



WORKSHOP S.

Moving Towards Civil Gideon

*2014 Legal Assistance
Partnership Conference*

Hosted by:

The New York State Bar Association
and The Committee on Legal Aid



**Copyright © 2014
All Rights Reserved
New York State Bar Association**

NEW YORK STATE BAR ASSOCIATION 2014 PARTNERSHIP CONFERENCE

S. ECONOMIC ISSUES AND FAMILY LAW: NAVIGATING THE INTERSECTIONS OF CONSUMER, FAMILY, BANKRUPTCY AND FORECLOSURE LAWS

AGENDA

**September 11, 2014
11:45 a.m. – 1:15 p.m.**

1.5 Transitional CLE Credits in Professional Practice.

*Under New York's MCLE rule, this program has been approved for all attorneys,
including newly admitted.*

Panelists:

Kevin Purcell, Esq., Supervising Attorney, Foreclosure Prevention Unit, Empire Justice Center
Laura A. Russell, Esq., Supervising Attorney, Family Law/Domestic Violence Unit, The Legal Aid
Society
Matthew Schedler, Esq., Supervising Attorney, CAMBA Legal Services, Inc.

- | | |
|---|----------------------------|
| I. Overview of The Economic Crimes Now Enumerated in Family Offenses | 11:45 am – 11:55 am |
| II. Consumer Debt Collection and Credit Reporting | 11:55 am – 12:20 pm |
| III. The Foreclosure Process and Evaluation of Mortgages | 12:20 pm – 12:45 pm |
| IV. The Interplay of Consumer Debt, Credit Reporting Home Ownership and Family Law and Domestic Violence | 12:45 pm – 1:10 pm |
| V. Questions and Answers | 1:10 pm – 1:15 pm |

Table of Contents

Substantive Outline.....	1
Biographies	15

Substantive Outline

S. ECONOMIC ISSUES AND FAMILY LAW: NAVIGATING THE INTERSECTIONS OF CONSUMER, FAMILY, BANKRUPTCY AND FORECLOSURE LAWS

OUTLINE

I. CHANGES TO THE ENUMERATED OFFENSES OF ORDERS OF PROTECTION (FCA SEC. 812)

A. Elements of Identity Theft, Grand Larceny and Coercion

1. Proof Required: Mechanisms for proving offenses
2. Soliciting necessary information from clients to prove offenses

B. Defining the documents allowed “to be returned” at disposition

II. OUT OF COURT DEBT COLLECTION

A. Life of a Debt

1. Original Creditors
 - a. Default – a debt is created at the moment the consumer misses a payment.
 - b. In House Debt Collection – if the consumer continues to miss payments the creditor will likely attempt to collect the debt themselves. The FDCPA does not apply here.
 - c. Charge Off – Charge off is merely an accounting term. The charge off of a debt does not affect the rights or liabilities of a consumer.
2. Outside Debt Collectors – at some point after charge off the original creditor will often hire an outside debt collector to attempt to collect the debt.
 - a. FDCPA - The FDCPA governs their activity, which may include letters and phone calls.
 - b. Collection efforts - Some outside debt collectors are nice others less so. It is common for a debt to be passed to a number of outside debt collectors.
3. Debt Buyers – If the original creditor cannot collect through in-house or outside debt collectors it will often sell the debt to debt buyers.

B. Rights Under the Fair Debt Collections Practices Act – The FDCPA applies to all persons who regularly collect the debts of another and only applies to consumer debt, debts for personal family, or household use.

1. Verification - 15 U.S.C. 162g –Consumer has 30 day from the initial communication from the debt collector to request verification.
 - a. Requirements for verification are minimal.
2. Cease and Desist - Consumer also has the right to request that the creditor stop cease and desist communications. Sometimes this can spur a lawsuit, or the transfer of the debt to another collector.

