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Real Property

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

Doing the deed: Some property-related tips for divorcing couples

BY ADAM WHITEMAN

If you are representing a spouse in a divorce, make sure to follow through on issues relating to the disposition of the marital homestead. By 'follow through,' I mean do not just make a note of what should happen in the Marital Settlement Agreement and call it a day. Rather, make sure that the property gets quitclaimed and recorded as necessary and make sure that the mortgage is refinanced or that some other agreement is put in place to remove the non-owning spouse from any mortgage that encumbers the property. It is in the interests of *both* divorcing spouses that this issue be handled diligently.

Continued on next page

Bankrupt widows and widowers beware: *In re Jaffe*, 568 B.R. 292 (2017) is out there

BY DAVID A. ZULKEY, JD

How much wood would a woodchuck chuck, if a woodchuck could chuck wood?

Judge A. Benjamin Goldgar knows . . . . On June 7, 2017 the Bankruptcy Court of the Northern District of Illinois, Eastern Division, issued an opinion, *In re Jaffe*, 568 B.R. 292. This case ultimately holds that death of a spouse terminates any interest held in a tenancy-by-the-entirety and, therefore, prohibits that interest in said property from being exempt from collection by a creditor under the

Continued on page 6

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Doing the deed: Some property-related tips for divorcing couples

CONTINUED FROM PAGE 1

For the spouse receiving the property

Have the Property Quitclaimed to You Alone

If you are the spouse that will be *receiving* the property, it is essential that it be deeded to you during the divorce. It is very difficult to get the opposing party to sign a quit claim deed to you after the case is closed, and it can be time-consuming and costly to bring the matter back into court.

Avoid creating a situation that will almost certainly require you to file a motion or a new case to enforce a settlement agreement. The issue of obtaining a quit claim deed can more expeditiously be handled while the divorce case is pending and the parties still have leverage over one another.

If you are representing a divorcing spouse, you absolutely must pull copies of the most recent deed(s) and you should order a title commitment when addressing property issues. Remember, a Marital Settlement Agreement is a contract which is "binding upon the court" unless it finds that the agreement is "unconscionable". (See 750 ILCS 5/502(a)). If the terms of the Marital Settlement Agreement describing the property being affected differ from the actual underlying deeds, then you have created an ambiguity which could prove to be a real problem if there is a post dissolution dispute. Therefore, it is incumbent upon the drafter to physically examine the underlying deeds.

Some divorce attorneys take their client's word when they say how their property is titled. The mistitling of property in a Marital Settlement Agreement can have profound effects on the disposition of property should there be a dispute down the road. Most laymen do not know the difference between a joint tenancy deed and a tenancy by the entirety deed and will likely misdescribe their deed when asked.

A mistake I have seen is where the parties wanted to "keep their property in joint tenancy," and that is the way the divorce attorney drafted the marital settlement agreement. After the divorce, when the former husband died, the former wife claimed full ownership over the property because she thought the property was held in joint tenancy. However, it was then found that the property was actually titled as tenants by the entirety. A dispute subsequently ensued between the former wife and the former husband's estate. The estate claimed that under Illinois law, the effect of a divorce in Illinois is to convert a tenancy by the entirety deed to a tenancy in common and that the estate, therefore, owned a 50% interest in the property.

Specifically, the relevant law is as follows:

> "...the estate in tenancy by the entirety so created shall exist only if, and as long as, the tenants are and remain married to each other, and upon the death of either such tenant the survivor shall retain the entire estate; provided that, upon a judgment of dissolution of marriage or of declaration of invalidity of marriage, the estate shall, by operation of law, become a tenancy in common until and unless the court directs otherwise..."

(See 765 ILCS 1005/1c).

By failing to check the actual deeds before drafting the Marital Settlement Agreement, the divorce attorney created ambiguity and practically invited post-dissolution litigation.

There is case law on this particular issue. In general, the terms of the Marital Settlement Agreement will control over the wording of the deed. Accordingly, "the property settlement agreement defined the nature and extent of the rights and liabilities of the parties with respect to the marital real estate…." *Coleman's Estate, Matter of,* 395 N.E.2d 1209, 1211 (Ill.App. 2 Dist. 1979). (In *Coleman*, the court severed

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a joint tenancy deed due to the terms of the divorce decree and the conduct of the parties).

If you are drafting a Marital Settlement Agreement, try to avoid clauses which require the parties sell property and split the proceeds *after* the divorce is finalized. This is a recipe for trouble. Even if the parties get along, one of them may die and then you have to contend with an estate of potentially uncooperative heirs. It is far better to settle all property matters while the proceedings are pending. Try to creatively address these issues by refinancing and paying off one spouse, or by crediting one spouse based on an agreed value.

