

## Family Law- Love It or List It?

Written by Kaine Fisher

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Q&A with [Kaine Fisher](#), Director of Rose Law Group [Family Law Department](#)

**“My husband has filed for divorce. We have a beautiful home in Paradise Valley and I raised our three teenage children in that house. Will I be forced to sell it?”**



I find myself interestingly drawn to the somewhat staged dilemma portrayed by the popular HGTV home design television show *Love It or List It*. Each episode depicts a family or couple presented with the option of either renovating their existing home (and continue living there) or purchasing a new home. Usually it seems pretty clear one spouse wants to stay and the other wants to move. The home designer is pitted against the realtor and each does whatever they can to convince the couple to either “love it or list it.” The couple provides the home designer with a list of “must haves” for redesigning their current home while the realtor tries to achieve the same by satisfying the couple’s “must haves” with respect to a new home. Almost without fail, the couple harmoniously agrees on a decision at the end and they live happily ever after. Unfortunately, such is not typically the case in divorce.

Most divorce cases I run across have at issue at least one community parcel of real property that must be disposed of in some form or fashion. The analysis starts by taking a look at whether there is equity in the property. In other words, taking a look at the fair market value of the property as compared to any liens or encumbrances that may be attached to the property. Determining value is fairly simple and can be accomplished in a handful of ways. A good starting point is to look at your tax valuation statement or by referencing online resources such as Zillow.com. That said, however, the most reliable methods I’ve found are by having a qualified realtor or real estate agent gather comparable properties (more commonly known as “comps”) or by having a licensed appraiser perform an appraisal. Most experienced family law attorneys should have a rolodex (or iphone) full of names of experts in these fields to assist you in ascertaining an accurate value of your home.

Once value is determined, you will need to take a look at what encumbrances may be associated with the property. This might include a first mortgage, second mortgage, home equity line of credit or tax lien. Performing a search on your county recorder’s website is a smart approach to ensuring you identify all encumbrances associated with the property. These encumbrances reduce the value of the property and will most certainly need to be satisfied upon any sale. You also need to take into consideration the fact that the equity in the property may also be reduced by real estate commissions and closing costs if the residence is sold. These factors should all be considered when deciding which position to take in your divorce case.

In a situation where the property may be worth less than is owed, I always recommend that my clients consult with a real estate attorney to discuss options and potential liability. Arizona is an anti-deficiency state, but depending on the type of mortgage(s) associated with the property, you may have some significant exposure depending on what option you decide to pursue in your divorce. A “short sale” or foreclosure may have serious tax consequences, FICO credit score impacts and even potential financial liability if there is a deficiency (i.e. the house sells for less than is owed on it at auction). The law in this area is ever-changing and your family law attorney will be able to point you in the right direction.

You can almost bet the farm that if you cannot *agree upon* a disposition of the property with your spouse, your Family Court Judge will order that it be sold. Judges simply do not have the time to get creative. I affectionately refer to this simplistic approach as the “guillotine” method. Sometimes I wonder if some Judges would cut the house in half if they could just to avoid the headache. Perhaps the family has spent the last 20 years in the home and one spouse desperately wants to stay for the stability of the children. This result therefore oftentimes presents a harsh reality for some clients, or perhaps even both parties, which frequently drives settlement discussion on this issue. This is when lawyers step in. I have penned several complicated, convoluted – yet creative and effective- property settlement agreements.

One important thing to remember is that the Family Court does not have proper jurisdiction (authority) to order third-party lenders to do, or not do, anything. This would include forcing the lender to refinance a spouse off a particular mortgage. Prior to 2007, this was not a problem. Most homes had equity, unemployment was low and people for the most part were doing well financially. It was the “good ol’ days.” Spouses were able to buy-out the other spouse by taking out equity and they were able to refinance the other spouse off the mortgage at the same time without any pushback from the lender. Now things are different. Although the real estate market is rebounding, a large portion of homes are still “upside-down” which limits the divorcing parties’ options. Nevertheless, a good attorney can be called upon to come up with creative solutions to solve the epidemic problem. For instance, a spouse can be given some time to refinance to allow for the mortgage to be paid down and for the market to rebound further. Of course, this requires certain safeguards and methods to resolve disputes down the road.

Some divorces take years but you will not be required to put up with your spouse until the divorce is final. Often one spouse or the other vacates the residence voluntarily once a divorce is looming. However, if both spouses dig in their heels and want to stay in the marital residence, a more formal approach may be necessary. If good cause exists, an Order of Protection (restraining order) is perhaps the swiftest way to oust a spouse from the marital residence. But more commonly, a spouse can file a Motion asking the Court for exclusive use and possession of the residence. The downside to this approach is that it may take a couple of months to obtain such relief from the Court unless an emergency exists. Interestingly, in the midst of the downturn in the economy, some couples chose to remain living together to preserve community funds. However, when a request is made, it is very likely the Court will order one party to leave. It’s easy to understand that problems that might arise if divorcing spouses are required to live together under the same roof.

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If only it were as easy as having a television network send a realtor and a home designer to your divorce Trial to testify and then you and your spouse decide which option will benefit the common good. Not shockingly, though, spouses going through a divorce don't see eye to eye. But be warned, if you can't find a way to swallow your pride and bury your animosity, the result may very well be something neither of you can live with.

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