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Real Property

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

Note From the Editors

BY WILLIAM J. ANAYA, MICHAEL J. MASLANKA, & MICHAEL J. ROONEY

We do live in interesting times and, yes, it is both a curse and a blessing. Our lives have been upended by the pandemic, but life goes on. Often, though, it is simply not possible to keep current with various pronouncements from the courts and regulatory agencies that cover bans, delays, and/or moratoria regarding evictions, foreclosures, and other debt collection techniques. Loyal readers are well advised to consult the websites of both local courts and the Illinois Supreme Court for detailed specifics.

This issue covers non-pandemic matters. Is the death of the section 1031 exchange at hand and are there any tax-planning devices left to the real estate practitioner? If you can foreclose a mortgage, what is a fair price at a sheriff's sale and exactly how much of a discount from the alleged fair market value can be expected? And what about the lender's or loan servicer's obligations to a borrower in possession when it comes to securing and "winterizing" the property? You'll want to read the imaginary

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Are Rumors of the Imminent Death of the Section 1031 Exchange Fact or Myth?

BY DONALD HYUN KIOLBASSA, J.D., C.P.A.

When I was a young boy, one of my favorite characters in Greek mythology was Perseus. This demi god was the son of Zeus and a mortal, and went on to defeat some of the fantastic monsters of his day.

He was even able to defeat the most resilient of monsters such as the Gorgon Medusa. Where many failed he triumphed with ingenuity and persistence.

Consider now, the 1031 exchange—a tax benefit that has been around since the 1920s and has long been an anchor tool of the real estate investor.

Many administrations have attempted to topple this mighty and popular tax provision but failed. The currently proposed tax proposal taxes aim at the 1031 by limiting the amount of the deferral to $500,000 per year for individuals and $1,000,000 for married couples.

Let us understand why so many have tried to slay 1031 and why they come up short.

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conversation between two familiar and trusted names in Illinois real estate practice!

If you represent purchasers, what is the extent of the attorney's duty to the client when it comes to physical condition of the premises? Does the attorney have a duty to inspect, or merely a duty to advise the client on options and alternatives if the condition is not acceptable to the client? And in addition to these articles on recent cases, we are re-printing an article from the Trusts and Estates newsletter about the amendments the TODI statute. Importantly, among other changes, a TODI is now available for real property other than residential.

As always, the editors solicit your contributions. Unfortunately, the many folks who volunteered to write article on the infamous cat case have not sent them in yet. What a purr-fect opportunity for you!■

Are Rumors of the Imminent Death of the Section 1031 Exchange Fact or Myth?

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26 U.S.C. Section 1031 allows taxpayers to defer taxes on the exchange of real property for Investment use. Here is a back of the napkin approach to understand the applicable taxes.

1. Section 1231 (i.e., capital gains). The taxpayer buys land for $10 and sells it for $30, resulting in a $20 gain.
2. However, beware of the section 1250 land mine for depreciation recapture. When the taxpayer buys investment property, the taxpayer gets a paper deduction called depreciation, but when the taxpayer sells the investment property, the IRS recaptures those depreciation deductions the taxpayer was taking.

In short, the 1031 exchange allows you to defer, not avoid, those two taxes. However, we cannot understand 1031 in a vacuum. Rather, we must connect it with 26 U.S.C. section 1014 to understand why it is beneficial to the real estate investor.

Section 1014 allows the taxpayer to "Step Up" basis in the property upon the taxpayer's death to the fair market value of the property at the time of the taxpayer's death. To keep it simple, if the taxpayer had purchased the land for $10 and at the taxpayer's death the land is worth $30, the new basis is $30. If the taxpayer at that time sells the property then, there is no 1231 profit or 1250 recapture. The heirs or devisees essentially inherit the land Income tax free. (Let's estate taxes and inheritance taxes for simplicity.)

This technique is referred to as "Swap Until You Drop." The taxpayer can keep exchanging, until death when all of the "Basis Sins" are forgiven and the taxpayer's heirs and devisees inherit and pay no income taxes.

By the way if the taxpayer is a couple, they may get double stepped up basis by performing this practice twice.

Rather than wait until death to enjoy the tax benefits, most people do some sort of tax free cash out.

