of credit with copies of the domestic relations orders as quickly as practicable. In extreme cases, practitioners may wish to seek an injunction against a creditor, preventing the disbursement of funds to the abuser.

Where the Survivor Wants to Refinance the Home

A domestic relations order transferring title into only the survivor's name should allow a survivor to refinance the property, presuming she has the credit and income to support a mortgage on the property. Refinancing may, under the voluntary payment doctrine, limit available claims against the holder, originator, and servicer, unless payment is made under protest. In some jurisdictions, refinancing may complicate Truth in Lending claims.¹⁸ Prior to refinancing, evaluate

¹⁵ See generally *id.* § 4.3.2.5.

¹⁶ Cf. Baumgardner v. Dep't of Housing & Urban Dev., 960 F.2d 572 (6th Cir. 1992) (Fair Housing Act violation where landlord refused to rent to four male roommates because men were not "clean"). See generally NCLC, Credit Discrimination § 3.3.4.3 (4th ed. 2005 and Supp.) (whether ECOA's ban on gender and marital status discrimination applies to sexual orientation).

¹⁷ Cf. Wood v. Wood, 672 N.E.2d 385, 390 (Ill. App. Ct. 1996) (finding that eviction based on wife's obtaining an order of protection could be barred as a retaliatory eviction in contravention of public policy).

¹⁸ See NCLC's Truth in Lending § 6.3.2.3 (6th ed. 2007 and Supp.) (discussing Truth in Lending rescission rights).

what claims the survivor may have against the creditor and its agents and take steps to preserve any viable claims.

Where the Survivor Wants to Sell the House

A survivor wanting to sell the house will need legal authority to do so. An order from domestic relations court transferring all rights and title into the survivor's name or a court-ordered power of attorney from the abuser, granting the survivor the authority to negotiate the sale, should suffice. The order may need to apportion any remaining equity or, in the case of a short sale, debt. The domestic relations court can, if the facts so warrant, order the abuser to deed a whole or partial interest in the home to the survivor. If the abuser fails to comply, the court can issue its own judicial deed to transfer the property. As with a refinancing, sale may bar claims against the creditor.¹⁹

If the Survivor Wants to Abandon the House

If the survivor wishes to abandon the house, get a domestic relations order assigning liability for remaining mortgage debt and apportioning the right to receive cash for keys. If there is equity in the home, instead seek a domestic relations order apportioning that equity and attempt a sale rather than abandonment, if practicable. With these orders in hand, you can work with the servicer to obtain a release from the mortgage and note for the survivor, coupled with cash for keys to cover her relocation expenses and credit repair. Servicers pay cash for keys even to tenants; they should have no qualms about paying a domestic violence survivor. If the abuser has moved out, it benefits the servicer to have the survivor surrender the property in an orderly fashion. If the servicer refuses to release the survivor from the note and mortgage, the survivor should consider filing for bankruptcy.

Should the Survivor File for Bankruptcy?

Bankruptcy's automatic stay can be useful for a survivor. Bankruptcy court is also a friendly forum to compel servicers to accept reasonable payment plans. If the survivor wishes to abandon the home, bankruptcy provides a method of discharging personal liability for the mortgage debt.²⁰

Apportioning Litigation Proceeds Involving the Home

Practitioners will need to seek orders in a domestic relations case, dividing the interest and liabilities connected to the home. A 50/50 split may be the default assumption in many family law courtrooms, but may not be appropriate for dividing either the mortgage or the home, particularly if the abuser was complicit in equity stripping, or the survivor is remaining in the home with the children. Home defense specialists should provide family law specialists with information as to the potential claims connected to the property and their likely value. Explicit division of these claims is critical.

When an Attorney Discovers Domestic Violence Midway Through a Foreclosure Case

If an attorney discovers domestic violence midway through a foreclosure case, the attorney must decide whether to continue representing both parties or withdraw from rep-

¹⁹ A sale or other transfer prior to rescission will bar Truth in Lending rescission. *Id.* § 6.3.2.2.

²⁰ See generally NCLC's Guide to Consumer Rights for Domestic Violence Survivors § 8 (2006).

resenting either party.²¹ The Model Rules only allow representation of both clients who are adverse if the lawyer “reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.”²² Both clients must be informed of the conflict and consent to continued representation.²³ The ABA’s current model rules require that the consent be in writing; best practices would include written information to each client of the conflict as well as signed waiver of the conflict by each client.

In deciding whether to continue dual representation, consider the conflict’s scope and how much withdrawal prejudices your clients. Talk with each client in making your evaluation. Sometimes, despite the abuse, both clients want the same thing—to sell the home, or that one of them should keep the house. Sometimes there is no alternative counsel available for the home defense case, or the case is near trial or deep in contested discovery. Certainly, representing both owners can simplify the foreclosure defense case; there is no question about the scope of your authority to negotiate a global settlement, and you don’t have to worry about the effect of a default order against an absent co-owner. On the other hand, will the clients be able to cooperate or be so locked in conflict that they torpedo the housing case? Will one party use her veto power over settlement to punish the other? Does one party so dominate as to coerce agreement to an unfavorable settlement of the housing matter? If the clients’ interests are likely adverse in the home defense case—as where the abuser has engaged in equity stripping—the conflict cannot be waived.²⁴

If you continue with representation, your clients need to get independent legal representation in the domestic relations case as soon as possible. Your continued representation of both parties in the housing case should be contingent on each

²¹ The Model Rules give former clients a veto power over the representation of an adverse party in a materially related matter. Model Rules of Prof’l Conduct R. 1.9 (2002). Nor may lawyer use information gained from the representation of a client against that client at some later date, absent fraud or criminal activity on the part of the client. *Id.* at R. 1.6, 1.8(b).

²² *Id.* at R. 1.7(b)(1).

²³ *Id.* at R. 1.7.

²⁴ *Id.* at R. 1.7(b)(3).

obtaining independent legal counsel in the domestic relations case. Neither you nor anyone in your firm can represent either party in the domestic relations case.²⁵ Nor should you refer either party to your pro bono panel. You can provide both parties with a list of lawyers who might be able to assist.

Keep in close contact with the domestic relations counsel, who must give you direction in settling the home defense case. You should also wait on a domestic relations order before distributing any settlement proceeds. Carefully document all major decisions in the file, with separate notice to each client. Final settlement will require signed consent by both parties.²⁶

Checklist for Home Defense and Domestic Violence

1. File a *lis pendens*.
2. In the domestic relations case:
 - Seek an order requiring the abuser to make payments.
 - Divide assets and liabilities—a) equity in home, b) mortgage debt liability, c) claims against mortgage brokers, lenders, appraisers, etc., d) title to home.
 - Apportion responsibility for mortgage.
 - Apportion responsibility for fraud as between abuser and survivor.
 - Obtain court order permitting/forbidding transfer or encumbrance of the property.
 - Provide copies of orders to servicer/holder of all mortgage debt.
3. In the home defense case:
 - Know who your client(s) is (are): who is on the deed? who is on the mortgage?
 - Interview homeowners separately at least once before accepting dual representation.
 - Advise couples of the potential conflicts inherent in dual representation.
 - Make early (and review often) decisions about representational goals and the scope of your settlement authority.
4. Evaluate bankruptcy as an option.

²⁵ *Id.* at R. 1.9(a), (b). While one client could consent to your firm’s representation of the other client in the domestic relations case, this is unlikely and seeking the abuser’s consent could potentially put the survivor in greater jeopardy.

²⁶ *Id.* at R. 1.8(g) (all clients consent in writing before global settlement accepted).

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