



REAL ESTATE LAW

Real property when you separate? A real estate lawyer's perspective



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LAW**

If you are going through a separation or divorce, there are a couple ways that the real property can be handled. Some couples decide to sell the home completely and each take a share of the sale proceeds. In other cases, one spouse may decide to continue living in the home and buy out the other spouse. This article gives you a brief description of what occurs in each situation. This article does not provide family law advice nor are we providing recommendations on what

avenue to take when dealing with the real property in your family law situation. This should be used as general information which can then be discussed with your family law lawyer.

Real property sold to a third party:

In the normal sale process of residential property to a third party, the lawyers, using the sale proceeds, will pay out any mortgages and liens against the property, the

real estate agents fees and the legal fees. After these expenditures the remaining sale proceeds will be distributed to the clients. When selling the property because of a separation or divorce, the lawyer will follow the normal sale process until the sale proceeds are distributed to the clients. If there is a separation agreement, the lawyer will ask to see a copy of the agreement, so that the lawyer pays the clients according to the agreement. If there is no separation agreement and the clients are able to agree on the distribution, the clients will each sign a declaration in writing confirming and directing the lawyers to disburse the funds as the clients have agreed. If there is no separation agreement and the parties cannot agree on how to

divide the funds, the sale proceeds will remain in the lawyer's trust account until the clients can agree on a division or the lawyer receives a direction from the family law lawyers representing the parties.

Real property sold or transferred to a spouse:

A lawyer can remove the name of one spouse on title; however, there are a few considerations that clients should be aware of before deciding to complete a transfer of title. First, when there is a significant change in circumstances such as a change in the title of the home, the mortgagors have an obligation to inform the bank of the change. When these changes occur, the bank has the right to demand pay-

ment of the mortgage immediately because the terms on which the bank agreed to lend the money no longer exist.

Second, when the bank is informed that a transfer of title is occurring to remove a party, the bank will either release that person's name from the mortgage or refuse to allow their name to be removed from the title.

If the spouse's name is removed from the mortgage, the bank may require nothing further. If the spouse buying out the other needs cash to do so, the bank may offer to refinance the mortgage so that there is cash available for the buyout.

If the name is not removed from the mortgage, the title transfer can still occur but the person removed from title

will still be responsible for the mortgage. Therefore, if any of the other people named on the title default on the mortgage, the person removed from title will still be pursued by the bank to pay the mortgage even though they are no longer named on title.

The third area of consideration is land transfer tax. If a transfer is occurring to remove one spouse's name but add the parents of the other spouse on title as well, Land Transfer Tax will be applicable on a portion of the value of the current mortgage balance equal to the percentage of interest in the home the parents are acquiring. For example, if \$300,000 is owing on the mortgage at the time of the transfer and the parents will have a 50% interest in the home, then Land Transfer Tax would apply on \$150,000. The amount owing on \$150,000 would equal \$1,225 of land transfer tax plus the legal fees for the transfer.

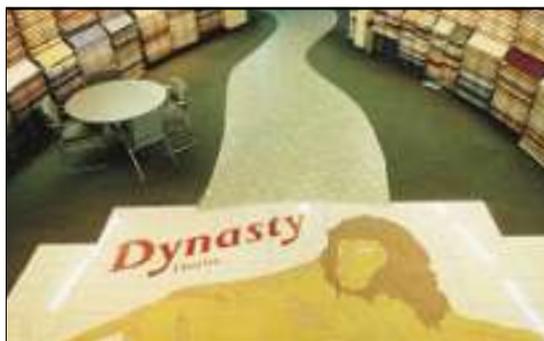
These are only some of areas of consideration that can be discussed with your family law lawyer. Your family law lawyer may have other reasons for choosing to sell the home to a third party over transferring it to a spouse that is specific to your situation. Always seek out the advice of a legal professional when considering changes to the title of real property.

co-authored with Robin Goski, associate lawyer

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