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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," 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 interest of both divorcing spouses that this issue be handled diligently.

FOR THE SPOUSE RECEIVING THE PROPERTY

Have the Property Quitclaimed to that Spouse Alone

If you are representing the spouse that will be receiving the property, it is essential that it be deeded to the receiving spouse during the divorce. It is very difficult to get the opposing party to sign a quitclaim deed 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 quitclaim deed can be handled more expeditiously 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 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."[1] If the terms of the Marital Settlement Agreement describing the property differ from the actual underlying deeds, then you have created an ambiguity which could 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 asking about the property's title. The mis-titling of prop-

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1 750 ILCS 5/505(b).

erty in a Marital Settlement Agreement can have profound effects on the disposition of property should there be a dispute later. Most laymen do not know the difference between a joint tenancy deed and a tenancy by the entirety deed, and will likely mis-describe their deed when asked.

A mistake I have seen happened when 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 is to convert a tenancy by the entirety to a tenancy in common and that the estate, therefore, owned a 50 percent 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..."[2]

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..."[3] In the *Coleman* case, the court severed a joint tenancy deed due to the terms of the divorce decree and the conduct of the parties.[4]

If you are drafting a Marital Settlement Agreement, try to avoid clauses which require the parties to 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 out one spouse, or by crediting one spouse based on an agreed value.

> "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."

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

In the case of *In re Marriage of Dudek*, the settlement agreement provided that the marital residence, which the parties held in joint tenancy, would remain in joint tenancy.[5] 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."[6] That is, since the ex-wife never took any action to sell the property during her lifetime, the joint tenancy provisions controlled and the surviving ex-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 *In re Marriage of Dowty*, the court was faced with a situation where the terms of the Marital Settlement Agreement conflicted with the joint tenancy nature of the deed.[7] In that case, "the property settlement agreement of the parties, as supplemented by their oral agreement at

2 765 ILCS 1005/1c.

3 *In re Estate of Colman*, Matter of, 77 Ill.App.3d 397, 400 (2d Dist. 1979).

4 *Id.*

5 *In re Marriage of Dudek*, 201 Ill.App.3d 995 (2d Dist. 1990).

6 *Id.* at 998.

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."[8] This case exemplifies the problems that can be created when the Marital Settlement Agreement leaves issues to be resolved post-dissolution.

Re-Finance and Get the Ex off the Mortgage

In addition, if you are representing the spouse who will be receiving the property, your client should refinance so that the old mortgage can be paid off and a new mortgage can be obtained in his or her sole name. Your client may be tempted to keep the old mortgage and just keep making payments, knowing that his or her name is on the deed and thinking that is all that matters. In this case, your client would be wrong.

Having a non-owning ex-spouse on the mortgage can create many problems. First, if your client's ex-spouse (hereafter called Ex) goes bankrupt, your client might not be able to sell his or her property if desired until your client or his or her lender files a motion in bankruptcy court to have the bankruptcy stay lifted with regard to the property. Once the lender finds out that the Ex has filed bankruptcy, the lender will not do anything until the stay has been lifted, even if the Ex is not on the deed. Just having the 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 your client has to undertake a short sale, the lender may require that the 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 your client sells the property, the title company (or the buyer's attorney) might possibly demand that the Ex sign a document waiving any potential homestead rights. Or, at a minimum, your client will have to present his or her divorce papers to the title company and possibly to the buyer's attorney, proving that the 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 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 the Non-Owning Spouse's Name off the Deed

As counsel for the non-owning spouse, you do not want your client's name to continue on the deed. This may seem counterintuitive to your client at first. He or she 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 client's name is on the deed, then your client is still the owner from the perspective of the rest of the world. That means, if a property tax bill is due, your client is liable for it. If someone slips and falls on the property, your client can be sued. If a gas or water bill needs to be paid, your client better get out the checkbook. If the Ex stops making mortgage payments and a foreclosure case is commenced, your client will be named as a party.

Get Your Client's Name off the Note and Mortgage

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

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

CONCLUSION

As illustrated above, it is in the interest of both spouses to properly finalize property issues while the divorce proceeding is still pending. That process is when both parties have the most incentive 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.

7 *In re Marriage of Dowty*, 146 Ill.App.3d 675 (2d Dist. 1986).
8 *Id.* at 679 (emphasis added).