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Can I Keep the Marital Home in my Divorce?

By Carmela M. Miraglia | October 23, 2019

Family Law | Divorce | Division of Assets

Divorce attorney Carmela M. Miraglia explores the many issues affecting whether one spouse can or should “keep the marital home” following a divorce.



One of the first questions most people ask during a [divorce consultation](#) is “Can I keep the house?” Most [family law attorneys](#) know that the standard answer is “it depends”, followed by “just because you *can* doesn’t mean you *should*.” For some divorcing spouses, keeping (or staying in) the marital home becomes their proverbial *white whale* in the divorce, dominating their attention and distorting their negotiating positions on other important issues.

Unlike many divorce issues, questions surrounding the marital home often bleed over and between the broad categories that define a divorce, such as [child custody](#), [child support](#) and the [division of marital assets](#). Indeed, a spouse’s right to continue using the marital home after a divorce can be influenced by custody, support and assets. Meanwhile, parties often connect strong emotions to the marital home, making it one of the more challenging issues to resolve in a [divorce](#).

There are several questions to consider before making the former marital home a priority in your divorce. These include basic financial accounting questions, strategic considerations in your [negotiation](#), legal concerns, and honest self-reflection about the emotional dynamics surrounding the question of: *Who keeps the marital home in a divorce?*

Five Questions: Who Keeps the House in a Divorce?

Which party keeps the marital home following a divorce is often a complicated question, particularly in cases in which both parties seek to retain the home. Here are 5 questions that parties should consider when deciding whether they should pursue the home in their divorce:

- Where will your children reside, and how long will they live there?
- Are there enough assets for you or your spouse to buy out the other party's interest in the home?
- Will you have enough income and cash flow to afford the house after the divorce?
- If you are not buying out the other party's interest, how long will you stay in the home after the divorce?
- Can I force my spouse to leave the home during our divorce?

Depending on how you answer these questions, it may make more sense, both emotionally and financially, to make alternative living arrangements.

1. Child Custody Can Impact Who Keeps the Marital Home

In a contested divorce, the court's [child custody](#) determination can be an important factor in which spouse will receive the marital home. In particular, if one spouse wishes to live in the marital home for a period of time after the divorce – without buying out the other spouse's interest – judges are likely to consider the needs of the children in one parent's request to continue using the home. Generally speaking, a parent with [primary or shared physical custody](#) will be in a better position to continue his or her use of the home after the divorce than a non-custodial parent who has limited parenting time.

The rationale behind allowing one parent to continue residing in the former marital home with the children is multifaceted. Judges often view such an arrangement as promoting stability for children who have just experienced the difficulty and trauma of their parents' divorce. Another frequent concern is whether the primary parent has the financial means to obtain *new housing* for the children if the marital home is sold. In some situations, judges will grant one parent a period of use and enjoyment of the home – which can be for a number of months or years – after the divorce to ensure the children have a roof over their heads, at least until the parent can regain his or her financial footing.

For spouses without minor children, debates over who keeps the marital home often come down to financial concerns. If children are involved, however, it is not uncommon for a court to permit one parent to remain in the home for a period of years following the divorce.

2. Do You Have the Assets to Buy Your Spouse Out of the Marital Home?

In many divorces, the marital home is the quintessential “joint marital asset”, making the marital home one of the most valuable assets that is [subject to division](#) in the parties’ divorce. Courts will frequently seek to equally divide the equity in the marital home. Thus, a spouse seeking to retain the marital home following a divorce, must generally draw on his or her share of separate assets to “buy out” the other spouse’s interest in the home.

(Example: If divorcing spouses have \$500,000 in equity in the marital home, the spouse seeking to retain the home must typically agree to pay \$250,000 to the other spouse in consideration of the other spouse’s 50% interest in the home. If the spouse seeking to keep the home lacks an additional \$250,000 in assets, performing such a buyout becomes difficult.)

A buyout does not need to be performed strictly with cash – you can offset the cost with other marital assets like a car, retirement fund, or maybe even payments over time to defray the upfront costs. However, spouse’s with limited assets must think carefully if it is really worth sacrificing all of their other assets in order to keep a home. It’s important to remember that for the majority of U.S. history, [real estate prices have barely outperformed inflation](#) in terms of increasing value. Real estate investments – particularly residential properties – also have substantial carrying costs, ranging from real estate taxes to mortgage interest to buying a new roof every 20 years. (Note that rental properties provide several tax advantages not available to conventional homeowners in terms of carrying costs.) In contrast, investments in the stock market – despite all of the crashes over the years – [have outperformed real estate investment](#) by 5x since 1928.

