May the Marital Residence Be Sold *Pendente Lite 7*

By S. Russ DiFazio*

The New York metropolitan area is experiencing one of the worst economic recessions in recent history. Unemployment rates have increased and, concomitantly, foreclosure actions are on the rise. What are the options when a family is mired in a contested divorce action and the bank is threatening to foreclose on the marital residence?

If ,a lender forecloses upon a marital residence, there is a significant danger that most of the equity value will be extinguished. Foreclosure costs, such as a higher default rate of interest, legal fees, disbursements, statutory costs, etc., erode the equity value in the marital residence. Moreover, the chances of receiving competitive bidding at the referee's sale have diminished because the interest of real estate speculators has waned. The logical choice when faced with an impending foreclosure suit is to sell the marital residence. If a speedy sale is attained, the parties may realize some of the equity interest in the home.

There are a variety of reasons why a party in a divorce action would refuse to consent to the sale of the marital residence *pendente lite.* When the party desiring to sell the marital residence encounters opposition from his or her spouse, the only option is to make application to the court.

The general rule is that the court should not order the sale of real property *pendente lite.* There is ample appellate authority which forbids the sale of a marital residence when it is held by the parties as tenants-by-the-entirety. The leading case is *Kahn v. Kahn?* wherein it is stated:"... unless a court alters the legal relationship of husband and wife by granting a divorce, an annulment, a separation or by declaring a void marriage a nullity, it has no authority to order the sale of a marital home owned by the parties as tenants by the entirety." Citing *Kahn,* the appellate courts have reversed many attempts by the trial courts to sell a marital residence *pendente lite.*[2]

Despite *Kahn* and its progeny, trial courts, when faced with exigent circumstances, have ordered the sale of the marital residence. Perhaps because of the proximity of the trial courts to the plight of the parties and the realization that if the marital residence is not sold there will not be any assets to distribute upon the entry of a divorce decree, the courts have ordered the sale of the marital residence so as to curtail any further dissipation of the marital estate. In *Wages v. Wages,*[3] the court determined that under unique circumstances it has the powerto direct the sale of the marital home and provide for the ultimate division of the proceeds of the sale at a later time. In *Wages,* the court noted that the defendant admitted that the "reality of the situation called for the sale of the home" and that the defendant had indicated his acquiescence to the sale. Furthermore, the court noted . - it was advisable that the home be immediately sold because vjit would financially benefit the child and facilitate support of the child.

In *Gordon v. Gordon,*[4] the trial court ordered that the marital residence be placed on the market for sale immediately, *pendente lite.* Again, in *Gordon,* the court noted that there were unique circumstances which supported the immediate sale of the marital residence. It reasoned that the marital residence was not being occupied by either party and that "it is apparent that requiring the marital apartment to remain empty and unsold from now through the time judgment in the matrimonial action is entered will constitute a waste of marital assets.. ."[5] The court noted that the movant sought to avoid the waste of many thousands of dollars and that the sale would not be a disposition of the residence, but rather a transformation of the asset, so as to preserve it.

In *St. Angelo v. St Angelo,*[6] the trial court ordered that the marital residence be immediately sold, since it was being threatened by a mortgage foreclosure. The proceeds of the sale were to be deposited with the court pending ultimate resolution of the equitable distribution of marital assets. The court stated[7]:

> "However, since the advent of the Equitable Distribution Law, marital property should be distributed 'in a manner which reflects the individual needs and circumstances of the parties' (Memorandum of Governor Carey, 1980 McKinney's Session Laws, p. 1863). Unlike a community property regime, fairness, not mathematical precision, is the guidepost. Under equitable distribution, a court possesses flexibility and elasticity to mold an appropriate decree because what is fair and just in one circumstance may not be so in another... Furthermore, DRL §234 extends judicial power over the possession of both real and personal property. The power was clearly designed to be utilized without regard to the state of title (1963 Report of Joint Legislative Committee on Matrimonial and Family Laws, N.Y. Legis. Doc, No. 34, pp. 81, 84-85; 2 Foster-Freed, *Law & the Family,* §22.37, p. 103), and it gives the court 'broad and flexible control' over the possession of property (1982-1983 Supplement, Siegel, *Practice Commentary,* McKinney's Cons. Laws of N.Y. Book 14, Domestic Relations Law, §234, p. 33), by providing in-kind support through possession of real *(Scampoli v. Scampoli,* 37 A.D.2d 614,323 N.Y.S.2d 627 [2d Dept. 1971]), or personal property *(Troiano v. Troiano,* 87 A.D.2d 588,447 N.Y.S.2d 753, [2d Dept. 1982]); *Silbert v. Silbert, 22* A.D.2d 893,255 N.Y.S.2d 272 (2d Dept. 1964), arrd,16 N.Y.2d 564,260 N.Y.S.2d 838,208 N.E.2d 783 (1965), by excluding one spouse from premises occupied by another *(Minnus v. Minnus,* 63 A.D.2d 966,405 N.Y.S.2d 504 (2d Dept. 1978), or by restraining transfers of property *pendente lite*

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(Leibowits v. Leibowits, 93 A.D.2d 535,462 N.Y.S.2d 469(2dDept. 1983).