When we examine section 1031 in relation to sections 1231, 1250, and 1014, it is easy to understand that a section 1031 exchange is an incredibly powerful tool for land owners to use in seeking to create generational wealth.

Most buy investment real estate for three reasons: appreciation, cash flow, and tax benefits. Today we should probably add inflation, but that is for another article.

1. Appreciation is tough, because the dirt is so expensive.
2. Cash flow is tough, because everyone watched a Saturday morning infomercial about retiring early off of rents and bought land. This drove up the price of the brick and mortar assets to the points where they don't justify the rents.

Real Property

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The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

3. Tax benefits are the last frontier. Taxpayers can still win with the technique described above and create generational wealth. Idle wealth for the most part, but wealth.

This is a critical battle as we approach the days of the silver tsunami. Many Baby Boomers will retire and pass on triggering the swap until you drop.

Will it increase velocity of transactions? Maybe, if there is a call or triggering event forcing the beneficiaries to pay the tax upon death.

Will it decrease velocity of transactions? Maybe, if the properties are ticking tax time bombs, and heirs choose not to sell.

Only time will tell, but will the current efforts at eliminating or reducing the impact of section 1031 be our Perseus? Or will they just be another warrior turned to stone by the Gorgon Medusa?

As real estate attorneys we must not only know the rules, but how they interface with other rules and their practical applications.

Get involved. This is not an academic debate. ■

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Case Summary: Fair Price at Sheriff's Sale

BY ROBERT FLOSS

In the case of *T2 Expressway, LLC v. Tollway*, LLC, 2020 IL App (1st) 192616 (June 28, 2021) the court was tasked with determining what constitutes a fair price at a sheriff's sale. Defendant property owner challenged the sale price at auction as "unconscionable, grossly inadequate, inequitable and justice was not done."

Before beginning analysis, bear in mind two underlying facts. The subject property consisted of eleven acres of land and four double-sided billboards. The main defendant was an LLC that filed bankruptcy, but several individually named defendants signed personal guarantees on the note that would result in deficiency judgments against them upon confirmation of sale at a price less than the judgment.

Plaintiff lender obtained foreclosure judgment against defendant for roughly $6.4 million, plus additional amounts and costs. Plaintiff placed the property for sheriff's sale with an opening bid of $3.5 million, which turned out to be the successful bid. At confirmation hearing, plaintiff sought approval of the sale and deficiency judgment for $3.1 million. Defendant requested an evidentiary hearing to show evidence the sale price at auction should have been higher.

Defendant's motion included an affidavit (but no appraisal) from an appraiser that the property was worth $5.5 to $6.5 million based on a contract from a year before the sheriff's sale wherein defendant agreed to sell only the four billboards to a buyer for $3.6 million. In addition to that price, there was also a marketing proposal from an agent stating the underlying eleven acres of land was worth between $2.1 and $3 million.

Plaintiff took a calculated approach of looking at the sheriff's sale opening bid based on a percentage of the property value. Plaintiff argued the large valuation and deficiency were a distraction from the typical percentage loss at foreclosure sale. Plaintiff argued the winning bid was 54 percent to 64 percent lower than defendant's valuation, which is acceptable. The court agreed and confirmed the sale. Defendant appealed using an appraisal valuing property at $6.3 million. Defendant also included emails to a prospective purchaser from plaintiff's receiver rejecting an offer of $4.2 million and countering with $5.4 million sale price. Defendant used both as evidence plaintiff knew the property should have a higher bid price and again requested an evidentiary hearing.

The court's analysis makes clear that the defendant in a foreclosure case must understand a property cannot be expected to bring its full value at a forced sale and must expect to suffer a loss. The court first turned its attention to the request for an evidentiary hearing. To grant an evidentiary hearing, the defendant must present a current appraisal (which was done) and prove the value is so different it must be unconscionable. While there is no established percentage of price at a sheriff's sale that would *de facto* establish unconscionability, the court took into consideration several cases that upheld allegedly unconscionable bid prices.