C. Rights Under New York City Law

1. Licensing
2. Settlements must be confirmed in writing
3. Must disclose if debt is past SOL
4. Enhanced verification

- a. Proof of agreement to pay original creditor
- b. Final account statement
- c. Breakdown of the amount due showing principal and interest
- d. Date and basis for all other charges

D. Scammers and other Frauds

E. Exempt Income

- 1. Bank accounts
 - a. Exempt Income Protection Act – the first \$1,920 in a bank account is exempt for everyone. If exempt income is being directly deposited that amount increases to \$2,625
 - b. Treasury Rule – 2 times the monthly amount of the protected benefit is exempt. Applies on if it offers great protection that EIPA
- 2. Wage Garnishment – 30 times minimum wage is protected. Above that 10% of the gross can be garnished
- 3. Property Liens

III. COLLECTION ACTIONS

A. Defenses

- 1. Improper Service
 - a. C.P.L.R. § 308 – governs the requirements of service
 - i. Service may be performed personally by hand delivery anywhere in the state.
 - ii. If not hand delivered service must be made at the actual home or place of business of the defendant.
 - iii. “Nail and mail” service is permissible if the Process server first exercises due diligence in attempting personal service.
- 2. Identity Theft
- 3. Duress
- 4. Disputing the Debt
- 5. Standing – Important to assert whenever a debt buyer is the plaintiff and it is often difficult to meet their burden of proof and prove ownership of the debt.
- 6. Statute of Limitations
 - a. C.P.L.R. §202 – New York’s borrowing statute requires that when a credit card contract is with an out of state party, the statute of limitations for the state that party resides applies if it is less than New York’s 6 year limit.
 - b. U.C.C. § 2-275 – New York’s 4 year statute of limitation on contracts of the sale of goods.
 - c. The 2 year statute of limitation on cell phones under 47 U.S.C. § 415(a).
- 7. Other Defenses

B. Common Motions

- 1. Motions to Dismiss for Lack of Personal Jurisdiction
- 2. Summary Judgment

3. Discovery Motions

C. Trial

IV. CREDIT REPORTING

A. Credit Reporting Basics

1. Areas where credit reporting is used as an evaluation tool
 - a. Credit, employment, housing, insurance
 - b. Collection proof individuals may still want good credit
2. The industry and Customers
 - a. The “big three” Equifax, Trans Union, Experian
 - b. Tenant screening companies
 - c. ChexSystems
 - d. Industry pus to sell more information
3. Problems with credit reports
 - a. One in four reports has serious errors
 - b. Dispute process is very automated; not uncommon for incorrect information to be verified
4. Key Laws
 - a. Fair Credit Reporting Act - 15 U.S.C. § 1681 et seq.
 - b. Fair and Accurate Credit Transactions Act (FACTA)
 - c. Fair Debt Collections Practices Act (FDCPA)
 - d. NYS Fair Credit Reporting Act (NY FCRA), NY Gen. Bus. Law § 380 et seq. (includes NY security freeze law)
 - e. NYC Tenant Fair Chance Act
5. Key Terms
 - a. Consumer Reporting Agencies 15 U.S.C. § 1681a(f)
 - b. Consumer Reports 15 U.S.C. § 1681a(d)(1)
 - c. Nationwide specialty consumer reporting agency
 - d. Furnisher
 - e. User
 - f. Tradeline
6. Information on a credit report
 - a. Personal identity information
 - b. Credit account information
 - c. Collection account information
 - d. Public records
 - e. Inquiries
 - f. Consumer statements
7. Time limits for negative information
 - a. 15 U.S.C. § 1681c(a)&(c) – accounts placed for collection or charged off: 7 years & 180 days from default (usually 7 years from charge off)
 - b. Other negative credit information – generally 10 years

- i. Bankruptcy – 10 years
- ii. Tax Liens – 7 years
- iii. Civil Judgment – 7 years or when the governing SOL expires, whichever is longer (CRA’s practice is to keep on for 7 years)
- iv. Student Loans – 7 years from default – may be much longer depending on the loan
- v. Inquiries – 2 years for “hard” inquires 1 year for “soft” inquires
- c. GBL§380-J – an account placed for collection or charged off must be removed after 5 years if it is paid within 5 years
 - i. A Judgment must be removed if satisfied within 5 years.

