ILLINOIS STATE BAR ASSOCIATION

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Real Property

The newsletter of the Illinois State Bar Association's Section on Real Estate Law

The risks of using legal forms without attorney guidance... Episode # 37

BY MIKE MASLANKA

Well, I don't know if there are 36 episodes before mine that fellow attorneys can relate, however, I can't imagine there aren't at least that many.

The days of do-it-yourself legal kits were replaced by online legal forms, but the premise of the user is the same: let me try being my own lawyer.

A client recently came to me with a deed

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Drones, federal and Illinois law, surveillance and the Fourth Amendment –*Ad coelom et ad inferos?*

BY ELIZABETH AUSTERMUEHLE, GREENSFELDER, HEMKER & GALE PC

On December 7, 2016, Amazon delivered its first package via a fully autonomous drone delivery system. This delivery, part of an Amazon test program, is just the tip of the iceberg when it comes to practical applications of unmanned aircraft systems ("UAS"), commonly referred to as drones or unmanned aerial vehicles ("UAVs"). Beyond package delivery, and beyond use by hobbyists, drones can and will be used in the coming years for land surveillance, monitoring traffic and weather conditions, crowd control, search and rescue operations, disaster response, border patrol, law enforcement, and much more.

All of these applications, however, are contingent on drones being able to fly freely through airspace, which not only

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The risks of using legal forms without attorney guidance...

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that was written on a commercially produced form by a company whose name rhymes with the name of a large pineapple plantation (that's your quiz of the day). Anyway, the form in the upper left hand corner said it was a "joint tenancy deed," but the body of the deed conveyed title from wife to husband and wife without ever mentioning joint tenancy or tenancy in common, or tenancy by the entirety. I had to tell the client, the surviving spouse, that she now shared her one-half undivided interest in the property with her late husband's heirs or legatees. She was shocked. This was not what she intended or expected. The form said "joint tenancy." Unless the family agrees otherwise, there are now several people who own the fee simple of this blackacre with her.

Per statute, a deed that doesn't reference how the grantees take the conveyance, take such as tenants in common. There is no presumption of joint tenancy.

The applicable statute states as follows:

> **765 ILCS 1005/1 [Express declaration of joint tenancy required]**
>
> No estate in joint tenancy in any lands, tenements or hereditaments, or in any parts thereof or interest therein, shall be held or claimed under any grant, legacy or conveyance whatsoever heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass not in tenancy in common but in joint tenancy; and every such estate other than to executors and trustees (unless otherwise expressly declared as aforesaid, or unless, as to a devise or conveyance of homestead property, expressly declared to pass to a husband and wife as tenants by the entirety in the manner provided by Section 1c [765 ILCS 1005/1c]), shall be deemed to be in tenancy in common and all conveyances heretofore made, or which hereafter may be made, wherein the premises therein mentioned were or shall be expressly declared to pass not in tenancy in common but in joint tenancy, are hereby declared to have created an estate in joint tenancy with the accompanying right of survivorship the same as it existed prior to the passage of "An Act to amend Section 1 of an Act entitled: 'An Act to revise the law in relation to joint rights and obligations,' approved February 25, 1874, in force July 1, 1874," approved June 26, 1917.

So, if your clients ever ask if they can just prepare a form, you can honestly say that they can but that they do so at their own risk, and the cost of an attorney's fee to prepare the form for her or him is likely going to be a lot less than the fee for fixing a mistake that the do-it-yourself form may produce. A fellow ISBA member once compared a divorce client going pro se to a person doing brain surgery on himself. I don't know if I would go that far, but the import of the analogy is close, and gets the point across. ■

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Drones, federal and Illinois law, surveillance and the Fourth Amendment

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implicates Federal Aviation Administration law and regulations, but also implicates real property owners' rights. This article examines the intersection of property owners' rights and drone operators' rights, and highlights some of the wide-ranging societal repercussions that may result from increased commercial and governmental drone usage in the coming years.