The first decision suggested any price below 50 percent fair market value to be unconscionable, another overturned a bid that was 16.66 percent of the fair market value, another at 10 percent of the fair market value, and a fourth at 2.7 percent of fair market value. The court avoided stating what would explicitly be an acceptable percentage. Instead, it shifted the burden to the defendant for failing to provide any decisions that supported unconscionability at a bid price over 50 percent fair market value. For this reason, the court upheld the denial of an evidentiary hearing.

It's worth noting the court went on to state an inadequate sale price would not be enough to deny a confirmation of sale. To overturn a sale, the defendant must allege an irregularity with the sale process like mistake, fraud, or violation of duty by

the officer conducting the sale. Here, the defendant made no such allegation, but instead relied upon circumstances leading up to the sale to support the sale being "unfair and prejudicial."

The aforementioned purchase contract to buy the billboards was raised. However, the contract required the conveyance of the billboards free and clear and separate from the land. The mortgage on the property placed a lien on the property and billboards together and plaintiff rejected the offer. Unfortunately, the contract to purchase the billboards was for $3.6 million and the plaintiff won the property and billboards at auction shortly thereafter for $3.5 million. Plaintiff countered the purchaser was welcome to pay more for the property at the sheriff's sale, thereby reducing the deficiency, but it did not appear. Ultimately, much of the defendant's argument fails on this simple argument: If the property was worth so much more, why did no one other than plaintiff bid at sheriff's sale?

The court repeated this argument to dismiss the claim the plaintiff's receiver countered a buyer with a higher price, showing the plaintiff knew the bid price was unconscionably low. The bid at sheriff's sale was 65 percent of the fair market value, well within the court's threshold over 50 percent, and if another buyer really wanted the property, it could have purchased at a discount at the sheriff's sale. The court determined there was no fraud or unfairness when any of the prospective purchasers had the opportunity to bid more than plaintiff at the sheriff's sale, and still obtain the property for under fair market value, and did not.

Practice Tips: When dealing with a sheriff's sale, consider—

1. Bid price above 50 percent fair market value is fair.
2. Even if lower, defendant must prove an irregularity with sale.
3. Burden of proof on defendant

CAVEAT TO THE RULE: The court declined to state 50 percent as a rule, only that the defendant failed to cite a case to support unconscionability at a price above 50 percent fair market value. ■

Robert Floss is the principal at Floss Law, LLC located in Northbrook. Licensed in 2009, he is a current member of the ISBA Real Estate Law Section Council. He concentrates his practice in the areas of real estate, business law and estate planning. He is a frequent speaker to investment groups on safely structuring investments in real estate.

A 'One-Way' Conversation With Steve Bashaw

BY JOE FORTUNATO

[Note: Joe Fortunato and Steve Bashaw have made joint Real Estate Caselaw Update presentations for the ISBA and other organizations for the last 20 years. Like any couple that has been together that long, they have begun to complete each other's sentences. This article reflects the fact that Steve, due to time constraints imposed by the pressures of operating a solo practice and family obligations, has had to step back from writing case law summaries and no longer publishes his "Real Estate Flashpoints." Joe recently read and wrote about the case of *Schweihs v. Chase Home Finance, et al.* 2021 IL App (1st) 191779 (June 29, 2021), and the following sets forth the "conversation" Joe imagined that he and Steve would likely have had about the opinion.]

S: Schweihs is a decision involving alleged tortious conduct by a loan servicer and its "contractors." I have seen variations of this theme during the foreclosure process for the past 45 years—the tension between a borrower's right to remain in possession during the redemption period and the lender's right to protect the collateral. But these events typically happen when the borrower is away from the house.

J: Well, Steve, the servicer wanted to "protect the lender's interest in property" after a judgment of foreclosure and during the redemption period. Doesn't the lender have a right to do that? Must they get an order for a receiver or mortgagee in possession?

S: Yes, they have the right, and they needn't get an order for mortgagee in possession. But—Plaintiff, an older woman living alone, found two guys at her door, with bulging muscles, no identification, tattoos everywhere, and one of them had removed the lock from her door. She likely became very upset, with all of the collection calls and other financial difficulties swirling around her, and these two guys with no IDs.

J: They thought the house was vacant, according to the opinion.

S: Vacant! Vacant is real estate with no improvements on it. When will the world acknowledge the difference between "vacant land" and "unoccupied improved real estate"?