B. Key Rights Under the FCRA

- 1. Duty of accuracy
 - a. CRAs
 - i. Must maintain reasonable procedures to ensure maximum possible accuracy. 15 U.S.C. § 1681e(b)
 - ii. Must reinvestigate disputed information 15 U.S.C. § 1681i
 - b. Furnishers
 - i. Must provide accurate information to CRAs 15 U.S.C. § 1681s(2)a
 - ii. If notified of dispute by CRA, furnishers must conduct a reasonable investigation 15 U.S.C. § 1681s-2(b)
- 2. Responsibilities of users
 - a. Permissible purpose
 - i. Credit transaction involving consumer
 - ii. Collection of credit account and judgments
 - iii. Inquiry in connection with employment
 - b. Adverse action notices
 - i. If user takes adverse action based in any part on information in a consumer report, user must provide notice of that information, along with name, address, and phone number of CRA used.
- 3. Consumer Rights
 - a. Obtain a free report
 - b. Id theft provisions
 - c. Security freeze
 - d. 100 word consumer statement
 - e. Dispute information on consumer report
 - f. Sue CRA or furnisher

C. Disputing a Credit Report

- 1. The method CRAs handle disputes – extremely mechanized
- 2. Common disputed items
 - a. Incorrect personal information
 - b. Unfamiliar original creditor account
 - c. Debt collector/debt buyer account

- d. Account not reflecting disputed, paid, settled status
 - e. Out of date public records
- 3. How to dispute
 - a. Always in writing
 - i. Send dispute return receipt
 - ii. Keep copies
 - iii. Follow - up
- 4. Disputes related to litigation
- 5. Identity Theft
 - a. Alerts
 - i. 3 varieties of alerts consumers may add
 - a) Initial – places an alert on the report that notifies users that the consumer may be a victim of fraud. Extenders of credit may only do so reasonable policies to ensure the applicant’s identity.
 - 1) Must let a consumer know they are entitled to a free report and provide a request report within 3 days.
 - 2) Alert is active for 90 days, however, a consumer may lift it earlier and a CRA may provide it longer.
 - b) Extended – lasts 7 years
 - 1) Consumer must provide proof of ID and an identity theft report.
 - 2) Right to two free reports over the subsequent 12 months
 - 3) CRAs must exclude consumers from any list generated to sell users transactions not initiated by the consumer.
 - This exclusion lasts 5 years.
 - c) Military
 - ii. One call – in theory each alert is one call. Meaning once you alert one CRA that CRA will alert the others.
 - iii. Must have proof of ID i.e.name, address, social, dob
- b. Blocks
 - i. Victims of id theft can require CRAs to block theft related debts from their files.
 - ii. What is needed
 - a) Proof of id
 - b) Id theft report
 - c) The fraudulent information
 - d) A statement from the consumer that the information does not relate to the consumer.
 - iii. CRA can decline a block
 - a) Consumer requests block erroneously
 - b) Consumer makes a material misrepresentation
 - c) Consumer benefited from the transaction

- iv. CRA must block items from CR within 4 business days
- v. Furnishers
 - a) Must implement procedures to prevent re-reporting the information
 - b) Cannot sell debt that has been blocked
- c. Freezes – allow consumers to prevent the release of their report
 - i. DV survivors can obtain a freeze at no charge.
 - ii. A freeze may be briefly lifted for a period of time or an individual creditor.
- 6. Considerations for survivors of domestic violence
 - a. Economic abuse
 - b. Risks associated with requesting a report or disputing items on a report
- 7. Claims under the FCRA

V. NEW YORK FORECLOSURE PROCESS

A. Pre-Foreclosure Notices

- 1. Lender or servicer send a Demand or Acceleration letter 90-day pre-foreclosure notice sent to all residential mortgage borrowers
- 2. prior to filing of the action (*See* RPAPL § 1304)

B. Filing of the Foreclosure

- 1. Lender will file the lis pendens, summons and complaint with the court.
- 2. The borrower is served the summons and complaint.
- 3. Borrower has 20 days to answer if served in person and 30 days if served by mail.

C. Answer

- 1. If borrower files an answer, the lender is likely to file a motion for summary judgment
- 2. If motion is granted, foreclosure continues as if no answer was filed.
- 3. If motion is not granted, borrower may continue discovery, seek a trial, or seek settlement
- 4. Note that pursuant to § 202.12-a(c)(7) of the Uniform Civil Rules for the Supreme and County Courts (effective February 13, 2010), all motions should be held in abeyance pending resolution of the settlement conference process.