A spouse who sinks all of his or her post-divorce assets into a single residential property is likely sacrificing the potential for major gains in the stock market over time. One way to think about this is to simply look at the economic crash of 2008. As of late 2016, the increases the [stock market outperformed the real estate market](#) in 20 of 24 metro areas across the United States. From 1928 to 2019, at least, the data is pretty clear: investing in

stocks outperforms investing in real estate. Spouses should consider this reality before sinking all of their post-divorce assets into the marital home.

Calculating a buyout price for the marital home can be challenging. Divorcing spouses frequently each retain real estate appraisers to value the home, and it is common for the buyout to be calculated based on the higher valuation. If both parties want to retain the home, this further complicates matters, as judges frequently have little patience for a “bidding war”. Parties negotiating a buyout must also consider issues such as whether the buyout decreases certain transactional costs, such as avoiding a realtor’s commission, which might factor into the buyout price.

Finally, it is worth noting that a spouse who seeks to buy out the other party’s interest in the home must also generally refinance any mortgages on the property, such that the other party’s name is removed from the mortgage. Obtaining a refinance can be challenging for parties with poor credit or limited income or assets. A key question in such cases focuses on how long a party has to obtain a refinance, and what happens to the property if he or she cannot refinance any mortgages.

3. Will You Have the Cash Flow to Maintain the Marital Home if You Keep It?

In some cases, Massachusetts courts have held that one party’s use of the marital home following a divorce can be viewed as a component of [child support](#). Under this theory, the non-custodial parent must wait for a future sale of home – delaying his or her share of the [division of assets](#) – while the custodial parent resides in the home with the children. In some cases, the non-custodial parent may be even be ordered to pay for the costs of the house as a component of child support.

More commonly, the party residing in the marital home is responsible for paying for 100% of the costs associated with the house. Such parents may (and often do) receive child support, which he or she then uses (along with his or her other sources of income) to pay for the home. For divorced spouses of limited means, this can result in the party becoming “house poor”.

Investopedia defines being “[house poor](#)” as follows:

House poor is a term used to describe a person who spends a large proportion of his or her total income on home ownership, including

mortgage payments, property taxes, maintenance, and utilities. Individuals in this situation are short of cash for discretionary items and tend to have trouble meeting other financial obligations, such as vehicle payments.

We regularly hear about spouses who fight hard to keep the marital home in a divorce, only to sell a year or two later, because maintaining the home is simply too expensive. It's important to remember that divorced spouses have to maintain two households – one for each former spouse – instead of a single home, following a divorce. The need for two households makes resources scarcer for both parties. In the context of paying for the former marital home, one spouse will often struggle to pay the operational and maintenance costs for a property that was originally supposed to cover the entire family's housing needs.

Paying for and maintaining the marital home with only one source of income can prove more difficult than many parties imagine. Even if you were the primary wage earner for your family, it is often a mistake to assume that the costs of maintaining the marital home will be easier after the divorce. Without the benefit of the added care attention from your spouse, there will likely be extra maintenance costs that you will have to factor into the equation. For example, you may have to hire a lawn company to keep up with the yard, a "handyman" to fix minor the issues that were once, or a housekeeper to assist with cleaning. Without the extra set of hands of your former spouse, you may not have the time to tackle every task during the weekends as you are also managing the household chores, grocery shopping and children's activities.

Spouses who fight for the marital home during a divorce and then succeed can quickly find themselves spending a greater portion of their income on their mortgage and the attendant costs of owning the home they fought for, leaving them "house poor." Before seeking to retain the marital home in a divorce, parties must carefully plan out their post-divorce budget. A difference of \$500 per month may seem minor, but this can be the difference between living "paycheck to paycheck" and having a cushion in the years ahead.

As part of the budget-making process, spouses should consider the following:

- a. All of the recurring expenses relating to the home, including mortgage, real estate taxes, utilities and upkeep costs.
- b. Estimating major periodic expenses, such as replacing the roof, exterior painting or replacing a boiler.

- c. Calculate all other weekly and monthly living expenses.
- d. Determine all sources of income, including employment income, child support or alimony received, and potential [tax credits and refunds](#).
- e. Your financial “cushion” – i.e. all of your [liquid assets](#), potential sources of borrowing, any other sources of cash if you experience financial difficulty.

4. How Long Do You Expect to Stay in the Marital Home After the Divorce?

Fighting for the marital home in a divorce can make a lot of sense if you intend to buy out your spouse’s interest in the home. For parties who only plan to live in the marital home for a limited number of years after the divorce, the calculus is more challenging.