The idea of a divorce is to separate the parties. Continued interest in owning property together after a divorce does not constitute a separation. Creating obligations to "sell the property" can generate problems if the parties subsequently decide not to sell.

In the case of *Marriage of Dudek*, 559 N.E.2d 1078 (2nd Dist. 1990), the settlement agreement provided that the marital residence, which the parties held in joint tenancy, would remain in joint tenancy. The property settlement agreement also provided that, upon the agreement of the parties, the marital residence could be sold. The spouse (former wife) then died and her estate sued to force the sale of the property. The court determined that, "the parties here clearly demonstrated their intent that the property remain in joint tenancy following the dissolution. Sophie never took any action contrary to that intent." *Id* at 1080. That is, since the wife never took any action to sell the property during her lifetime, the joint tenancy provisions controlled and the surviving husband received full right, title and interest in and to the property. Thus, the provision in the Marital Settlement Agreement that the property could be sold really didn't accomplish much other than inviting a lawsuit by the decedent's estate. In order to avoid such litigation, it is advised, where possible, that the divorcing parties avoid co-ownership of property following the divorce.

In the case of *Marriage of Dowty*, 496 N.E.2d 1252, 146 Ill.App.3d 675, 100 Ill.Dec. 187 (Ill.App. 2 Dist. 1986) the court was faced with a situation where the terms of the Marital Settlement Agreement conflicted with the joint tenancy nature of the deed. In this case, "the property settlement agreement of the parties, as supplemented by their oral agreement at the dissolution hearing, clearly demonstrates their intent to sell it as soon as possible. The property was, indeed, then on the market, and was only withdrawn from sale by the husband at the untimely death of the wife. *The other terms of their agreement depended for execution, in large part, upon the sale of the property*; that was one condition for cessation of maintenance by the husband and also for distribution between the parties of their interests in the home, the wife's share of the retirement trust funds and payment of her attorney's fees." (emphasis added) This case exemplifies the problems that can be created when the Marital Settlement Agreement leaves issues to be resolved post-dissolution.

Refinance and Get Your Ex Off The Mortgage

In addition, if you are the spouse that will be *receiving* the property, you also should refinance so that you can pay off the old mortgage and thereby obtain a new mortgage with only your name on it. You may be tempted to keep the old mortgage and just keep making payments thinking that your name is on the deed and that is all that matters. You are wrong.

Having a non-owning ex-spouse on the mortgage can create many problems. First, if your Ex goes bankrupt, you might not be able to sell your property until you or your lender file a motion in bankruptcy court to have the bankruptcy stay lifted with regard to the property. Once your lender finds out that your Ex has filed bankruptcy, they will not do *anything* until the stay has been lifted, even if your Ex is not on the deed. Just having your Ex on the mortgage will raise red flags for the lender and the bankruptcy trustee who will want to confirm that the estate has no claim to the actual property.

Second, if you have to undertake a short sale, your lender may require that your Ex (whose name is still on the mortgage) sign certain documents relating to the short sale or prove that their assets should not be considered for purposes of the short sale approval process.

Third, if you sell the property, your title company (or the buyer's attorney) might possibly demand that your Ex sign a document waiving any potential homestead rights. Or, at a minimum, you will have to present your divorce papers to the title company and possibly to the buyer's attorney proving that your Ex has no remaining homestead rights. Why bother going through this exercise when the matter can be better handled during the divorce itself?

I can tell you from first-hand experience that I have handled real estate transactions where each of the above issues presented themselves. In each case, many expensive and time-consuming problems could have been avoided had proper titling and re-mortgaging been handled during the divorce.

I understand that re-mortgaging might not always be a realistic option for a variety of reasons from a financial perspective. However, it would have helped to at least have a certified document signed by the Ex-Spouse waiving homestead rights and granting the owning spouse full power of attorney to dispose of the property and the mortgage. Perhaps such an agreement would also contain a provision promising to cooperate with any future need for signatures and perhaps an enforcement provision granting attorney fees if the owning spouse is forced to go back to court to compel the non-owning spouse to cooperate.

For the non-owning spouse

Get Your Name Off The Deed

As a non-owning spouse you *do not* want your name to continue on the deed. This may seem counterintuitive at first. You may think what's wrong with continuing to own something that was not awarded to

me? The answer is "plenty."