D. Request for Judicial intervention (“RJI”) with special foreclosure addendum for “home loans” (as defined in RPAPL 1304) must be filed. Together with affidavits of service for summons and complaint, per Uniform Rule 2012.12-a.

E. Settlement conferences: CPLR 3408(a)

- 1. Mandatory for all foreclosure actions filed after February 14, 2010, where the subject property is the principal residence of the borrower.
- 2. Settlement conference should be scheduled within 60 days of the running of the homeowner’s time to Answer.
- 3. More info on settlement conferences below in Section III

F. Lender files Motion for Judgment of Foreclosure

G. Lender files Motion for Order of Reference

1. Generally this is filed simultaneously with the Motion for Judgment of Foreclosure, but this is not required.

H. Referee is appointed by court and calculates amount owed by borrower

I. Court signs Judgment and Order of Reference.

J. Lender schedules auction with referee and advertises auction in newspaper for at least 30 days.

K. Auction

1. Borrower's right of redemption ends Pays arrears
 - a. Negotiate with lender a plan to become current on loan
 - b. Sell property
 - c. Refinance or pay off loan completely
 - d. File bankruptcy
2. Surplus or Deficiency rights
 - a. Lender refunds surplus to borrower if a surplus exists after payment of all liens and foreclosure fees and costs.
 - b. Lender MAY pursue a deficiency if house sale does not cover all costs and liens.
3. Property is sold to third party or lender takes title and property becomes a Real Estate Owned (REO) property.

L. New owner commences eviction proceedings through landlord/tenant court.

VI. SAVING THE HOME FROM FORECLOSURE

A. Role of housing counselors

1. Counselors provide one-on-one assistance to homeowners at risk of losing their homes by guiding them through the loss mitigation program of their lender.
 - a. Explain foreclosure process to the client
 - i. Timeline
 - ii. Settlement opportunities and options
 - b. Review the loan documents and make referral for legal assistance, if appropriate
 - c. Review budget and help homeowners fill out all the forms lenders will require in order to be reviewed for a possible loan modification
 - d. Make recommendations to the client if appropriate and make referrals to other agencies for services as appropriate.
 - e. In many areas, courts will allow housing counselors to appear with the homeowner in the settlement conference
2. Housing counseling agencies exist in every region of New York and are staffed by trained professionals.
 - a. A list of HUD Approved Counseling agencies is available at:
 - i. <http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm?webListAction=search&searchstate=NY>

ii. 1-800-569-4287

b. The NYS Attorney General maintains a list of agencies which have received funding to provide foreclosure prevention services under the HOPP network and is available at: <http://www.aghomehelp.com/housing-counseling.html>

B. Apply for Loss Mitigation Options

1. Retention Options: (Curable)

- a. Special Forbearance/Moratorium: A period of suspended or reduced payments, over a fixed period of time. At the end of the forbearance/moratorium the delinquency must be cured through a lump sum payment, a long-term repayment plan or a loan modification, often with a sizeable down payment from the borrower.
- b. Repayment Plan: A written agreement between the borrower and the lender/servicer where the borrower agrees to cure the delinquency by adding and additional amount to the normal monthly payment until the loan becomes current. It is commonly one and a half payments per month. The borrower is still considered to be in default during this time, as well as still being reported late to the credit bureaus.
- c. Modification: A loan is brought current by permanently adjusting one or more of the original terms of the loan; increasing the principle balance by adding in the past due amounts, extending the term of the loan: or reducing the interest rate, change in payments. The loan is usually modified to account for the arrearage, the loan is then re-amortized.

2. Liquidation options: (Incurable)

- a. Short Sale: An approved sale of the property to an unrelated third-party for less than is owed on the mortgage, preventing foreclosure on the borrower's credit report.
- b. Deed-in-Lieu of Foreclosure: The property is voluntarily returned to the investor, preventing a foreclosure on the borrower's credit report. This is not a common workout.