J: Okay; but she didn't answer the door when they knocked, and they thought no one was living there.

S: They could have called the phone number of the real estate broker that was on the "For Sale" sign in the yard, if they wanted to know whether anyone was living there. The presence of the "For Sale" sign should have been enough of a clue. Keep in mind that these "contractors" are paid as little as $15for a simple inspection, but a great deal more if they can secure and winterize the property.

J: They asked the neighbor across the street, who said there was a woman who comes and goes…

S: They could have called her attorney in the mortgage foreclosure case!

J: Steve—everyone knows you can't believe anything that a mortgage foreclosure

defense attorney says.

S: They still should have investigated further.

J: But the lender told them to winterize the house.

S: In June?! Are you kidding? No one could blame her for being frightened.

J: I think she was being overly sensitive. I know they were both ripped and heavily tatted, but it was summer, and, you know the saying – "sun's out, guns out." So what if they had just removed the lock from her door and were trying to get into her house? This is Chicagoland. Breaking and entering is almost as commonplace as 16-inch softball. And when she told them to get out, they asked her to step outside with them to discuss the fact that they had been directed to board up the place.

S: So, she should not have been terrified that they wanted to take her outside and do whatever, as opposed to doing it inside? She stayed inside and called the police, like any elderly woman in her right mind would do.

J: But the men had the right to be there, according to the mortgage contract.

S: Ah, the "freedom of contract" argument. The court relied heavily on the fact that Plaintiff freely and voluntarily signed an agreement, which provided, in relevant part, at Paragraph 7 of the standard Fannie Mae mortgage: "If Borrower fails to perform the covenants and agreements… or if there is a legal proceeding that may significantly affect Lender's rights in the Property…Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include… entering onto the Property to make repairs." (Emphases added by the court.)

J: Are you claiming that someone forced her to sign the mortgage?

S: I believe it is disingenuous to think that the concept of "freedom of contract" should extend to provisions in a mortgage, especially in the case of standardized documents like the Fannie Mae Note and Mortgage. When was the last time you were able to negotiate an amendment to any of the provisions in a Fannie mortgage? Or any mortgage, in that regard?

J: But she was not forced into it.

S: True, she could have decided not to buy the house in the first place, and just rented some place to live. At least then, as long as she rented a residence in Cook County, someone would have her back (between the Chicago RLTO, the Cook County RTLO and the eviction stays). Outside of Cook County, not so much.

J: But you forget that the Plaintiff was in default on her mortgage and a judgment had been entered against her.

S: Joe, the borrower is supposed to have rights of peaceful possession. The redemption period had not expired. There had been no sale, no Order for Possession, no Receiver, no Mortgagee in Possession.

J: Whatever. The court said the intent of the two "contractors" was immaterial to the issue of trespass. There is no such thing as "negligent trespass." And the mortgage allowed them to enter onto the property, even though they were mistaken about the issue of occupancy.

S: Well, intent does matter when it comes to the issue of assault. And don't forget that even though the house was cluttered, there really was no need for "property preservation." This was a Lock-Out, plain and simple. Lenders (and landlords) will be encouraged by the amount of "self-help" the court allowed.

J: Oh, grow up. The court said Plaintiff should not have been so worried about the two gentlemen who resembled villains in a bad Bruce Willis movie. The trial court needn't have had a hearing over the issue of her reaction to them. After all, they told her that the mortgage company had sent them.

S: Is there such a thing as a "good" Bruce Willis movie? Anyway, these guys are subject to policies and procedures established by lenders to make them seem like they are concerned about the well-being of the public, and not really because lenders are afraid of countersuits.

J: Glad you mentioned the policies and procedures. This lender had five separate statuses of occupancy. Plaintiff tried to introduce evidence of violation of such policies and procedures, but the court shut that down. The court said it would not impose a duty based upon the lender's policies and procedures where there was no duty owed to the borrower in the first place.