[1] The power under DRL §234 to direct one party to deliver possession to the other necessarily includes the power to prevent a party from frustrating such delivery by improper disposition or wasteful dissipation of assets."

In *Reid v. Reid,*[6] the court ordered the sale of both the marital residence and a North Carolina property, *pendente lite,* and the proceeds thereof to be held in escrow pending final disposition by the court. In *Reid,* the court noted that the mortgage payment had been in default several times and that neither party could afford to maintain the premises. Furthermore, it noted that the defendant therein had refused to sell the marital residence. The court stated: This is the antithesis of preserving the major marital asset. Defendant is spending money unnecessarily in making monthly payments for the upkeep of the home, which monthly payments amount to approximately $2,000.00 and these payments reduce the marital estate." The court required that both the plaintiff and defendant in *Reid* to execute a brokerage agreement for the sale of the marital residence which, of course, indicated a consent by both parties to the sale.

In *Klein v. Klein,*[9] the court was faced with an application to sell the marital residence *pendente lite.* The court noted that the plaintiff could no longer maintain the property and that she was compelled to borrow money from friends to keep the mortgage payments in a constant one month lapse. The court ruled that a *pendente lite* sale is not a premature distribution of the asset before final resolution of the action. The court stated:

> Therefore, in order to preserve the equity in the asset and avoid a dissipation of the asset (foreclosure has already been threatened by the mortgagee), plaintiff should be appointed a receiver of the property with the authority to sell it if necessary. The net proceeds of such a sale will be held in escrow pending distribution by the court."

In *Price v. Price,*™ the court, under similar circumstances, stated:

> "It is apparent that requiring the marital home to go unsold from now through the time judgment in the matrimonial action is entered will constitute a waste of marital assets, because the house will go into foreclosure and the equity therein will be lost.

It is clear that some trial courts have been reluctant to follow the tenet as set forth in *Kahn* due to the overwhelming obligation to conserve the marital assets and prohibit the dissipation thereof during the pendency of the divorce action. In *Lidsky v.* L/dsky,[11] the husband moved *pendente lite* for an order directing the wife to execute all documents necessary to secure refinancing of a mortgage loan on the marital premises. The refinancing would lowerthe mortgage interest rate from fifteen (15%) percent to nine and one-half (91/2%) percent, thereby lowering the monthly mortgage payment. The court, mindful of its obligation to protect marital assets and maximize the amount of money which would be available to the wife for child support payments, directed the wife to affirmatively execute the refinancing documents.

Undoubtedly, there is a need for the trial court to be empowered to make such direction with regard to the marital premises so as to prevent or minimize the dissipation of marital assets. In *Sedghv. Sedgh,*™ the trial court noted that the marital residence was the subject of two (2) separate foreclosure actions. The wife refused to sell the house, even though the husband had offered her alternative accommodations. Justice Allan L Winick wrestled with this situation. He noted that there are circumstances where the need arises to sell the marital residence *pendente lite* before the assets are dissipated. Moreover, it was stated that "experience shows that complicated matrimonial litigation, with the increased need for discovery, causes the action to drag on for long periods of time thus increasing the peril of dissipating assets through outside forces, such as a mortgage foreclosure."[13] The court noted Supreme Court cases such as *Klien, supra; St Angelo, supra,* which diverged from the *Kahn* ruling. However, by virtue of *stare decisis,* the court ruled in accordance with the *Kahn* decision. The court stated that: "if there is to be any remedy, there must be a change in the law to permit the court to order such an emergent sale ... "[14] Perhaps the time is right for such a law.

Endnotes

1. 33 N.Y.2d 203,401 N.Y.S.2d 47, 51 (1977).
2. Brady v. Brady, 101 A.D.2d 797, 475 N.Y.S.2d 470, *affd.,* 64 N.Y.2d 339,486 N.Y.S.2d 891; Berke v. Berk©, 170 A.D.2d 564, 566 N.Y.S.2d 340 (2d Dept. 1991); Jancu v. Jancu, 174 A.D.2d 428,571 N.Y.S.2d 456 (1st Dept. 1991); Harrilal v. Harrilal, 128 A.D.2d 502, 512 N.Y.S.2d 433 (2d Dept. 1987).
3. 38 A.D.2d 968, 332 N.Y.S.2d 94 (2d Dept. 1972).
4. 144 Misc. 2d 27,543 N.Y.S.2d 638.
5. *Id.* at 543 N.Y.S.2d at 639.
6. 130 Misc. 2d 583,496 N.Y.S.2d 633 (1985).
7. *Id.* at 496 N.Y.S.2d at 634.
8. N.Y.L.J., July 12,1990. p. 35, col. 2.
9. February 21,1989, p. 26, col. 4.
10. N.Y.L.J., July 15,1991, p. 28, col. 5.
11. 134 Misc. 2d 511, 511 N.Y.S.2d765 (1986).
12. 142 Misc. 2d 931, 539 N.Y.S.2d 255 (1989).
13. *Id.* at 539 N.Y.S.2d at 256.
14. *Id.*

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