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## It's Nearly Always About the House

Real estate law is related to divorce law. Whether it is the marital home and considerations of exclusive possession, or issues arising from an asset as a source of income, nearly every case requires us to understand our client's rights and obligations and provide advice and formulate strategy vis-à-vis real property. The form of ownership and basic real estate law can have interesting and significant effects on parties' rights and obligations. For these reasons, close attention to real property issues is required as we represent our divorce clients.



Image via [Wikipedia](#)

### Initial steps

As soon as the divorce engagement has been formalized and the attorney-client relationship formed, launch the process of pinning down exactly what real property the divorcing parties own; how the real property is titled; and what liens, claims, and encumbrances affect each property. Your intake questionnaire should seek information from the

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The Cerbone Law Blog

client: What do you and your spouse own? Is there a vacation house? How about rental income? Those answers begin your roadmap.

The first step is to obtain a title report on each parcel of real property identified by the client. Real estate lawyers frequently find that the recorded title differs from how the client believes the title is held. A title report will tell you the exact name(s) of title holder(s) and will provide a formal legal description of the property; a chain of title indicating dates, volumes, and pages of deed recording information; dates and original principal amounts of mortgages; and a list of any other formalized claims against the property. I always ask the title searcher for copies of all salient deeds, common interest documents, and encumbrances for my files.

At the outset, it is useful to bear in mind that in the context of divorce in either community property or common law states, the manner in which a client holds title does not necessarily dictate the outcome in terms of property distribution. These systems have differing approaches to which property can be divided between the parties and at what percentages.

- Community property states define "community property" as anything other than the separate property of a party brought into the marriage or inherited or received by gift during the marriage. This is generally considered to be all property and earnings acquired after the date of the marriage, except as described above. A community property court has limitations on its discretion and generally must distribute community property equally between spouses, despite the manner in which the property is titled. This result arises from the notion that marriage is the common undertaking of both parties. As well, in community property states, courts have little or no discretion to award a party's separate property to the other spouse, unless it has been transmuted into community property (usually by commingling).
- In common law states, a court generally has broad discretion to consider and apply a variety of equitable factors in fashioning distribution orders covering both premarital and marital assets, however titled.

### **Forms of ownership**

As you review the title report, you will see that ownership can take several forms. Depending on the manner in which title is held, an owner has different rights, and our advice will be tailored accordingly. Typically, title is held as follows: tenancy in common, joint tenants with rights of survivorship, tenancy by the entirety, life estates, and leasehold interests.

- Tenancy in common is a form of concurrent ownership in which each owner holds an undivided interest in the property-- a shared single right. Interests need not be equal and may be alienated or conveyed without the consent

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of the other tenants in common. There is no right of survivorship-- an ownership interest passes to the tenant in common's estate or heirs upon death.

- Joint tenancy with right of survivorship is a form of concurrent ownership in which each owner holds an undivided and equal interest in the property. Under common law, joint tenancy requires four unities: interest (matching type of ownership--fee simply cannot be matched with leasehold), title (have to take by the same deed), time (conveyance must occur at the same time) and possession (each tenant has the same rights of possession of the entire property). Specific words of intent must be present to create the joint tenancy with survivorship rights. Upon the death of a joint tenant, that tenant's interest in the property passes to the surviving tenant(s) by operation of law. Of significant interest to family law practitioners is that divorce may or may not sever a joint tenancy with right of survivorship, so the prudent approach to ensure a termination of a joint tenancy is to make a conveyance of a joint tenancy interest, to avoid the potentially horrible result of an ex-spouse becoming the owner of the other ex-spouse's interest, postdivorce upon death.
- Tenancy by the entirety is a form of concurrent ownership between spouses in which a fifth unity, that of marriage, exists. The trend is away from tenancy by the entirety and toward joint tenancy
- Life estate is an interest in real property in which a grantor conveys property to the grantee (remainderman) and reserves a life use in the property to the life tenant (the grantor or a third party). The result of the retained life use is that the life tenant, for his or her lifetime (or some other person's lifetime), possesses and uses the property, collects rents/ income, and pays the costs and expenses of the property. At the end of the measuring life, possession and use pass to the remainderman. There are significant tax and Medicaid implications-- check with your tax and elder law advisors.
- Leasehold is an interest in real property created by a lease agreement in which the owner grants use and possession of the property to a tenant for a stated period of time. The terms, duration, and rights of the tenant are described in the lease. A client's ownership of a leasehold interest as either landlord or tenant can translate into measurable benefits and burdens.