S: That both proves and begs the question, does it not? The borrower ought to be deemed the third-party beneficiary of the policies and procedures that are the subject matter of the contract between the loan servicer and these contractors. Should the lender be deemed not to owe duties to the borrower because the duties are not expressed in the mortgage? Shouldn't the courts of review revisit the concept of good faith and fair dealing in instances like this? Clearly, the lender does not want to express that it has a duty of honesty and fair dealing, or a duty to refrain from violation of the borrower's rights of due process, a duty to refrain from tortious conduct such as trespass and assault. Does that mean that assault is now fair game, because the mortgage is silent about it?

J: Don't be a bleeding heart. Of course, all of those things are out of bounds. But the policies and procedures don't create new duties.

S: But they are there for a reason. Perhaps violation of the policies and procedures demonstrate breach of another pre-existing duty. But we will never know, because the court granted a motion in limine barring any testimony concerning possible violations of the lender's policies and procedures. Is a motion in limine really necessary here, where there is no jury, and the court can allow such evidence to be introduce and give whatever weight is appropriate to such evidence?

J. The court stated that the Plaintiff didn't enter into the loan contract in reliance on the lender's policies and procedures, and the policies and procedures were not incorporated into the mortgage contract.

S: Maybe not, but what does that prove? Who enters into a contract, or any business relationship, with the expectation that the other side will try to lock you out and engage in tortious conduct? Do you add to your attorney review letters a condition that your client will not be subjected to battery, malicious mischief or fraudulent conduct?

J. I save those clauses for my buyers of new construction. Trespass, unlike negligence, does not depend upon proof of a breach of a legal duty or a standard of care,

but instead depends upon permission to enter the property.

S. Would not permission depend upon whether or not the house was unoccupied?

J. Permission depends on whether the loan is in default.

S. Paragraph 7 of the mortgage talks about the lender entering the property to make repairs. The two "contractors" were not repairing anything. They were removing locks on an occupied house without due process.

J. "Repair" is one of the things a lender "may" do. Lenders' remedies are not limited to effecting repairs.

S. But the assault claim should have survived a 2-615 motion. The question of whether Plaintiff was placed in a reasonable apprehension of receiving a battery should be subjective. Don't you take your Plaintiff as you find her?

J. Not according to this court. The court relied on permission to enter the property set forth in the mortgage, and the "great lengths" to which the two men went to determine whether anyone was present, the fact that they were sent by the lender to the property, and the fact that when Plaintiff asked that they leave, they left. Any proof of Plaintiff's apprehension without proof that the individual defendants intended to cause it was found by this court to be insufficient to impose liability for the tort of assault.

S. Maybe the result here was decided on a "no harm, no foul" theory. But what if the borrower had been away?

J. Maybe there are different standards applied in different locations, even in Metro Chicago? Would the result have been different if the events took place in the suburbs?

S. What a question! But Joe—you know that you don't winterize a house in June, right?

J. Picky, picky.■

Joseph R. Fortunato Jr. is a partner with Momkus LLP in Lisle and is a frequent contributor to ISBA programs and newsletters. First licensed to practice in 1973, he is a long-time ISBA member and has served multiple terms on the Real Estate Section Council. He is a member of IRELA and actively involved in drafting multiple versions of the Multi-Board contract.

Crawford v. Hayen: The Infamous Count VI

BY MICHAEL J. ROONEY

The first district appellate court published an opinion last November in a case where the narrow and precise holding may be correct, but in which the opinion itself is highly suspect. *Crawford v. Hayen,* 2020 IL App (1st) 200076 (November 20, 2020). The case involves a malpractice suit (Count VI, specifically) against a lawyer who represented the buyer of a condominium unit. Paragraph 13 of the appellate opinion recites that the plaintiff-buyer alleged that the attorney breached his "duty to adequately investigate and secure all available information about patent or latent defects of the condominium prior to closing."

Now, if you are reading this and you are a practicing real estate lawyer who handles residential transactions you may be wondering where in the world that particular duty is set forth as the obligation of buyer's counsel. Good question. After all, patent defects are, by definition, those that are obvious to anyone from a cursory look. If the buyer who is buying the property did not see the patent defect, how would anyone else? And where, by the way, is it written that the buyer's attorney has any duty whatsoever to physically inspect the quality of the improvements located on real estate? I have not found that Illinois case yet. Nor do I see that duty in any of the Illinois Rules of Professional Conduct.