As noted above, courts will often consider requests by parents who wish to continue residing in the marital home with the children for a period of time, even if the parent making the requests lacks the assets to buy out the other party’s interest in the home. There can be significant downsides to continuing to reside in the marital home under these circumstances, however. These include:

- **You will need to pay for the house from your available income** – Former spouses receiving a limited child support or alimony for a limited period of time after the divorce must ask themselves if it really makes sense to spend their limited resources on an expensive home.
- **You will still need to sell the home and split the equity** – Although living in the home may bring comfort, it’s important to remember that the other spouse is still entitled to his or share of 50% of the value following a sale.
- **Paying for repairs and maintenance can be challenging** – What happens if the home needs a new roof after the divorce? While the party residing outside of the home may be willing to wait for his or her share of the sale proceeds, asking that party to pay for major repairs may be a different story. One problem with allowing one party to remain in the home for a lengthy period of time after the divorce is that the home may fall into disrepair, harming the eventual sale price down the road.
- **How long will you stay there?** – We frequently see agreements and orders allowing one spouse to reside in the home for between 1 and 5 years following the divorce. On some occasions, the period of residency is tied to one or more [child becoming emancipated](#), turning 18 or graduating from high

school or college. The longer the period of residency, the greater the burden on the party outside of the home – who must wait for his or her share of the proceeds – and the more challenging the situation becomes for both parties.

5. Can I Force my Spouse to Leave the Marital Home Before the Divorce is Over?

In case you haven't noticed, the Lynch & Owens blog has never been afraid to [criticize the Massachusetts legislature](#) for failing to update silly laws. When it comes to orders to “vacate the marital home”, however, the legislature gets something of a pass. For vacate orders, we must direct our frustration at the judges of the Probate & Family Courts.

Massachusetts has a clear statute that *should* be met before a Court forces one spouse to “vacate” the marital home during a divorce. [Chapter 208, s. 34B](#) provides:

Any court having jurisdiction of actions for divorce ... may, upon commencement of such action ... order the husband or wife to vacate forthwith the marital home for a period of time not exceeding ninety days, and upon further motion for such additional certain period of time, as the court deems necessary or appropriate if the court finds, after a hearing, that the health, safety or welfare of the moving party or any minor children residing with the parties would be endangered or substantially impaired by a failure to enter such an order.

In other words, the Massachusetts “vacate statute” requires a court to find that the “health, safety or welfare” of a party or minor child will be “endangered or substantially impaired” unless one spouse is involuntarily removed from the home while the divorce is pending. In reality, Probate and Family Court judges routinely ignore this legal standard, thereby forcing one spouse to leave the home even when there is no evidence of substantial harm or impairment.

It is widely agreed that the “vacate” legal standard requires a lower degree of risk than what is required for a [209A abuse prevention order](#), but not a whole lot lower. In general, the mere fact that spouses are getting divorced should *not* be sufficient to satisfy the substantial harm or impairment standard.

Of course, a statute is meaningless if judges don't follow it. And in Massachusetts, many judges simply *ignore* the vacate statute, instead choosing to enter [temporary orders](#) granting one spouse “exclusive use and

enjoyment” of the marital home during the divorce, which forces the other spouse to leave the home. To be clear, the phrase “use and enjoyment” is taken from real estate law (and/or landlord-tenant law), but there appears to be no legal basis for the entry of such an order in a divorce case.

(Editor’s Note: The [vacate statute](#) is narrowly tailored in a way that *should* make it exclusive remedy for judges seeking to remove a spouse from the marital home pursuant to a divorce. There is really no arguable basis for removing a spouse from the home based on a simple temporary orders pursuant to [Ch. 208, s. 28A](#). Nevertheless, “use and enjoyment” orders are used by judges on a regular basis to circumvent the vacate statute.)

Because of the peculiar nature of temporary orders in the probate court, neither the Massachusetts Appeals Court nor Supreme Judicial Court have [addressed the vacate statute since 2005](#). In practical terms, this means that judges who require a spouse to leave the home using a temporary order for “use and enjoyment” face little or no pushback from the appellate courts. The bottom line is that Massachusetts judges frequently require one spouse to leave the marital home during a divorce in three ways:

- 209A abuse prevention orders (domestic restraining orders)
- Vacate orders under Ch. 208, s. 34B
- Temporary orders granting one party “sole use and enjoyment” of the marital home

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CDFAs Can Help: Should I keep the Marital Home After my Divorce?

Consulting with a Certified Divorce Financial Analyst (CDFA) is often a good idea before, during or after your divorce. A CDFA can help you analyze your budget to determine if you will have the post-divorce income and cash flow to afford the home on your own. In addition, a CDFA can help you understand the differences between investing in a “dead asset” like a residential home

versus [more liquid assets](#) that can generate investment income over the long haul.

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Schedule a free consultation with [Carmela M. Miraglia](#) today at (781) 253-2049 or send [her an email](#).

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