

Divorcing Your Mortgage Educational Series

Avoiding Acceleration of Mortgage in a Divorce Situation



Divorce Lending Association

Although the Divorce Decree may determine who retains ownership of the marital home after the divorce is final, it is important to understand that the Deed, Decree and Debt are three entirely separate issues to settle.

The Deed & Transferring Ownership | Transfer of ownership can simply be done with a Quitclaim Deed or other instrument. When both parties are co-mortgagees on the mortgage note, there is typically no further action needed when retaining the current mortgage as-is. However, it is important to take action and notify the current mortgagor of the ownership transfer to avoid an acceleration of the mortgage due to a transfer of ownership when the party who is retaining the home is not obligated on the current mortgage note.

The Garn-St Germain Depository Institutes Act of 1982 protects consumers from mortgage lenders enforcing the due-on-sale clauses of their mortgage loan documents when the transfer of ownership includes transfers to a spouse, or children of the borrower, transfers at divorce or death, the granting of a leasehold interest of three years or less not containing an option to purchase and the transfer into an inter vivos trust (or a living trust) where the borrower is a beneficiary.

When one spouse is awarded the marital home and ownership is transferred leaving the current mortgage intact, the receiving spouse is agreeing to take sole responsibility for the mortgage payments through the assumption process. A loan assumption allows a transfer of ownership and leaves the loan intact at the same interest rate, loan terms and balance.

In some assumptions, the lender may release the original borrower from his or her obligation on the promissory note, however, in most cases, the original borrower remains liable on the note. This means that, depending on state law and the circumstances of the particular case, if the new owner stops making mortgage payments at some point in the future and goes into foreclosure, the lender may come after the original borrower for a deficiency judgment to collect the debt.

In assuming a mortgage that is in default, the new borrower must “cure the default” by either paying the amount in full or negotiating to pay on the past-due amounts in a repayment plan or as part of a loan modification under a program such as HAMP. The Federal Home Affordable Modification Program (HAMP) has comprehensive rules for how loan providers (the company you make your mortgage payment to) should handle the transfer of title issue upon death, divorce, and similar circumstances. If the loan is in default at the time of assumption, Fannie Mae requires loan providers to evaluate the new owner for a workout option such as HAMP, a standard modification, mortgage release, or short sale if the due-on-sale clause is unenforceable.

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Assumption & Release of Liability | When a former spouse assumes ownership of the home and the mortgage, this does not always mean the mortgage lender will release the original borrower from their financial obligation or liability on the mortgage. A loan assumption is a transaction in which a person (the “assumptor”) obtains an ownership interest in real property from another person and accepts responsibility for the terms, payments and obligations of that other person’s mortgage loan. The assumptor is liable for the outstanding obligations and unless a release of liability is requested, the original borrower will remain liable as well.

Successor Homeowner’s Right to Information | Another sticking point for divorcing spouses who are awarded ownership of the marital home and who are not currently obligated on the existing mortgage is the hurdle of obtaining information on the current mortgage.

Two important sets of CFPB amendments to its RESPA and TILA mortgage servicing rules went into effect April 19, 2018. One set of amendments for the first time extends the broad array of mortgage servicing protections to successors in interest—such as homeowners who inherited a home after the borrower’s death or were awarded the marital home in a divorce. These homeowners now are entitled to protections relating to loan modifications, dispute rights, monthly statements, escrow accounts, servicing transfers, and other rights afforded by TILA and RESPA to home mortgage borrowers.

The new rules expand the definition of a “borrower” for purposes of RESPA, and “consumer” for purposes of TILA, to include a confirmed successor in interest. Successor in interest is defined as coextensive with transfers listed in the Garn-St. Germain Act after which a due-on-sale clause may not be exercised.

This list includes transfers related to the borrower’s death or a divorce or separation agreement, transfers to a spouse or children, or to a trust in which the borrower is a beneficiary. Protections are afforded a successor under RESPA and TILA once a servicer has confirmed the successor’s identity and ownership interest in the property. No other requirement should be imposed as a condition of “confirming” a successor in interest pursuant to the regulation .

The CFPB created a special limited “Request for Information” applicable to potential successors in new RESPA § 1024.36(i). If a servicer receives any written request from a person that “indicates” that a person “may be a successor in interest” and that contains the name of the transferor borrower and sufficient information to enable the servicer to identify the loan at issue, the servicer must respond by providing the potential successor in interest with a written description of the documents the servicer reasonably requires to confirm the person’s identity and ownership interest. The servicer must acknowledge receipt within five business days and respond substantively within thirty business days.

A simple letter including a copy of the Divorce Decree sent to the mortgage holder may suffice as notice to the servicer. Sample wording follows:

Loan No. 12345678

GARN-ST. GERMAIN ACT ASSUMPTION NOTICE

I write to inform you that, as of April 1, 2018, my husband and I were divorced by an order of the Circuit Court of Henry County, Georgia. Pursuant to the divorce decree, Mr. Smith is required to transfer to me his entire interest in the marital residence located at 1234 Main Street. The transfer will take place on May 30, 2018. On that date, I am to assume the mortgage that encumbers the property and to make the payments thereon.

Therefore, pursuant to the Garn-St. Germain Depository Institutions Act of 1982, I hereby notify you of my intent to assume the Mortgage and Note. You may begin mailing statements to me immediately. Thank you for your cooperation and understanding.

It is always important to work with an experienced mortgage professional who specializes in working with divorcing clients. A Certified Divorce Lending Professional (CDLP) can help answer questions and provide excellent advice. Please don’t hesitate to reach out to me directly if I can provide additional information.

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