Perhaps the problems were due to latent defects? By definition, though, latent defects are those that are not obvious to everyone on a cursory examination because they are hidden and can only be found by engineers, architects, or construction specialists (think, plumbers and electricians) and then only upon a more detailed examination or inspection. What qualifies a real estate practitioner to perform such work? And, again, where is it written that such obligations are a part of the real estate lawyer's duty to the client? I have not found that Illinois case yet. Nor do I see that duty in any of the Illinois Rules of Professional Conduct.

Also in Paragraph 13 of the opinion is the true gravamen of the buyer's complaint against the attorney: the attorney failed "to properly advise [him] of the ramifications and options associated with the contents of the 22.1 disclosure statement, …" The buyer alleged that if he had received proper legal counsel, he would have required that an escrow account be established to pay for remediation of the water infiltration issues, or he might have canceled the sale. Interestingly, the buyer did retain an expert to conduct an inspection of the premises and, having read that report, decided to consummate the transaction anyway. Even so, defendant's failure thoroughly to advise the client of options and alternative courses of conduct is clear.

Even when the court finds, in Paragraph 22, that the plaintiff did not sufficiently plead a breach of duty by defendant to discover and secure all information about latent and patent defects, the reason the court gives is not that such a duty simply does not exist. Rather, the court says that plaintiff's allegation that the additional information could not have been discovered by the plaintiff with ordinary prudence (because the seller lied about the water infiltration and deliberately failed to provide all association

board meeting minutes) means it also could not have been discovered by the lawyer. For that reason (not because the duty simply does not exist) the court found plaintiff did not successfully plead a breach of duty.

In Paragraph 23 the court goes on to say that its analysis does not end there. The court cites another malpractice case (*Metrick v. Chatz,* 266 Ill. App. 3d 649 (1994)) for the proposition that the lawyer does have a duty to advise the client about the available options for alternative legal solutions and to explain the risks and benefits of those options. Without deciding the issue of an actual breach of such a duty, the court finds in Paragraph 23 that the plaintiff's allegations successfully plead a breach of that duty.

In Paragraph 29 the appellate court agreed that the infamous Count VI did not sufficiently plead that the lawyer failed "to adequately investigate and secure all available information about" the water infiltration issues. Stunningly, however, the court seems to accept, without deciding, that such a duty of the lawyer for a buyer actually exists. Shame on plaintiff's trial counsel for making the assertion. Shame on plaintiff's appellate counsel for continuing that argument with, apparently, no citation to any authority whatsoever that such a duty exists. And shame on the appellate court for not saying that even if defendant did nothing to "adequately investigate and secure all information about patent or latent defects of the condominium prior to closing" he could not be held liable because the alleged duty simply does not exist.

So, what is the hypothetically reasonable real estate practitioner to do to protect both the lawyer and the client? Two words: engagement letter. Two more words, client communication.

In your engagement letter, tell the client quite specifically what you will and will not do when it comes to the physical condition of the property. Unless the lawyer is also an architect, or structural engineer, or construction specialist, or trained home inspector, the lawyer should say that the lawyer is not a member of one of those professions and, therefore, is not qualified to opine upon the physical characteristics of the property. Advise the client to retain, initially, a home inspector and to accompany the home inspector when the inspector performs the home inspection. Advise the client to read the report thoroughly and to ask the inspector any questions that come to mind. Advise the client that if the report discloses (or a seller's disclosure report reveals) physical defects that are not acceptable to the client, you will assist the client by advising the client of the options and alternative courses of action concerning the transaction in light of the defects. Then give those options and alternatives and let the client decide how to proceed.

Under Rule 1.2(c) of the Illinois Rules of Professional Conduct, the lawyer may limit the scope of the representation if the limitation is reasonable and the client gives informed consent. Read Rule 1.0 thoroughly, especially Rule 1.0(e) defining "informed consent" and understand the term is about what the client understands more than it is about what the lawyer says. Also read Comment [6] and Comment [7] to Rule 1.0 and Comment [6], Comment [7], and Comment [8] to Rule 1.2. Thus, the engagement letter may impose a reasonable limitation on the scope of the lawyer's representation. No, I do not believe you can disclaim all duties with respect to the physical condition of the property. And you cannot make an agreement with the client that limits the lawyer's liability for malpractice unless the client obtains independent representation in making the agreement (Rule 1.8(h)).