### **Types of real property**

In addition to the differing forms of ownership, be aware of the differing uses of real property. Depending on the type, real property may be limited to certain uses. In this context, focus on zoning rules and regulations, common-interest community rules and fees, environmental considerations, and the need to ensure that your appraiser is qualified to provide an expert opinion as to value and permitted uses.

The typical types or uses of property are residential (the marital home, the vacation home, or condominium), commercial (income-producing property, such as an office building, an apartment complex, or a retail center) and industrial or farmland. From a use perspective, take care to ensure that each property is in zoning compliance and fire code compliance, that grazing, water, and mineral rights are examined, and that any environmental issues are properly evaluated and incorporated into the advice provided in connection with trial and property division goals.

### **Specific matters to address**

- Land records, lis pendens, and slander of title. While an increasing number of jurisdictions have passed "automatic orders" or "standing orders," which theoretically prohibit the conveyance of real property after commencement of a dissolution case, those rules do not always prevent a party from attempting to dispose of or otherwise convey property in reaction to a dissolution action. While fraudulent conveyance laws and contempt proceedings may provide some relief, another method of preventing such a conveyance at the outset of a case and securing your client's interest is to put the world on notice that a claim against the property is pending by recording and properly serving a lis pendens covering each property. As you utilize the title report to prepare the lis pendens, be certain that you have a good faith basis for placing the lis pendens, in order to avoid any claim of slander of title. A claim of slander of title may be sustained if the following elements are proved: (1) communication of a statement disparaging the title, (2) the statement was false, (3) the statement was malicious, and (4) the statement caused special damages. Examples of this would be placing a lien on a corporation's property (when the opposing party is merely a stockholder or employee) or claiming an interest in the property of a paramour without any basis.
- Residential real property/marital home. We are often asked to seek exclusive possession of the marital home. The likelihood of success will be fact-specific. However, in all cases, it pays to be aware of the title history and status of the property (it may help to argue that a property has been in a particular family for multiple generations), as well as the particulars of the mortgage (name of lender, payment status, balance due, monthly payment), taxes (amount, payment status, and whether included in the mortgage payment), homeowners' insurance (name of insurer, payment status) and any maintenance issues or needs of the property. This information will have a role in the financial orders you seek and directly implicate preservation of the marital estate.

As the case is proceeding to judgment, we typically confront the questions of whether the marital home should be sold, awarded to one of the parties, and/or refinanced. A primary consideration to review with your client is the question of "can you afford it." If not, and if the other party is not prepared to tender an acceptable buy-out of your client, then a sale of the property is best.

If the decision is made to sell the property, make sure that any agreement/order addressing the sale includes treatment of the property's curb appeal and the sharing of any costs of sprucing up the property. As well, ensure that your client has protections regarding the terms of any listing agreement and that there are provisions in the final agreement/order mandating cooperation by both parties regarding showings and open houses (both in terms of the property being made available and that it is presentable).

The agreement will need to have mechanisms for price reductions and specify what constitutes an acceptable offer. During the term of any listing, the parties will need an agreement covering responsibility for the payment of the mortgage, taxes, insurance, maintenance, and repairs on the property. You will be well advised to talk through with your client the risk-reward balance between the benefits of including these protections in an agreement versus the risk associated with buyers or real estate agents becoming aware of mandatory pricing reduction mechanisms, which could affect potential buyers' offers.

In the event of a buyout, be sure that if your client is the party being bought out, the other party has an obligation to refinance any existing mortgages or other encumbrances for which your client has payment responsibility within a strict period of time (30 to 45 days should be ample). Include a provision that the court retains jurisdiction over the real property, so that if the refinance is not completed within whatever timeframe you agree upon, the property must be listed for sale, or, at a minimum, the party being bought out can petition the court to order a sale). Include a hold-harmless provision and express language obligating the other party to keep all payments current until the refinance is complete and state that the goal is to ensure timely payments by the other party and maintenance of your client's credit rating. Have your client execute a quit claim deed and either hold it in escrow or deliver it to the attorney for the other party in escrow, with express written instructions that it may be used only in connection with a completed and recorded refinance that fully releases your client.

Whether your client is awarded the marital home or receives an equity buyout, another question to confront is whether to seek or tender a deed now or in the future upon some triggering event, such as the minor children's completion of high school. If your client's name remains on the title, there are potential premises liability issues and real estate tax obligations that may subject your client to future liability. As well, consult your tax advisor regarding capital gains holding periods and tax treatment of gains from the sale of your principal residence as you address the question of whether to remain in title or not. Federal law prevents an owner-occupied residential lender from exercising a "due on sale or transfer" clause if the transfer is to a spouse pursuant to a dissolution of marriage, legal separation, or incidental property settlement agreement.

