Thirty years is the initial term of most mortgages, so in a divorce situation it is generally of utmost importance for both parties to reach an agreement that specifically establishes a workable method to dispose of the marital mortgage. The idea is to not only to legally separate yourself from your spouse, but also from all marital debt so that you can start your new life without worrying about previous obligations.

Unfortunately, getting released from liability for the mortgage is a problem, especially in today's market. And when a divorce is added to the equation, it becomes even more complicated because (1) the courts become involved and must approve the basic terms for any future sale or refinance of the marital home; and (2) bankruptcy laws surrounding divorce obligations have gotten stricter over the past few years.

Unless the parties agree to sell the marital residence together at the time of the divorce or separation, one party or the other will be awarded possession and legal title to the house subject to the mortgage in both parties' names. The party no longer having possession or title to the marital residence is still liable for the mortgage until the mortgage is paid off by virtue of a refinancing or sale. That means both parties' credit will continue to reflect this debt and be affected by the possibility of late payments even though only one party will have the right to reside in the house. For this reason, it is important for both parties in a divorce to carefully consider their options as to potentially satisfying the marital mortgage by agreement before jumping straight into court.

Typically it is not unreasonable for both parties to agree that the person with possession of the marital residence "shall refinance the mortgage on the marital residence releasing the other party from liability". However, simply including a provision to refinance the marital residence is not enough. Here's why:

The Courts are limited in their power to enforce such a provision. The remedy for the trial court is simply. Either:

**1.** A hefty fine each day until the mortgage is refinanced. (I have seen as much as $1500 per day suggested by the Court)

**2.** Incarceration in the local jail until the refinancing is completed.

Neither party wants either of these results. Be sure your attorney drafts a settlement agreement to provide for the possibility that the mortgage may not be refinanced. Detail will be critical at this point. The detail should cover the following:

1. **Exclusive ownership**. Transferring the asset back to the other party so that they can participate in the sale or rental of the property, if that becomes necessary. This means allowing occupancy or possession to both parties.
2. **Costs of Sale or Rental**. Costs to cover maintaining the house while it is in limbo and the expenses associated with a sale will help move the process quickly past the obstacles anyone faces when selling a home. Such detail would possibly include:

**a.** List the house for sale with a real estate broker selected;

**b.** A method for calculating the price;

**c.** Cooperation during a sale including to pursue the sale in a good faith and expeditious manner;

**d.** Acceptable terms of sale. For instance, a cash offer of 95% of the list price must be accepted.

* Special thanks to [Atlanta Family Law Attorney Jordan Hendrick](#) for his contribution on this article.