VII. 3408(a) SETTLEMENT CONFERENCES

A. General information

- 1. Court format varies depending on area of state – may be heard in front of judge, law clerk, or referee.
- 2. There is an affirmative duty for the bank to negotiate in good faith with the homeowner for an alternative to foreclosure, including a loan modification if possible.
- 3. Obligation on lender to have someone with “settlement authority” appear at the settlement conference. In reality, in most areas of state lenders will send local counsel and often a per diem attorney.
- 4. Settlement conferences have become the venue for attempting to negotiate HAMP and other loan modifications, short sales, or other resolutions.

5. If settlement conference successfully ends with a modification or other resolution, foreclosure action is discontinued.
 - a. CPLR 3408 requires vacatur of lis pendens and discontinuance of foreclosure action within 150 days of modification or settlement.
6. N.Y. Foreclosure Settlement Conferences (CPLR 3408) Motion Practice
 - a. If you feel lender did not negotiate in good faith, you may make a motion to the court.
 - b. General Principles:
 - i. Court sitting at equity has power to order equitable relief to remedy injurious conduct arising out of foreclosure settlement conferences and bad faith negotiation.
 - c. Equitable Defenses to Foreclosure Relating to Requirements of Federal Programs: *Federal National Mortgage Association v. Ricks*, 372 NYS2d 485 (Sup. Ct. Kings Cty. 1975) (mortgagee noncompliance with HUD handbook guidelines could make a party ineligible for equitable relief).
 - d. Types of Relief:
 - i. Compel in-person appearance of authorized representative
 - ii. Compel production of claimed investor restriction barring modification
 - iii. Tolling (prospective or retrospective) of interest, fees, barring attorney's fees
 - iv. Specific performance of modification
 - v. Dismissal or stay of foreclosure until plaintiff complies with CPLR 3408 obligations (directive for defendant to make payments into court in one instance)

VIII. LOAN MODIFICATION PROGRAMS

A. Home Affordable Modification Program ("HAMP")

1. Rolled out in 2008 by Obama Administration through Treasury Department
2. Almost all large servicers/lenders take part in the program – only holdout is HSBC
3. Goal of program is to lower the monthly mortgage payments (including taxes and homeowners insurance) of qualified borrowers to, at most, 31% of gross monthly income
 - a. This is accomplished through what is called the "waterfall test"
 - i. Capitalize all outstanding arrearages
 - a) This means homeowner does not need to come up with lump sum at outset of program
 - ii. Interest rate reduction (floor of 2%)
 - iii. Extension of term (to a maximum of 40 years)
 - iv. Deferment of principal
4. Available for Fannie Mae and Freddie Mac-owned loans, as well as some loans owned by investors

B. FHA Loss Mitigation

1. Different program available for all FHA loans
2. Series of potential solutions, depending on how far homeowner is behind
 - a. Forbearance Plans
 - b. FHA Loan Modification
 - c. FHA-HAMP

IX. SPECIAL CONSIDERATIONS FOR DOMESTIC VIOLENCE & FAMILY LAW PRACTITIONERS

A. Removing names from mortgages regardless of a court order, a party will not be permitted to unilaterally remove a co-borrower from a mortgage.

1. The party wishing to keep the mortgage must have the income and resources to support a refinance on their own.

B. If one party has stopped making mortgage payments, despite an order from the court,

1. The lender will likely proceed with foreclosure regardless of the order. The order cannot be enforced against the lender who was a third party to the domestic relations order.

C. Lack of timely filings at the clerk office –

1. Follow up with local county clerk office to be sure that appropriate filings were made such as discharge of mortgages or transfer of deeds.

D. Loan modifications may need to be signed by all parties.

1. Depending upon the types of terms modified, the lender may not require all parties to sign. However, modifications under the federal program generally do require every party who was on the original mortgage to sign the modification also. Open question – Could a spouse sue later for modification of terms without their consent? Where is the harm?

X. MARITAL DEBT IN A DIVORCE

A. Types of debts – Medical, mortgages, credit cards, car loans, personal loans

1. Is the debt separate or marital? Questions to ask: when was it incurred, what was it used for?

B. Division of Debt – Pro Rata vs. Equal

C. Factors to be considered

1. Income of parties
2. Equitable Distribution of the asset associated with the debt
3. Marital waste
4. Egregious conduct

D. Interplay with consumer credit actions

1. Who is liable? – party who signed the contract, not the party who just was an authorized user
2. What if consumer law and Judgment of Divorce conflicts? Creditor will go after the person who signed the contract only. Debtor will then be required to pay the entire debt and then bring a contempt/enforcement motion in Supreme Court as part of a post-

Judgment action. The debtor cannot use the Judgment of Divorce as a defense in the consumer proceeding.

