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## Till death do us part... or the housing market rebounds

By CORREY E. STEPHENSON

**M**cLean lawyer Joe Condo will never forget January 2009.

Usually, the phone rings off the hook in family law practices after the holidays. But that year, there was an eerie silence. Worried, Condo began calling other practitioners and learned they were experiencing a similar phenomenon.

The Great Recession was so bad couples were actually waiting to divorce. With 401(k) plans and stocks low and some houses so underwater they were basically upside down, even the most incompatible couples could not afford to establish two separate households.

Couples that did separate even remained living under the same roof, in some cases after the divorce itself. “We had one case where a gentleman put a cinderblock wall in the stairwell” to separate his basement residence from his ex-wife living upstairs, Vienna-based Alan Plevy said.

Now, roughly four years later, things have improved.

“People couldn’t even think about divorce before – they were just focused on survival,” Plevy said. “Now the economy has absolutely changed and we’ve seen a lot more money in the system, with people able to refinance and a lower unemployment rate.”

“We’re coming out of the storm,” Condo agreed. “A lot of people are telling me, ‘I would have been in a year ago but the bottom fell out.’”

The state of affairs has not returned to the pre-recession situation, however, with some couples still having to live together after filing

for divorce and lingering questions about job security. Virginia Beach attorney Cheshire Eveleigh said that despite experiencing some economic improvement, many of her clients are still concerned about the effects of sequestration, with heavy military and government employment in the Hampton Roads area.

“They don’t know from one minute to the next what is going to happen,” she said. She has a current client who works as a civil servant who was told he would be furloughed one day per week for the next six weeks. While he recently learned that would be the extent of his furlough days this fiscal year, he was told to expect up to 22 days for fiscal year 2014, looming ahead. “It’s tough to start the new fiscal year with so much uncertainty,” Eveleigh noted.

### One house, separate lives

Traditionally, divorcing couples relied upon home equity to finance their divorce. But a tough housing market changed that. During the recession, “real estate was the number one problem,” said Chesterfield practitioner Lawrence D. Diehl. Options were limited: when values dropped, many houses were over-financed. And banks were extremely reluctant to let a couple refinance to remove one of the parties from the mortgage, given the uncertain job market. “I learned a new term in 2010: short sale,” Plevy said.

When faced with an underwater house, parties were often left to their own devices by the courts, Eveleigh said. She referenced *Fox v. Fox*, where Suffolk Circuit Court Judge Rodham T. Delk refused to divide two properties

owned by a divorcing couple that had no equity. Although the court could have ordered the transfer of one or both of the properties to one spouse, or could have ordered a public or private sale, neither option was viable given the negative equity of both parcels. Instead, in a move affirmed by the Court of Appeals, Delk essentially told the parties to figure it out on their own.

“It’s not fun for the clients or the attorneys,” Eveleigh said. “A lot of times it leads to bankruptcy, if the house is substantially under water and the parties can’t work it out.” In some situations, one party might provide a quitclaim deed to the other; other times, unable to be removed from the mortgage, one party might agree to continue making payments for a pre-determined amount of time until – fingers crossed – the market has improved.

Clients in Virginia unable to sell a home or refinance the mortgage sometimes chose to remain living together – and yet apart.

State law requires that a couple be legally separated for a period of one year, in order to divorce under Va. Code § 20-91(A)(9). Family law practitioners reported that some courts were flexible, allowing couples living at the same address to divorce with corroboration that their lives were “separate and apart” – not sharing the same bedroom, for example, or going out as a couple. Affidavits from the couple as well as sworn statements from witnesses – sometimes adult children or family friends – would satisfy the standard.

But other courts – like Henrico County – kept to a strict interpretation of the law, creating a tough burden for clients, Diehl said.

The phenomenon became so common in some jurisdictions that a separate docket was created for divorcing couples living separate and apart under the same roof. Virginia Beach created such a docket, Eveleigh said, which puts all the parties on notice that the case requires an additional level of proof “over and above what a normal divorce case would be.”

Although the real estate market is on the upswing, some couples are still struggling to separate. “I have one case right now I can’t settle because the house has a huge foundation problem and there is no money to fix it, so it is essentially not marketable,” Condo said.

### Silver linings

Real estate hasn’t been the only problem area for practitioners.

Many attorneys learned the hard way that both parties should take on some of the risk when splitting stocks or 401(k) accounts, Eveleigh said. Historically, one party would agree to pay a set dollar amount from a retirement plan as of the date of separation or the parties’ divorce agreement.

But during the recession, the value of the plan often dropped – sometimes precipitously – leaving the payor spouse “handing over most of the account to a former spouse,” she said. Recognizing the uncertain economy, parties began using percentages instead. Now, instead of paying \$25,000 or \$50,000 out of a pot that might be leaking money, the spouse will agree to pay 40 or 50 percent of the value as of a given date, allocating the risk between the parties. “With a finite amount of money available, each party is protected,” she said.

The economic downturn also changed how some clients wanted to resolve their differences, and how much assistance they could afford.

Plevy said couples are quicker to consider mediation or to use the collaborative process in an attempt to cut costs. Others here attempted to navigate the process pro se. “We had plenty of people in the office who would ask us to review a mediator agreement,” Plevy said.

Parties were also reluctant to take time off from work for various litigation-related events like trial, said Kyung (Kathryn) Dickerson of Vienna, as they were worried about losing their jobs.

Dickerson noted a silver lining from the recession: Couples forced to continue living together were also forced to be more civil. “It’s easy enough to send a raging email to your spouse, but it’s a different thing to send it and have to come home and see them.”

Economic struggles also encouraged a more practical approach to the process, Dickerson said. “People are always going to disagree with regard to children to a certain extent, but we saw a lot less of ‘I want this lamp or that sofa,’” she explained. “Clients seemed to understand that it was easier to go to Ikea and buy another sofa for less than they would spend on attorney’s fees back and forth.”

Struggling to make ends meet also meant the parties were less likely to think a hidden pot of money existed somewhere, she added. “If both people are worried about how to pay the utility bill, then they were more respectful of each other in the process.”