Before airplanes became a common mode of transportation, a property owner's rights were said to extend *ad coelom et ad inferos*, or up to heaven and down to hell. When the first planes were invented and flown, therefore, any time they flew over neighboring property without permission they were technically trespassing on that property by flying in the airspace, or vertical curtilage, of that property. As the aviation industry grew and expanded, however, the government decided to regulate airspace. The government enacted legislation that effectively adjusted property owners' airspace rights in order to accommodate airplanes. Eventually, property owners' rights were limited to what a property owner could reasonably use, and generally, airspace 500 feet above ground level is considered navigable airspace, regulated by the FAA. Now when an airplane flies over your property, the airplane is no longer trespassing.

Drones, however, generally fly in airspace below the FAA's navigable airspace, in the vertical curtilage that is viewed as still belonging to a property owner. This airspace has been, up until now, largely unregulated. In June of 2016, however, the FAA released its first operational rules for routine use of small UAS. *See* Operation and Certification of Small Unmanned Aircraft Systems, FAA Part 107 Rule (June 21, 2016). The rules offer safety regulations for UAS weighing less than 55 pounds conducting non-hobbyist operations. Among other things, the rules require drone operators to keep the drones within their visual line of sight and prohibit flights over unprotected people on the ground who are not directly participating in the UAS operation. While these prohibitions effectively limit drone operations over property that does not belong to the drone operator, the rules do not explicitly address the rights of neighboring property owners who do not wish to permit drones over their property. While several commentators have raised property owners' rights as a concern, the rules explicitly state that "[a]djudicating private property rights is beyond the scope of this rule," and concerned citizens are directed to review applicable state and local trespassing law. *See* FAA Part 107 Rule, page 228.

Many states have passed legislation addressing drones, but much of this legislation is still preliminary and/or investigatory at this point. Illinois, for example, passed the Unmanned Aerial System Oversight Task Force Act, 20 ILCS 5065 *et seq*. This Act's purpose is to "establish a task force to provide oversight and input in creating comprehensive laws and rules for the operation and use of drone technology within this State, subject to federal oversight and regulation." The Act requires the Task Force to issue a report with recommendations as to how to best address drone technology to the Governor and General Assembly no later than July of 2017 (this deadline was initially July 2016, but has since been extended). *See* 20 ILCS 5065/15(g).

It is clear, therefore, that the existing legislation regarding drones does not explicitly address the concerns of real property owners with regard to drone usage over one's property. However, in the absence of federal or state regulations granting drones the right to fly over private property without the property owner's permission, drones do not have the right to do so. Property owners may enforce their rights through tort law, and may bring trespass and invasion of privacy claims to do so. In Illinois, trespass is "an invasion of the exclusive possession and physical condition of land." *Colwell Sys., Inc. v. Henson*, 117 Ill. App. 3d 113, 116, 452 N.E.2d 889, 892 (4th Dist. 1983). Thus, if a drone operator flew a drone over your property below the FAA's navigable airspace, the operator would technically be trespassing on your land.

Additionally, to establish a claim for invasion of privacy based on intrusion upon seclusion in Illinois, a plaintiff is required to show that (1) the defendant committed an unauthorized intrusion or prying into the plaintiff's seclusion; (2) the intrusion would be highly offensive or objectionable to a reasonable person; (3) the matter intruded on was private; and (4) the intrusion caused the plaintiff anguish and suffering. *See Busse v. Motorola Inc.*, 351 Ill.App.3d 67, 71 (1st Dist., 2004). Therefore, if a drone was equipped with a camera or other recording device that objectionably recorded the private activities of the property owner, the drone operator would also be committing an invasion of privacy.

