BOLHOUSE, BAAR & LEFERE, P.C.
ATTORNEYS AT LAW

Divorce and the Upside Down Mortgage

Michelle M. McLean

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In today's real estate market, a divorcing couple might be faced with the difficult task of figuring out what to do with a house that is worth far less than their outstanding mortgage balance. To complicate things more, both are usually co-obligors on the mortgage and the corresponding note of indebtedness.

Many times, one spouse will agree to keep the marital home despite the negative equity. The Judgment of Divorce, agreed to by consent, usually contains two provisions: (1) the spouse being awarded the marital home must "indemnify and hold the other spouse harmless" from the mortgage debt; and, (2) the spouse awarded the home must also refinance the mortgage within a specific time period so as to relieve the other spouse of his or her contractual liability. While this type of language is typical, it can be perilous. For example, what happens if the spouse awarded the home defaults and the mortgage goes into foreclosure? It is easy to see how difficult it is for the injured spouse to enforce the provisions in their Judgment, especially if the defaulting spouse is unemployed, disabled, etc. In today's market, it is possible the home's value will continue to decline, causing further problems.

While there are no easy answers and each situation will be unique in its own way, there are strategies that can be used which limit exposure to liability for both spouses. These strategies may include intentional default, short sale, loan modification, or even bankruptcy depending on the couple's goals.

Drafting a Judgment of Divorce, especially in today's mortgage climate, takes skill. Anyone negotiating a divorce complicated by mortgage-related issues needs competent professional advice and guidance from a family law attorney who has specific experience in dealing with these types of issues.