The Real Estate Lawyer's Divorce Primer (and the Divorce Lawyer's Guide to Real Estate)

(provided by Margaret A. Bennett, P.C.)

Real estate lawyers should learn the family law implications of property conveyances, and divorce lawyers should know the pitfalls of transferring real property incident to divorce. This article is designed to alert both sets of lawyers to some of their most basic common concerns.

I. Introduction

Despite the trend towards specialization in our profession, real estate and matrimonial practitioners each must have a basic understanding of the law common to both areas. Serious adverse consequences can occur when transfers between spouses are made without proper consideration, documentation, analysis, and disclosure.

Many property-allocation disputes in dissolution cases arise out of conveyances prepared by well-intentioned general practitioners and real estate attorneys. Such transfers too often result in one party to a divorce receiving a financial windfall and the other sustaining a serious economic loss. On the other hand, matrimonial attorneys acting on inaccurate information provided by their clients too often prepare defective property conveyances. This article attempts to explain the legal ramifications of pre- and post-matrimonial judgment property conveyances.

II. The Rise of Equitable Distribution

The Illinois Marriage and Dissolution of Marriage Act (IMDMA) 1 was adopted 20 years ago to cure the inequities caused by the "common law title" doctrine, under which the separate property of each spouse was awarded to the party holding legal title (e.g., the husband's pension would be awarded entirely to him with no interest to the wife). The drafters of the IMDMA created statutory presumptions and adopted the "unity of title" doctrine to achieve financial parity for the economically disadvantaged spouse, thereby giving effect to the equitable distribution of property theory. 2

The authors of the statute could not have envisioned the societal changes that have occurred in the past 20 years. More women have entered the work force and now occupy executive and managerial positions. Corporations offer lucrative employee benefit programs that include retirement, stock ownership, and stock option plans to their employees. Couples are more likely to divorce and remarry, combining their premarital assets.

Individuals bringing significant assets to the marriage should be advised to consider keeping their property separate from the marital estate. However, too many attorneys outside the matrimonial bar are unfamiliar with the statutory presumption favoring the marital estate and are not properly advising their clients when transferring, titling, and gifting real and personal property.

The property distribution provisions of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) are contained in section 503 of the statute. This section evolved from section 307 of the Uniform Marriage and Divorce Act, which embraces the equitable distribution of property theory. This theory recognizes, and attempts to compensate for, each party's contribution to the marriage. The majority of states now apply the equitable distribution system.

III. Persistent Misconceptions about Property and Divorce

Although this theory of property allocation was adopted 20 years ago, many misconceptions still exist; five of the most common are discussed below.

1. "I'll get a greater share of property if my spouse is guilty of adultery or other misbehavior that constitutes grounds for divorce."

The IMDMA provides for division of marital property without regard to marital fault. 3 Illinois still retains 12 grounds for divorce, 4 however, the most recent and most often used is "irreconcilable differences." The statute requires a showing that irreconcilable differences have caused the irretrievable breakdown of the marriage, that efforts at reconciliation have failed, or that future attempts at reconciliation would be impracticable and not in the best interest of the family. 5 The parties must have lived separate and apart continuously for more than two years, though that period can be reduced to six months upon written stipulations of both parties.

2. "The IMDMA requires courts to divide marital property 50-50."

The IMDMA does not require an equal division of marital property; it requires a just division. 6 Courts often award the economically disadvantaged spouse a greater share of the marital estate.

3. "The marital estate should be valued when the parties separated or when the petition for dissolution was filed."

The value of the marital property is typically measured on the date of trial, not at the time of physical separation or when the petition for dissolution was filed. 7

4. "The stock is in my name, so I'll get it in the divorce."

As previously stated, the court is to divide the marital assets in just proportions upon dissolution without regard to which spouse holds title, unless the property is classified as non-marital.

5. "My spouse inherited property during the marriage in his/her name alone, and I'm entitled to my share of it when we divorce."

Section 503(a) of the IMDMA identifies and awards non-marital property to the party owning it as long as it has not been transferred into co-ownership with the spouse. Inherited property owned individually is not marital property.

IV. Classifying Property in Divorce -Marital and Non-Marital

The IMDMA classifies all property into two categories - non-marital and marital. Thus, the court must identify property as marital or non-marital before distributing it in a divorce proceeding. Non-marital property is deemed not to be part of the marital estate and is therefore assigned to the owner-spouse prior to division or allocation of the marital estate The party seeking to have property treated as non-marital has the burden of proving that he or she owned it before the marriage or received it during the marriage as by gift or inheritance.

Unfortunately, parties often unknowingly transfer their non-marital property into the marital estate. The practitioner must be aware of these classifications when transferring real estate and other assets on behalf of a client.

The two most common forms of non-marital property are those acquired 1) by gift, legacy, or descent prior to or during the marriage and 2) before the marriage and not transferred into co ownership with a spouse. 8 Unlike other states, Illinois classifies the income and appreciation from non-marital assets as non-marital property. However, the burden is on the party seeking to show that the property is non-marital to do so by clear and convincing proof. 9 Therefore, partners should keep non-marital assets separate from the marital estate during the marriage if there is a possibility of divorce.