3. **Example:** Wife signed the contract (note) for the car; husband has possession of the car. Wife is liable whether husband pays or not. Car can still be reposed. Wife will be liable for any deficiency judgment, regardless of what Judgment of Divorce states. Furthermore, Wife may still have car in her name and therefore, will be liable for tickets, fines and accidents on the car.

E. Matrimonial Settlement Suggestions

1. Pay off all joint debts with any available monies (including tax refunds) – do not just remove a spouse's name, this may continue to make them liable
2. Have debtor party sign a Judgment with interest to be held in escrow by an attorney until default
3. Re-finance any secured loans
4. Require debtor to pay all outstanding debts prior to being able to claim children on their taxes, if they are the non-custodial parent
5. Transfer the debt from a card used during the marriage to a new credit card
6. Close all joint accounts – checking, saving, credit cards

XI. HOW DOES A CREDIT SCORE AFFECT DIVORCE SETTLEMENTS?

A. Consider the effect of a poor credit score on:

1. Renting an apartment-may preclude one from renting
2. Obtaining insurance (health, auto)
3. Obtaining utilities, cell phones
4. Obtaining credit

B. During divorce litigation – Check your client's credit report, review for accuracies, negative histories and correct debts and amounts

C. Understand what your client may not be able to do after settlement

1. For example, your client may not be able to rent an apartment, so staying in the marital residence is important
2. Can your client obtain a car, cell phone or other item needed to abide by the stipulation?
3. Argue the position your client is in and it is because of the economic abuse of the Domestic Violence
4. Craft a settlement to account for this-more money up front, larger maintenance award, refusal to sell marital residence

XII. OWNING THE MARITAL RESIDENCE: DIVORCE DILEMMAS

A. Options for the marital home post-divorce

1. Custodial parent stays in residence until youngest child is 18 or 21: If so, stipulation should give custodial parent a credit for pay down of the mortgage, and all capital improvements over a certain dollar amount should be shared by both parties.

2. Marital residence can be sold: A judge can only order this after a divorce; no property can be sold while a divorce is pending. A judge can also order a property with negative value to be sold and either or both parties will have to contribute to the sale.
3. Courts can award the property to one spouse, or this can be done in a stipulation. But, the party must re-finance and remove the other party's name from the deed, mortgage and note. Otherwise, the non-owning party will still be liable.

B. Issues to be considered in Settlement/Trial

1. Confirm all HELOCs are closed
2. Allow the spouse staying in the residence to have a first right of purchase
3. Have any monies owed by the other spouse paid at the time of closing from their share
4. Confirm all utilities, taxes and insurances are no longer in the name of the spouse who will not be living there
5. Confirm the spouse receiving the house can re-finance and remove the other spouse's name?

C. Who owns the residence (before and after a divorce)?

1. How is the deed held?
 - a. solely by one spouse
 - b. jointly as husband and wife (tenants in the entirety) – each party owns 100% interest in the whole and this cannot be severed except by death or divorce
 - c. jointly with another (either joint tenants with rights of survivorship (“jtrws”) or tenants in common) – jtwros is the same as tenants in the entirety but the parties are not married, tenants in common is percentage ownership, where one party can sell their percentage to whomever they want regardless of what the other owner wants
2. How is ownership changed after divorce?
 - a. Tenants in the entirety must be married. A divorce severs this relationship and the parties will now hold as tenants in common. There is no deed change, it is automatic post-divorce.
 - b. All other forms of ownership are not contingent on the parties being married.

D. Foreclosure and Divorce: Some concerns

1. The foreclosure and divorce are rarely even consolidated.
2. The spouse who is not on the note or the mortgage has no standing in the foreclosure action. Many times different parties are on the deed, note, mortgage or all three.
3. Most of the time both spouses must agree to modify the loan. Courts will usually not order a spouse to sign a modification.
4. Even if the residence is imminently about to be foreclosed on, the Court not order a sale until the divorce is final.
5. In many counties, one action will move more quickly than the other, placing the party in a difficult situation.