First, regardless of what the Marital Settlement Agreement says, if your name is on the deed, then from the perspective of the rest of the world, you are still the owner. That means, if a property tax bill is due, you are liable for it. If someone slips and falls on the property, you can be sued. If a gas or water bill needs to be paid, get out your checkbook. If your Ex stops making mortgage payments and a foreclosure case is commenced, you will be named as a party.

Get Your Name Off The Note and Mortgage

You may think that once your name is off the deed, you are safe from danger associated with continued ownership of the property. However, if your name remains on the note and mortgage, you are still exposed to many risks.

First, as with the deed, if your name is still on the note and/or mortgage after the divorce, and there is a subsequent foreclosure case, you will be named as a party. Remember, if your name is still on the note and mortgage, then you are *still liable for the debt*. The bank will not care that you got divorced. They are not a party to, and therefore not affected by, the Marital Settlement Agreement. Also, your old note and mortgage with your Ex may affect your credit and your ability to obtain a new mortgage on different property. If your Ex fails to make timely payments on the marital mortgage, it will affect your credit score. Finally, you will very likely be bothered for a signature down the road if your Ex does pretty much anything with the property other than continue to make payments.

Conclusion

As illustrated above, it is in the interests of *both* spouses to properly finalize property issues while the divorce proceeding is still pending. That is when both parties are most incentivized to get property related matters resolved so they can move on with their lives. Avoid clauses in Marital Settlement Agreements that keep the parties bound to one another through joint property ownership after the divorce. In any divorce setting, a clean separation is a better result, indeed. ■

This article was first published in The Lake County Bar Association's, The Docket, Vol. 2404, April 2017.

Bankrupt widows and widowers beware

CONTINUED FROM PAGE 1

Bankruptcy Code and Illinois law.

Scott N. Jaffe filed a chapter 7 Bankruptcy petition in 2015. He declared a judgment lien secured against his residence which was owned by himself and his wife through a tenancy-by-the-entirety, and scheduled the real estate interest as exempt under section 12-112 of the Illinois Code of Civil Procedure, 735 ILCS 5/12-112 (2014) and, in a core proceeding, he moved to have the judgment lien avoided because it impaired his exemption in his interest of his property held through a tenancy-by-the-entirety. Williams, a creditor, argued, successfully, that her judgment lien is not avoided as to those "contingent future interests."

During the pendency of the bankruptcy proceeding, but before Jaffe moved the court to avoid the judgment lien, his wife passed away.

Jaffe unsuccessfully argued that the Court should follow *In re Hamacher*, 535 B.R. 180 (Bankr. E.D. Mich. 2015) (holding "exemptions are determined as of the bankruptcy petition filing date"), *In re O'Sullivan*, No. 15-30173-can7, 2017 WL 1047228 (Bankr. W.D. Mo. 2017), appeal docketed, No. 17-6012 (B.A.P. 8th Cir. Apr. 5, 2017)(holding "Missouri law does not recognize the 'right of survivorship' as being a different title or right than the original TBE interest."), and *In re Mukhi*, 246 B.R. 859, 862 (Bankr. N.D. Ill. 2000) (affirming avoidance of a lien through an exemption claimed on property held as a tenant-by-the-entirety because no timely objections were made). *In re Jaffe*, 568 B.R. at 297-99.

Specifically, the Court found that because there are "'different types of contingent future interests,' interests each tenant holds individually," *Id.* at 296, "each tenant by the entirety holds [. . .] an exemptible current interest as a tenant but also contingent future interests that are not exempt." *Id.* at 294.

By "contingent future interests" the Court refers to the provisions of the Joint Tenancy Act 765 ILCS 1005/1c (2014) which define a tenancy-by-the-entirety and provide for disposition of property held as such should certain, possible unforeseeable life events occur. The Joint Tenancy Act, section 1c, provides in pertinent part:

> . . . . the estate in tenancy by the entirety so created shall exist only if, and as long as, the tenants are and remain married to each other, and upon the death of either such tenant the survivor shall retain the entire estate; provided that, upon a judgment of dissolution of marriage or of declaration of invalidity of marriage, the estate shall, by operation of law, become a tenancy in common until and unless the court directs otherwise; provided further that the estate shall, by operation of law, become a joint tenancy upon the creation and maintenance by both spouses together of other property as a homestead. A devise, conveyance, assignment, or other transfer to 2 grantees who are not in fact husband and wife that purports to create an estate by the entirety shall be construed as having created an estate in joint tenancy. . . . .This amendatory Act of 1995 is declarative of existing law.

In a tenancy-by-the-entirety, the partners in a marriage "hold an undivided fee simple interest in the entireties property, as well as an interest in rents or other income from the property." *In re Jaffe*, 568 B.R. at 296.

