

## **Who Gets the House?**

**By Matt Flanagan**

This is a common question that does not always have a straightforward answer. There are some preliminary questions that must be answered before we can discuss who the court might award the home to.

Is the award temporary or permanent?

Is there a mortgage?

Is the house separate property or community property?

Whose name is on the deed?

### **Is the award temporary or permanent?**

The court may temporarily award exclusive use and possession of the home to Spouse A, but that does not necessarily mean that Spouse A will keep the home once the divorce is finalized. Awarding the home at temporary orders is just that: temporary. This article aims at looking at some of the key factors that courts consider when awarding the home at a final trial.

### **Is there a mortgage?**

Usually the largest barrier to one spouse keeping the home is the mortgage. A mortgage agreement is a contractual loan agreement. When two spouses sign a mortgage agreement, they are jointly entering into a contract with the lender to pay back the amount borrowed and thus both are on the hook.

A mortgage is a contract. Courts generally do not have the ability to modify contracts. A court cannot order the mortgage company to remove either spouse from the mortgage because by doing so the court is ordering the mortgage company to change its contract with the spouses.

In many cases, both spouses signed the mortgage loan that permitted them to buy the home. This means that each spouse is individually obligated to pay back the mortgage loan. So long as you are a party to that mortgage loan agreement, the lender may come after you for 100% of the mortgage in the event the mortgage does not get paid.

If one spouse is awarded the home, the court will often make that award conditional on that spouse being able to refinance the home, thus removing the "losing" spouse from the mortgage loan obligation. Since many couples buy homes based on their combined credit, it is often difficult for one spouse to individually qualify to refinance the home on his or her own. Owelty liens sometimes permit a spouse to refinance a home where they would not normally qualify. Look into this option if you are considering refinancing.

Scenario: Spouse A and Spouse B bought a home during the marriage. Both spouses are on the mortgage. Spouse A really wants to stay in the home but is not sure if he/she can refinance it.

It would not be a fair or practical solution to award the home to Spouse A while Spouse B remains on the mortgage. That would put Spouse B in the position of having personal liability for a piece of property Spouse B no longer owns.

A common solution is to award the home to Spouse A on the condition that Spouse A obtains refinancing for the home within a specified period of time, usually not longer than a year. If Spouse A cannot successfully refinance the home, removing Spouse B from the note, the court will order the home sold and the parties will divide the proceeds.

Caution: If you are considering an agreement to award the home to your spouse and you are not conditioning the award upon refinancing and removing your name from the mortgage obligation, it is extremely important that you obtain a deed of trust to secure assumption. This will partially protect you in the event your spouse ceases to make payment on the note in the event of a default. You should contact an attorney regarding how to implement and use this document.

### **Is the house separate property or community property?**

If it is determined that a home is the separate property of Spouse A, under no circumstances can the court award the home to Spouse B.

Scenario 1: Spouse A owns a home outright with no monthly mortgage payments prior to the marriage. Ten years after the marriage the parties file for divorce.

The judge should award the home to spouse A.

Scenario 2: Spouse A bought the home one month before the marriage and put zero dollars down on the home (100% financing). The couple spends the next 10 years using their combined incomes to make the mortgage payments. The parties commence divorce proceedings and the home has \$100,000 in equity.

It would be quite unfair for Spouse A to experience a windfall and take the home outright. Income is community property, and both parties contributed their community income to the home. But the court cannot award the home to Spouse B because of the separate property rules. This does not seem very fair does it?

In this case it is likely the court would attempt to remedy this unfair outcome to Spouse B by giving Spouse B a disproportionate share of some other community asset in order to offset the windfall Spouse A takes in the home. This is commonly referred to as a reimbursement.

There are other reasons the judge might order a reimbursement. A good example would be where community income is used to make significant improvements to separate property.

### Whose name is on the deed?

Let's step outside the community and separate property rules for just a minute and look at some general principles of real estate law in Texas.

Documents that define ownership in real estate are commonly referred to as deeds or title. There is a strong presumption that a person named on a recorded deed is an owner of the property described in the deed. If there are two names on the deed, the presumption is that each individual is a 50% owner of the property. If there are three names on the deed, the presumption is that each individual is a 1/3 owner, and so on.

Scenario 1: I had a case a few years ago where Spouse A and Spouse B purchased a home. They could not afford the financing on their own, so Spouse A got his brother to co-sign on the mortgage. In exchange, Brother was placed on the deed. Divorce was filed and the parties were faced with a deed that has the names of Spouse A, Spouse B, and Brother.

In this case it is presumed that all three names on the deed are equal owners. It is likely the judge would determine that Spouse A and B would have a 2/3 interest in the home that is a community asset in their marriage, and Brother has a 1/3 interest.

As you might imagine, we were not able to get out of the divorce without selling the property. The spouses split their 2/3 share of the sale proceeds according to the community property presumption. The Brother received 1/3 because he was on the deed.

Scenario 2: Spouse A buys a home during the marriage. The purchase is made with 100% community funds. Spouse A is the only name on the deed.

Does this mean Spouse A is a 100% owner of the property? No – the property was acquired during the marriage with presumptively community income and is therefore a community asset owned by both spouses. This principle applies to any asset purchased with community funds. In short, once an asset is designated as “community,” the name on the title takes on less significance.

Caution: A spouse can gift community property to another spouse and thereby make it the separate property of the receiving spouse. Specific deed language is very important in determining whether real property is gifted. The above scenario could quickly change if there is evidence that the deed was gifted to the spouse named therein (sometimes referred to as a gift deed). Always consult an experienced family law attorney prior to engaging in a real estate transaction where your spouse is the only person named on the deed.

Please contact one of our family lawyers to help you navigate the often difficult issue of home ownership after divorce.