However, filing a lawsuit seeking damages for trespass or invasion of privacy after the fact is a longer term solution than some would like. In June 2015, William Merideth shot down an unmanned aircraft with a shotgun as it flew over his Kentucky home. Mr. Merideth stated that he believed the drone was recording his teenage daughter as she sunbathed, and that he was entitled to shoot down the drone pursuant to Kentucky's stand-your-ground law, which allows a landowner to use physical force "upon another person when the person believes that such force is immediately necessary to prevent the commission of criminal trespass." Ky. Rev. Stat. Ann. § 503.080. Mr. Merideth was initially charged and prosecuted in Bullitt County, Kentucky for criminal mischief and wanton endangerment, but the judge concluded that the drone flight had constituted an invasion of privacy and dismissed all charges against Mr. Merideth.

Subsequently, the drone owner filed a federal claim in the Western District of Kentucky seeking money damages for the damaged drone and asking for a declaratory judgment resolving the tension between the rights of drone operators and the rights of property owners. *See Boggs v. Merideth*, 16-cv-6-DJH (W.D. Ky). The

complaint asked the district court judge to issue a judgment declaring that drones are "aircraft" subject to federal law and thus when they are operating in navigable airspace they cannot be committing trespass or an invasion of privacy. The court has yet to resolve the issue, as there is currently a pending motion to dismiss based on lack of subject matter jurisdiction.

The question the drone operator asked the court to resolve in *Boggs v. Merideth* will have wide ranging implications no matter which way it is eventually decided. That is, whether the law eventually settles on viewing drones as airplanes and effectively lowering the navigable airspace (thus reducing property owners' rights), or the law decides to favor property owners' rights and views unauthorized drone flight over private property as akin to any other unauthorized entry onto private property, the outcome will implicate larger questions that will affect all of us on a daily basis.

If, for example, the vertical curtilage of property is lowered to allow effectively unconstrained drone operations over private property, there will likely be serious Fourth Amendment implications. Generally, the government is required to obtain a warrant to perform a search on private property, but it is not required to obtain a warrant to perform public surveillance. That is because, pursuant to Fourth Amendment doctrine, a person has a reasonable expectation of privacy in her home, whereas she does not generally have a reasonable expectation of privacy when in public. If, however, people become accustomed to private drones constantly flying over their homes, whether or not those drones are equipped with surveillance cameras, then it will be much more difficult for the average person to object to governmental drones doing the same thing. So, by allowing Amazon to fly over our property to deliver packages, we are opening the door to allowing the government to do away with the warrant it would otherwise be required to obtain in order to do the same thing.

On the other hand, forbidding drones to fly over private property in deference to property owners' rights may stifle innovation and greatly reduce many of the benefits potentially offered by drone technology. While drones could theoretically only fly over public roadways, requiring drones to do so to make deliveries or perform other functions that we see as a net good would reduce the efficiency of the drones. And, while a company like Amazon could theoretically obtain the permission of many property owners to routinely fly over their property (either by requiring consent as a term and condition of accepting Amazon deliveries, or alternatively by instituting a micropayment process through which property owners would be compensated each time a drone flew over their property), less ubiquitous companies would be unable to obtain consent of enough property owners and would either be forced out of or prevented from entering the marketplace.

In the end, it is inevitable that drones will become a much larger part of our daily life. Drone technology represents the next frontier in aviation, and drone usage will certainly result in tangible benefits to society at large. However, when making decisions regarding how drones our viewed in the legal system, we need to be cognizant of and sensitive to the significant tradeoffs to property and privacy rights that will result, regardless of how the law is eventually settled. ■

A tip to ingratiate yourself with real estate purchasing clients

BY MIKE MASLANKA

These days, we hear, over and over, about how 15 minutes can save you a certain percentage on your insurance premium. So, it is apropos to suggest that an extra minute or two when counseling real estate purchasing clients, can help you establish a better relationship with them and build their confidence in you. Clients who come to you for representation in the purchase of real property may expect no more than to walk away from the closing with good title to the property they just bought and some keys to open the locks to their new dream home. Making suggestions and recommendations to the purchasers/clients during the entire time of the transaction should sit very well with them, as they will most likely appreciate those suggestions and recommendations of things that they should consider concerning the property they are buying especially when they come from an attorney who is experienced in the field. Your extra advice, suggestions, and recommendations, that are free and, perhaps, not expected, will give most clients a feeling that they are getting more bang for their buck, and that you are truly and personally concerned with their future welfare.