If the decision is made to transfer the property from one party to the other at the time of the dissolution, any future payment of equitable distribution will need to be secured by a note and mortgage. This equitable distribution arrangement will force consideration of whether any existing loans should be refinanced to remove liability of the party receiving the equitable distribution or whether the existing loans will remain in place and the liability of the party receiving the equitable distribution will be protected by a hold-harmless agreement. Although it is an imperfect solution, it may be helpful to have an alimony provision in the final agreement, allowing a party to return to court to seek a modification to enforce a hold-harmless and recoup payments to the lender that were otherwise made the responsibility of the other party in the decree. Though this imperfect solution may trigger tax consequences that your client should discuss with his or her tax advisor, those consequences may be preferable to an otherwise unenforceable hold-harmless provision.

The note and mortgage securing the equitable distribution should be for a sum certain, specify a rate of interest and a due date, and require the obligated party to make full and timely payment of all mortgage payments, real estate taxes, homeowner's insurance, and maintenance costs necessary to protect the collateral. As well, it is good practice to add an "open end" provision to the mortgage, giving the secured spouse the option, but not the obligation, to pay and add to the amount due any real estate taxes, insurance, and other such payments if not made by the party owing the equitable distribution.

Finally, the note and mortgage need to provide a mechanism for foreclosing the mortgage upon any uncured default and for the collection of interest and default interest, as well as attorneys' fees and costs upon default.

For a better understanding of the rules applicable to holding periods and conveyances of the marital home, review IRS Publication 523 and speak with your tax advisor.

- Income-producing property. If your case involves income-producing property, carefully review for each property: (a) a rent roll (a listing of each tenant, the term of the lease, and the payment obligation and history); (b) a listing of all tenant security deposits (be certain to understand your local law regarding the obligation to pay a tenant interest on any security deposit and requiring segregation of accounts); (c) each actual underlying lease; (d) any documentation exposing landlord-tenant friction, concerns, or complaints; (e) any documentation covering environmental considerations, such as lead-based paint, asbestos, oil tanks, and prior uses that may create liability for an owner; and (f) any reports that shed light on the condition of the property and any deferred maintenance that may exist. Without a full review of these items, an award of a property to your client may not result in the benefit thought to exist, based merely on an appraisal of the property.

## Contracts and conveyancing

Whether your family law client turns out to be a seller or buyer, you will need some ability to discuss contracts and conveyancing with him or her. For any contract, be sure that the parties to the contract are accurately named and, in particular, that the property description is accurate and that the named seller exactly matches the owner named in the certificate of title you obtained early in the case. Be certain that the contract calls for delivery of "marketable" title, not merely "insurable" title. "Marketable" title will be defined by your state's standards of title, which describe what is or is not acceptable title for sellers and buyers. "Insurable" title means that a conveyancing deed may contain title issues that would be solved by a title insurer "insuring over" by assuming risk as to certain title issues.

Though a tempting prospect, this solution may translate into an issue in the future. If your client accepts insurable title at the time of the purchase, he or she may not be able to tender "marketable" title at the time of a future sale, and the defect may not be insurable at that time.

The contract also needs to address typical contingencies. At a minimum, contingencies are needed to address: (a) inspections, such as structural, wood-destroying insects, septic, well, (both potability and rate of recovery); presence of lead-based paint, asbestos, radon, and other environmental issues, such as oil tanks or leaks (include language giving the right to seek Phase I, Phase II, and further environmental testing, particularly if the property is not residential); (b) title and survey issues; (c) any mortgage needed, including language setting forth a deadline by which the buyer must secure a loan commitment, and spelling out the loan-to-value ratio and any maximum interest rate for the mortgage; (d) any required sale of an existing home or property; (e) what will occur if the buyer suffers loss of employment or reduction of income; (f) adjustments and treatment of costs at closing (covering such matters as heating oil in the tank), real estate taxes, brokerage commissions, and any seller concessions--all of which will affect the cash requirements at closing; (g) any special timing for a closing, such as school commencement or other important dates.

Be aware that in many jurisdictions, unless the contract specifies that time is of the essence, dates in the contract may not, in fact, be firm. When it comes to school commencement and finding alternate housing, if a closing is delayed, this can represent a problem that is best addressed in advance. In the current economic environment, it is not unusual for a seller to give a buyer a closing cost credit against the price. The contract should state that the final credit must be approved by the new lender and disclosed on the HUD-1 Settlement Statement.

Take time as well to familiarize yourself with the conveyancing requirements of your jurisdiction. The ministerial requirements for your locale, such as the number and independence of witnesses, the requirement of

acknowledgments or other notarial formalities, are all matters to discuss with your client.