E. Special Concerns for houses with negative equity: When the asset is really a debt?

1. Liability concerns:

a. Without the ability to refinance, if both spouses are on the note and mortgage, then both spouses must stay on these and will continue to be liable. The issue then is if either wants the property. As there is little you can do, except for try to short sale or pay to sell the property, it is best if one party can afford the property and wants to keep it. Therefore, if you represent the spouse not staying in the property here are some issues:

- i. Should there be a date certain that the residing spouse either must sell or re-finance?
- ii. How should any foreclosure/deficiency be handled? (Can you have the residing spouse be liable in the Judgment for any deficiency?)
- iii. Should a value be set (say 120% of the current mortgage amount) where if the house is worth that much it will be sold or re-financed into one spouse's name?
- iv. Should there be a clause that if the house has equity again the proceeds split? Is this adverse to current law (yes)?
- v. Can you let one party stay in the house with a pending foreclosure? Is this a good idea?

b. If the house can be sold, either through a short sale or by giving the mortgage holder some money, it should be considered. The reason to consider this is that the house may have credit consequences later on. A foreclosure will affect the ability to purchase in the future, and will destroy your credit and credit score. A house sold in foreclosure will, usually, create a deficiency judgment that both parties (if on the note) will be liable for. Tax liens, for unpaid real estate taxes, can also create judgments. All these judgments can take 10% of gross wages and will stay on your credit report for decades.

c. If the parties defend themselves in the foreclosure, it could equate to higher monies owed, but it will mean the ability to stay in the house for a longer period of time. Options, including likelihood of success against a foreclosure action, should be discussed with the client.

Biographies

Kevin Purcell is the Supervising Attorney of the Foreclosure Prevention Unit in Empire Justice Center's Rochester office. Kevin works with low-income homeowners who have been targeted by predatory lenders as well as with those homeowners who are unable to meet current mortgage obligations in an attempt to prevent foreclosure. In addition, Kevin has done extensive community outreach and trainings around the state. Kevin graduated cum laude from George Mason University Law School in 2005, where he was on the Moot Court Board and Civil Rights Law Journal.

Laura A. Russell is currently the Supervising attorney of the Family Law/Domestic Violence Unit of the Bronx Neighborhood Office, Harlem Community Law Office and the Queens Neighborhood Office of The Legal Aid Society in New York City, and the Co-Supervising Attorney of the Domestic Violence Immigration Unit. Formerly, she was the Matrimonial Director of Sanctuary for Families, Center for Battered Women's Legal Services and prior to this, the Director of SHIELD, a program of the New York City Bar's Justice Center. As a Supervising attorney, she supervises staff in family law and immigration matters, works on domestic violence policy issues and coordinates family law matters for the two neighborhood offices. She has handled a variety of matrimonial and family law actions, including Contested Matrimonials, Orders of Protection, Abuse/Neglect matters and Custody/Visitation issues. Ms. Russell is admitted in both New York and New Jersey, and has lectured on various family law topics, including equitable distribution, domestic violence and Orders of Protection, and also on consumer and tax issues, especially as they relate to domestic violence. She sat on Judge Miller's Matrimonial Commission, the NYC Bar's Judiciary Committee, and the Lawyers Committee Against Domestic Violence's Matrimonial Committee. She currently sits on the Attorney for the Child Advisory Committee for the Second Department, the NYC Bar's Civil Courts Committee and the Bronx Bar's Matrimonial Committee.

Matthew Schedler is the Supervising Attorney in charge of CAMBA Legal Services Consumer Law Project. The Consumer Law Project works in coalition with the Urban Justice Center, Housing Conservation Coordinators, Northern Manhattan Improvement Corporation, and Westside SRO Law Project to assist housing clients at these organizations with debt collection and credit issues in order to achieve self-sufficiency after representation is complete. Mr. Schedler has also been a founding member of the DV CLARO Project and works with domestic violence survivors regarding financial abuse and consumer debt issues. Mr. Schedler received his B.A. from the University of Rochester and his J.D. from Boston University.