PENNSYLVANIA
Law Weekly
November 1, 2011
An ALM publication

COMMENTARY

BY CAREN E. MORRISSEY
Special to the Law Weekly

FAMILY LAW

CMORRISSEY@WGLAW.COM

A House Divided: Turbulent Economy Brings New Challenges to Family Law

Mark and Angie were married in 1992. Anyone who met them thought they were doing well. From early in their marriage until a year before separation, Mark's income had been growing every year. They bought their first shore house in 1999 and their second in 2005. In 2002 they moved into their dream home in Montgomery County. It was new construction and had a theater room in the basement. They had no children. They each had their own BMW. Life was good.

Unfortunately, in 2008, Mark's income took a huge hit and he couldn't make the shore mortgage payments any longer. He could barely make the mortgage on the marital residence. Mark had to liquidate his retirement just to make it every month. Angie signed all the documents necessary to liquidate their retirement. She buried her head in the sand about their financial situation and let Mark handle it all.

By the time Angie filed for divorce in 2009, there was no retirement left and they had three properties with little to no equity.

Angie had not had a job in 15 years. She had always suffered from depression and Mark always handled the finances. Angie's lawyer advised her to get a job. Angie refused. As the divorce progressed, and was eventually finalized, they continued to live in the same household because they simply could not afford to live separately.

During their separation, they listed the marital residence for sale. It sat on the market for three years and was reduced four times from the original $900,000.

The shore houses were also listed for sale. They sat and sat and actually turned down offers they thought were too low. Mark eventually stopped paying the mortgages on the shore properties. Two years after being on the market, one shore property was approved by the bank for a short sale and the other was sold at sheriff's sale.

While not all marriages wind up with this level of financial crisis, more and more divorcing families have at least one of these issues to deal with: a house that is under water or won't sell; a house that needs to be sold at either sheriff's sale or approved for a short sale; a spouse that is underemployed and refuses to work to their earning capacity; parties that remain in the same household for years post-separation (and even post-divorce) for financial reasons.

As a divorce lawyer, you want to be able to tell your clients what they can expect. Each new client comes to you with their own individual set of facts and circumstances. While every client's situation is different, they want to hear from you that you have handled this type of situation before. They want to hear they are going to be OK.

Unfortunately, the economic landscape has changed so significantly over the last few years that family law practitioners are now dealing with issues they haven't previously encountered. Here are a few of the problems Mark and Angie's lawyers will have to tackle:

Living in the Same House

Mark and Angie need to sell their marital residence. They bought it at the height of the market and refuse to sell it for less than their mortgage. Mark's income is not enough to support them both and Angie refuses to get a job. They are forced to live together until their house sells. Even after their divorce is final, the parties continued to live together for another year, until the house sold. They simply could not afford to live in separate households.

While living in the same house, many couples struggle with issues of custody and support. Who buys the groceries becomes a major point of conflict. All of a sudden the contents of the pantry become a major point of contention. Divorce lawyers have no legal training on how to negotiate the purchase, and consumption, of groceries; however, it is an issue we have to deal with.

Custody schedules while the parties are in the same house can be particularly thorny depending on the county in which you live. While our new custody

Caren E. Morrissey is a partner with Weber Gallagher. She focuses her practice on divorce and family law matters, including child custody and visitation, child support issues, and the division of marital assets and debts.

PENNSYLVANIA LawWeekly

statute provides that the courts may issue a custody order while the parties are residing in the same home, it does not take effect until one of the parties moves out. Some counties still will not schedule a custody conference while the parties remain in the same house. For those couples that cannot communicate, and that is most of them, the lack of a custody order leads to uncertainty for the children and the parents and more contention in the household. And when one party moves out unexpectedly, and there is no custody order in place, chaos ensues.

Refinancing Troubles

If either Mark or Angie wanted to keep the marital residence, neither of them would qualify for a mortgage in their own name. In most of our cases, one party wants to keep the house, whether it's for the sake of the children or for other reasons. While rates may be low, mortgage companies are getting increasingly strict with regard to approving individuals for mortgages. Divorce settlements now must be very detailed with regard to timelines for refinancing approval and outlining the specifics with regard to sale of the property in case a spouse is not approved for a mortgage.

Lack of Cooperation

Mark wants the sale price on the marital residence to cover the mortgage and Angie just wants it sold. The problem is that they do not have the money to pay the bank if there is a short fall between the sales price and the mortgage balance. To make matters worse, the parties cannot afford the monthly mortgage payments.

Selling a house requires many levels of cooperation. There is the original list price to agree upon, then if the house is not selling, they must agree on the reduced price. Then there is the question of whether or not to accept an offer. Unfortunately, most of our clients have trouble agreeing as to which day of the week it is, let alone what the value of their house is. More and more petitions for special relief are being filed with the courts because one party refuses to cooperate with reducing the list price, they won't accept an offer and then they won't cooperate with the sale. Many are filed the day of settlement because one party fails to appear at the settlement table.

Short Sale

Mark and Angie have agreed to sell one of their shore properties for less than the mortgage. Angie wants Mark to indemnify her if the bank goes after her for the loss. Mark and Angie's attorneys will have to learn the ins and outs of a short sale.

If the parties agree to sell the property for less than the mortgage, they are well-served by having a realtor who specializes in short sales. A short sale will require that the bank approve the sale for less than the mortgage. The parties want to make sure that the bank agrees not to go after their other assets, if they have any, for the short fall.

> The courts are seeing more and more of these cases of unemployment or underemployment.

Sheriff's sale: Mark and Angie take a complete loss on the second shore property. They simply stop paying the mortgage or any of the associated expenses. If they "walk away," the house will be put up for sheriff's sale and the bank could still come after them for the short fall. There are ways to delay the sale; however, if the payments cannot be made, the property will eventually be sold. Clients will be at risk if they have equity in other real estate in their name. They need to be advised that just because they walked away, the bank has not necessarily walked away and could go after them for the short fall.

Reduced Earning Capacity

Throughout the parties' lengthy separation, Angie refused to get a job or go back to school. Her earning capacity is next to nothing, not due to inability but due to unwillingness. Angie's failure to educate or employ herself has contributed to the parties' dire financial circumstances. When the parties are negotiating alimony, Mark's lawyer makes these arguments regarding her earning capacity; however, they fall on deaf ears and Angie is attributed an earning capacity of minimum wage. Mark's income has significantly reduced, to no fault of his own, but Angie's lawyer argues that it should be higher. Again, these arguments fall on deaf ears.

The courts are seeing more and more of these cases of unemployment or underemployment. Due to this rise, they are not buying the arguments on earning capacity as much as they used to, which works to the advantage of those who voluntarily reduce their incomes.

I used to tell clients that if they voluntarily reduce their incomes, they will be assigned a higher earning capacity. I still tell my clients that. However, support conference officers are not assigning higher earning capacities as often as they used to and those seeking child and spousal support are having a harder and harder time making these arguments.

Lawyers and the courts are addressing difficult issues in all areas of equitable distribution, support and custody. I look forward to the day when my earning capacity arguments are successful due to the strong job market and when houses are selling for higher then the list price. •