But I believe it is reasonable to limit the scope of representation when it comes to the physical condition of the property simply because lawyers have no special training or experience or expertise, as lawyers, in that arena. However, I also believe the lawyer has a duty to advise the client about the options and alternatives available to the client when a proper inspector finds a report on (or a seller's disclosure report reveals) a physical defect in the property that is not acceptable to the client. And, by all means tell the client you will do that.

Further, if the lawyer has quoted the client a flat-fee arrangement for the transaction, tell the client whether that advice and the extra time to negotiate with the other side is or is not included in the flat fee. If an hourly rate is not otherwise stated in the engagement letter, tell the client what the additional rate is when the client approaches you about the defect. And do not, in any agreement or negotiation, try to limit the ability of the client to file a complaint with the ARDC as that is defined as misconduct in Rule 8.4(h).

I am not a fan of the opinion, but I think the holding is sound if properly analyzed by reading the entire opinion and taking into consideration the procedural posture of the case on appeal.■

Michael J. Rooney graduated from Illinois State University in 1971 and from the University of Illinois College of Law in 1976. Between degrees, he served in the U.S. Army 1971-1973. A member of the ISBA since 1976, he served multiple terms on the Real Estate Law Section Council, including as chair 1986-1987. He served as executive director of IICLE 2013-2020, having previously served on the Board of Directors between 1984 and 1993, and as chairman of the Board 1991-1992. Prior to his role as executive director of IICLE, he spent over 30 years in the title insurance industry in Illinois and other states. In 2019 he was honored by the Fellows of the Illinois Bar Foundation with its Distinguished Service to Law & Society Award. In 2021 he was honored by IICLE with its Addis E. Hull Award for his years of contributions to IICLE as a volunteer author, speaker, director and board chair.

Public Act 102-68 – Long Awaited Changes to the Illinois ~~Residential~~ Real Property Transfer on Death Instrument Act

BY MICHAEL J. FLECK

Introduction. On July 9, 2021, Governor Pritzker signed into law Senate Bill 47, effective January 1, 2022, making changes to what is now known as the Illinois *Real* Property Transfer on Death Instrument Act (formerly the Illinois *Residential* Property Transfer on Death Instrument Act). This article summarizes the changes made that improve the use of Transfer on Death Instruments ("TODIs") as an effective means of transferring real property in one's estate planning.

In the April 2021 issue of the ISBA Trust & Estates Newsletter, we covered "Transfer on Death

Instruments: Pitfalls and Pending Legislation" which gave a review of the then-current TODI Act and the pending legislation now signed into law.[1] By and large, these changes made it into the final legislation.

Definitions. The most notable change is that TODIs are no longer limited to residential property. The very title of the act removes the word "Residential".[2] For purposes of the Act, "Real Property" is now defined as "an interest in realty located in this State being capable of being transferred on the death of the owner".[3] The former limitation to residential property (1-4 units) has been a large criticism of the utility of the TODI Act and this change removes that limitation. Note that the Act is only effective for non-residential property after the effective date of January 1, 2022.[4]

The definition of "Person" is expanded to include "a guardian; a custodian designated or to be designated under any state's uniform transfers to minors act; or any other legal entity".[5]

Trust as Beneficiary. A new provision allows for the transfer to a trustee of a trust under certain circumstances even if the trust is subject to amendment, modification, revocation, or termination.[6] Particularly, said transfer may be made (1) "to a trustee of a trust that is in existence when the owner executes a transfer on death instrument and that is identified in the transfer on death instrument"; (2) "to a trustee of a trust created under the owner's will"; (3) "to a trustee of a trust created under the transfer on death instrument"; or (4) "to a trustee of a trust under the will of another individual if that individual has predeceased the owner, is permitted even if the trust is subject to amendment, modification, revocation, or termination." Unless the TODI states otherwise, if the trust is revoked or terminated before the owner's death, the transfer to the trust will then pass to the owner's estate.[7]