In the Court's analysis, it acknowledges that Section 522(b)(3)(B) (formerly known as Section 522(b)(2) before 2005) exempts "any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety, … to the extent that such interest … is exempt from process under applicable nonbankruptcy law." 11 U.S.C.S. 522(b)(3).

Here, "applicable nonbankruptcy law" refers to Section 12-112 of the Illinois Code of Civil Procedure, which provides, "Any real property … held in tenancy by the entirety shall not be liable to be sold upon judgment entered on or after October 1, 1990 against only one of the tenants . . . ." 735 ILCS 5/12-112 (2014).

However, the Court found that the exemption claimed under Section 12-112 only exempts his present interest, as a tenant by the entirety and not his contingent future interests. *In re Jaffe*, 568 B.R. at 296. Therefore, analysis of the extent the judgment lien might impair an exemption to which the debtor would have been entitled under subsection (b) of this section 11 U.S.C.S. 522(f)(1) was not applicable. *In re Jaffe*, 568 B.R. at 296.

In conclusion, the Court found a tenancy-by-the-entirety "therefore exists 'only if, and as long as, the tenants are and remain married to each other . . . . ' 765 ILCS 1005/1c (2014)" *In re Jaffe*, 568 B.R. at 296. The Court found the arguments made by Jaffe were not persuasive and not binding and, so, the Court denied Jaffe's motion to avoid the judgment lien on his homestead property, which was owned as a tenancy-by-the-entirety with his wife at the time the bankruptcy petition was filed. *In re Jaffe*, 568 B.R. at 297-299. It appears the Court reasoned that because "Illinois law nowhere says an individual tenant's contingent future interests cannot be sold to satisfy a judgment" and that based upon *In re Yotis*, 518 B.R. 481, 486 (N.D. Ill. 2014) and *In re Chinosorn*, 243 B.R. 688, 690 (Bankr. N.D. Ill.), rev'd on other grounds, 248 B.R. 324 (N.D. Ill. 2000), Illinois appears to draw a distinction between the "right of survivorship" as being a different title or right than the original "tenancy-by-the-entirety interest." *Id*. Thus, it is ostensibly appropriate in Illinois to interpret the law so strictly or

broadly, depending on one's perspective, to provide some creditors potential motives or interests to prefer non-debtor spouses pass away before the debtor-spouse or to encourage debtor-spouses to get divorced to salvage some potential property value for their heirs.

Interestingly, in support of its position, the court primarily relied upon 3 cases, *In re Chinosorn*, 243 B.R. 688, 690 (Bankr. N.D. Ill.), rev'd on other grounds, 248 B.R. 324 (N.D. Ill. 2000), *In re Yotis*, 518 B.R. 481, 486 (N.D. Ill. 2014) and *In re Mukhi*, 246 B.R. 859, 862 (Bankr. N.D. Ill. 2000). *In re Chinosorn* found that despite a late objection, the exemption did not apply to the creditor's future contingent interests in the debtor's property held in a tenancy-by-the-entirety. *In re Chinosorn* reversed the bankruptcy court because the exemption should have been affirmed based upon no timely objections and did not even address the previous court's analysis as to future contingent interests of property held in a tenancy-by-the-entirety. Ironically, *In re Yotis*, 518 B.R. 481, 486 (N.D. Ill. 2014) relied upon the analysis of *In re Chinosorn* and held the future contingent interests in the debtor's property held in a tenancy-by-the-entirety were not avoided but the present interest was exempt.

So, the question(s) of the session: How much of one's interest in property held through a tenancy-by-the-entirety, wherein an individual shares or shared 100% ownership with his or her spouse, does an unavoided judgment lien in bankruptcy encumber upon the death of one's spouse? In other words, if a person owns 100% of something, what is the "future contingent interest" gained upon the death of one's spouse who also owned 100% of the same thing? What does this say about the sanctity of marriage in Illinois? ■

Meet our section council members

Ellis B. Levin's law practice focuses on real estate, condominium association, and residential cooperatives, and includes human rights and discrimination law.

He previously served 16 years in the Illinois House of Representatives, during which time he sponsored every amendment to the Condominium Property Act.

He also authored the "Historical and Practice Notes" for the Illinois Condominium Property Act, which appeared in Smith Hurd Annotated and has been cited as authoritative in twenty Illinois appellate court decisions and in three Illinois Supreme Court decisions. In the 2014 Illinois Supreme Court decision in *Spanish Court Two Condominium Association v. Carlson*, his writing was cited by both the majority and dissent.

He is one of the few condominium lawyers who believes in a balance between unit owner rights and the ability of associations to operate. ■

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