The classification of property in divorce is further complicated by the double presumptions in section 503 and by the "unity of title doctrine" incorporated into the statute. Section 503 incorporates the presumption that all property acquired after the marriage and before entry of judgment is marital regardless of how title is held unless classified as non-marital property. 10 In addition, a gift is presumed when one party provides the consideration from non-marital funds or assets and title is taken to the asset in co-ownership by the spouses.

During a marriage, parties often sell their non-marital residence to purchase a co-owned marital home, thus transferring funds from the non-marital to the marital estate. It would be logical for courts to classify a given percentage of the equity in the home as marital and non-marital property upon divorce. However, the court may not classify property as partly marital and partly non-marital, but only as entirely one or the other. 11 Such a conveyance is therefore presumed to be a gift to the marital estate. Any doubts as to the nature of the property will be resolved in favor of finding it to be marital.

Although classifying co-owned property as marital is only a presumption, it is rarely rebutted by the donor spouse. It is now more common for parties to bring substantial assets to the marriage that they unintentionally commingled with the marital estate and will be allocated upon divorce. Lawyers must warn clients of the consequences of transferring their nonmusical assets to the new spouse and advise them to consider alternatives to joint ownership.

V. Potential Real Property Pitfalls in Divorce

With this background, here are pitfalls to avoid.

Don't stop with legal description. Generally, every divorce results in a transfer of assets, including real property. When conveying real estate, matrimonial attorneys usually receive only

a legal description of the property, and as a result too often fail to transfer title pursuant to the terms of the judgment for dissolution.

Careful lawyers will not limit their inquiry to the legal description of the property. Instead, they will pursue actual evidence of ownership and encumbrances, including liens, by ordering a title commitment from a title company. If the client refuses this recommendation, the careful lawyer will provide the client with a disclosure and obtain a release of liability from him or her.

Take care when freezing a line of credit. A pre-existing line of credit or home equity loan is means by which one spouse can surreptitiously obtain large sums of money without the other spouse's knowledge and consent. Worse yet, these liens against property are difficult to freeze or close. In First American Title Insurance Company v. TCF Bank, 12 the appellate court held that the payment of a line of credit loan by the title company in full did not close the line of credit, because the demand must come from the borrower or the credit line is not cancelled.

When freezing a line of credit, obtain a letter signed by each of the mortgagors requesting that the line of credit be frozen, and request a written acknowledgement from the lender of bank. If one of the parties refuses to cooperate, obtain a court order requiring the reluctant part to sign a written request freezing the account.

Be mindful of the differences between joint tenancy and tenancy by the entirety. The signatures of both parties are required on the deed when conveying one spouse's inters in the marital residence to the other if the home is held by the parties as tenants by the entirety. However, when the residence is held in joint tenancy, only the signature of the grantor spouse is required on the deed to complete the conveyance to the grantee spouse.

The estate of tenancy by the entirety exists as long as the tenants remain married to each other. 13 The entry of a judgment for dissolution terminates the tenancy by the entirety and by operation of law converts the form of ownership to tenancy in common. Of additional importance, however, is that a joint tenancy is not severed upon dissolution of marriage. Therefore, be sure to examine a copy of the most recently recorded deed to the property when preparing a quitclaim incident to divorce proceedings.

VI. Consider the Implications of Property Transfers

Even though we continue towards concentration of our practices, some areas of law require continual vigilance of related fields. The risks inherent in transferring property without sufficient expertise far outweigh any possible gain.

When transferring real property between couples or couples contemplating marriage, the best course of action is to evaluate not just the obvious purpose but consider unintended or unanticipated results. It may be necessary to carefully review the impending conveyance and consequence with the grantor. If you or your client needs more information, co-consult a matrimonial practitioner.

Likewise, the family law attorney should carefully investigate property ownership, including the existence of liens and mortgages, when preparing real estate transfer documents incident to divorce or consult with a real estate attorney. Addressing these issues before problems arise is the best way to serve your client's interests.

1 750 ILCS 5/101 et. seq.
2 Uniform Marriage and Divorce Act, 307, 9 ULA (1973)
3 In Re Marriage of Rogers, 85 Ill 2d 217, 422 NE2d 635 (1981).
4 750 ILCS 5/401
5 750 ILCS 5/101 (a)(2)
6 In Re Marriage of Dunseth, 260 Ill App 3d 816, 633 NE2d 82 (4th D 1994); In Re Marriage of Minear, 287 Ill app 3d 1073, 679 NE2d 856 (4th 1997).
7 Hollensbe v. Hollensbe, 165 Ill App 3d 522, 519 NE2d 40 (5th 1988).
8 750 ILCS 5/503
9 In Re Marriage of Hegge, 285 Ill App 3d 138, 674 NE2d 124 (2d D 1996).
10 Id 674 NE2d at 126.
11 In Re Marriage of Komnick, 84 Ill 2d 89, 417 NE2d 1305 (1981).
12 286 Ill App 3d 268, 676 NE2d 1003 (2d 1997).
13 765 ILCS 1005/1c.

Information provided by:
Margaret A. Bennett, P.C.