In many jurisdictions, both at the state and local level, governmental entities are utilizing real estate conveyancing as a means of raising revenue. Be sure to educate yourself about applicable state and local conveyance taxes, tax returns, and similar tax stamp requirements, as well as becoming aware of any applicable tax exemptions. In Connecticut, for example, there is a conveyance tax exemption if the conveyance arises from a dissolution-of-marriage decree.

Title insurance has become ubiquitous in real estate transactions. The policy generally insures either the lender or the owner (a combined policy can insure both lender and owner) against certain title defects not otherwise excluded or excepted from coverage. It is good practice to develop a working relationship with a title insurer and, in particular, with that insurer's legal department, to address any questions that may arise in connection with title issues.

At closing (or settlement, as it is known in certain parts of the country), the deed is delivered; loan documents are signed; adjustments are accounted for; fees (for brokers, agents, attorneys, and land records recordation) are collected; conveyance taxes are paid; and keys, alarm codes, and garage door openers are delivered. In some areas, the closing occurs in an attorney's office. In other areas of the country, attorneys are not involved in the settlement process, and the closing occurs with oversight by an escrow or title company. The deed can take the form of a warranty deed (the seller "warrants" the title against all defects, except as expressly disclosed); a special or limited warranty deed (the seller "warrants" against any defects arising during the seller's term of ownership), or a quit claim deed (the seller makes no representation as to the status of the title being conveyed). On an arm's length basis, a warranty deed is best. Between spouses, it is generally acceptable to tender a quit claim deed.

Foreclosures, deeds in lieu, and short sales

With increasing frequency, mortgage foreclosures have become part of the landscape for the family lawyer. Job loss, a reduction of income, increasing credit card debt, and less favorable debtor-side bankruptcy provisions have resulted in more and more home mortgage defaults. Generally speaking, given the standardization of note and mortgage forms, every borrower will be jointly and severally liable on any loan documents.

In the event of a loan default, a lender may initially be willing to enter into a repayment plan or other arrangement to bring the loan back to current status. However, if either the borrower or lender is unable or unwilling to do so, the lender will commence a foreclosure of the mortgage. Depending on the jurisdiction and type of loan, foreclosure may be judicial or nonjudicial. (For a general description of the foreclosure process, see page 10.) Foreclosures are an area in which you may want to have your client consult a specialist. In response to increasing numbers of



foreclosures, many jurisdictions are implementing provisions requiring mediation or some other assistance for homeowners. Similarly, lenders may have foreclosure moratoria or workout policies that may assist the borrower.

- Short sales are yet another mechanism by which properties in default might be handled. A short sale involves the sale of a property to a third party, but for a sale price that is less than what is owed to the lender. The process involves securing the lender's advance agreement to accept less than what is owed, in exchange for the lender's agreement to release the mortgage at the time of the sale to the third party.

Generally, a lender will only consider a short sale if that is a more economically beneficial way to obtain some satisfaction of the debt and to avoid owning the property. If your client is considering a short sale, be sure to consult with an attorney well-versed in this area prior to entering into any purchase and sale agreement. The contract will need to have provisions covering the relationship between seller and purchaser as well as contingencies covering the seller and lender relationship. There are forgiveness-of-debt implications in short sales that can have income tax ramifications, and the lender may not be willing to waive any claim for deficiency. In the context of distressed properties, there are certain limited exceptions from the forgiveness-of-debt rules contained in the Mortgage Forgiveness Debt Relief Act of 2007. The lender will issue a Form 1099-C--Cancellation of Debt--to the borrower, setting forth the amount of forgiven debt. The borrower then would file IRS Form 982--Reduction of Tax Attributes Due to Discharge of Indebtedness--to take advantage of any applicable exceptions.

For an overview of this issue, IRS Publication 4681 will be of assistance. In any case, review with a qualified tax advisor the income-tax implications of debt forgiveness prior to taking any step in this regard.

Finally, while too complex an issue to cover in this article, in any circumstance where the debt load is burdensome to the family law client, recommend a consult with a qualified bankruptcy lawyer, so that the client understands his or her rights and the dischargeability of those debts in a bankruptcy court.

### **Conclusion**

All family lawyers must develop a working knowledge of many varied areas of the law--a level of expertise sufficient to spot issues and know when the assistance of other professionals is appropriate. As we have done for years with tax experts, business valuation experts, and mental health professionals, we need to build bridges to others with specialized knowledge of real property and its implications as we counsel our family law clients and help them navigate the difficulties of their cases.

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