In the recent case of *Galinas v. The Barry Quadrangle Condominium Association, et al.*, 2017 IL App(1st) 160826, decided by the First District Appellate Court on February 14, 2017, the Illinois Property Condominium Act was discussed.

In *Galinas*, a fire occurred in his condominium unit which damaged his unit and some common areas. The Association made a claim on its insurance policy and it was paid. However, the Association also had to pay a $10,000 deductible. The Association, based on the Condominium Property Act and its own Declaration and By-laws, charged back the $10,000 deductible to Galinas. He objected. There was notice to him and a hearing by the Board of the Association and the charge back to him was approved. In Court, Galinas argued for interpretations of the Condominium Property Act and the Declaration and By-Laws of the Association, with which the trial court and the Appellate court did not agree.

The Appellate Court found that the Condominium Property Act authorized the Association to charge the unit owner the amount not covered by insurance. In this case, the $10,000 deductible.

The Appellate Court needed to refer to Black's Law Dictionary for reference to the definition of "deductible." (Whoever thought in law school that Black's Dictionary would be the one textbook we would always be referring to during our career?). Additionally, it was somewhat refreshing to read that the Appellate Court admitted that it did (and one can infer that it regularly does do) its own research on issues and arguments raised by the parties in their briefs. Some may think that the Appellate Court only relies on the cases referred to in the briefs submitted by the parties, however, reading that more sets of eyes are actually looking for the law and applicable cases is comforting.

So, getting back to the connection with the title of this article, an attorney representing real property purchasers should suggest and recommend that the townhome/condo purchasers immediately look into purchasing homeowner's insurance, even though the Association has its own policy. Some associations require the unit owners to have their own policy and most lenders will require mortgaging purchasers to have their own homeowner's insurance policy. Speak to your clients about this topic and spend a little time explaining the benefits and risks of having or not having such a policy, even if it is not required by the association and their lender. You will look much better in your clients' eyes when they realize that you are concerned about their future after you part from the closing table. Further, direct the clients to speak to their prospective condo/townhome owner's insurance company agent about whether the policy they intend to purchase will cover any deductible charged back to them as unit owners by the association. If Galinas had such a policy, this case may have never gone to court. ■

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Tuesday, 05-09-17- Webinar—PDF Power Hour. Practice Toolbox Series. 12:00 -1:00 p.m.

Wednesday, 05-10-17- Chicago, ISBA Regional Office—Settlement in Federal Court Cases. Presented by the Federal Civil Practice Section. 1:00 p.m. – 5:00 p.m.

Thursday, 05-11-17 – Loyola University of Chicago School of Law Ceremonial Courtroom—Balancing the Scales: Women in the Law. 11:30a.m. -1:30 p.m.

Thursday, 05-11-17 – Bilandic Building, Chicago—Ethics Extravaganza 2017. Presented by the Government Lawyers Section. 12:30 – 4:45 p.m.

Friday, 05-12-17— Chicago, ISBA Regional Office —Civil Practice & Procedure: Trial Practice 2017. Presented by the Civil Practice & Procedure Section. 8:50 am – 5:00 pm

Friday, 05-12-17— Live Webcast— Civil Practice & Procedure: Trial Practice 2017. Presented by the Civil Practice & Procedure Section. 8:50 am – 5:00 pm.

Wednesday, 05-17-17 – Chicago, ISBA Regional Office (Room C only)— Innovations in Mental Health Law. Presented by the Mental Health Section. 9:00 a.m. – 12:30 p.m. ■

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