Still Non-Testamentary. TODIs have always been considered non-testamentary, that is a TODI permits an owner to state who should receive the real property regardless of what the owner's will states. The Public Act added language that made it clear that a TODI may not be admitted to probate as the will of the owner or as a codicil thereto.[8]

Powers of Attorney cannot grant the power to the agent to make a TODI on behalf the principal.[9]

Execution/Witnessing Requirements. The Public Act also makes some changes to the form and the execution/witnessing of the TODI. Of note, and a common mistake made by non-attorneys attempting to create their own Will, TODI or Power of Attorney for Property (1) the witnesses must also sign in the presence of a notary; and (2) if a beneficiary or the spouse of the beneficiary acts as a witness, they will lose their beneficial interest unless there are sufficient witnesses to attest if they had not signed.[10] Failure to properly witness and notarize a TODI could render it void.

***Practice Tip*:** Make certain that the witnesses also sign before the notary and the notarial clause reflects this; and make sure the witnesses are qualified to be witnesses and will not lose their benefit under the TODI.

Beneficiaries. The relationship of a named beneficiary to the owner may have an impact on how the property is distributed if the named beneficiary predeceases the owner. The practitioner should be aware of these changes and distinctions and consider the possible results in the event of a beneficiary pre-deceasing. Key provisions concerning this issue are:

- If the owner has identified two or more designated beneficiaries to receive concurrent interests in the real property, the interests are taken in equal and undivided shares *with no right of survivorship*.
- Except as provided in paragraph (5), if the owner has identified a single designated beneficiary and the designated beneficiary fails to survive the owner or is not in existence on the date of the owner's death, then the real property shall pass *to the owner's estate*.
- Except as provided in paragraph (5), if the owner has identified 2 or more designated beneficiaries to receive concurrent interests, and one or more, but less than all, designated beneficiaries predecease the owner,

then the interests of those that lapse or fail for any reason are transferred to the other remaining designated beneficiary or beneficiaries in proportion to the interest of each in the remaining part of the real property held concurrently.

- If the designated beneficiary who dies before the owner *is a descendant of the owner*, the descendants of the deceased designated beneficiary living at the time of the owner's death shall take the deceased designated beneficiary's share of the real property *per stirpes*.[11]

Renunciation. The spouse of an owner may now renounce a TODI, in a fashion similar to the Probate Act renunciation, allowing the spouse to claim a one-third interest.[1] Renunciation is effected by the owner's surviving spouse filing in the office of the recorder of deeds where the TODI is filed, a document signed by the renouncing spouse, and declaring the renunciation and setting forth a description of the real property. This must be filed within 7 months of the date of death of the owner, or within such additional time as a court having jurisdiction of the real property may grant pursuant to Section 2-8 of the Probate Act of 1975. The filing of the instrument renouncing the transfer on death instrument is a complete bar to any claim of the surviving spouse under the transfer on death instrument.[2]

Creditors. A beneficiary of a transfer on death instrument is subject to creditor, administrative, funeral and burial, and statutory claims to the same extent and in the same manner as a beneficiary of a trust that was revocable at the time of the settlor's death as provided in Section 505 of the Illinois Trust Code, except that if more than one real property is transferred by a transfer on death instrument, the liability will be apportioned among the real properties in proportion to the net values of the real properties at the time of the owner's death."[3] ■

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1. Michael J. Fleck, Transfer on Death Instruments: Pitfalls and Pending Legislation, 67 Ill. St. Bar Assoc. Trusts & Estates Newsletter (April 2021) .
2. 755 ILCS 27/1, eff. 1/1/22.
3. 755 ILCS 27/5, eff. 1/1/22.
4. 755 ILCS 27/10(2), eff. 1/1/22.
5. *Id*.
6. 755 ILCS 27/21, eff. 1/1/22.
7. *Id*.
8. 755 ILCS 27/30, eff. 1/1/22.
9. 755 ILCS 27/35, eff. 1/1/22.
10. 755 ILCS 27/45, eff. 1/1/22.
11. 755 ILCS 27/65, eff. 1/1/22.
12. 755 ILCS 27/66, eff. 1/1/22. For reference and comparison, Probate Act renunciation language can be found at 755 ILCS 5/2-8.
13. *Id*.
14. 755 ILCS 27/85, eff. 1/1/22.

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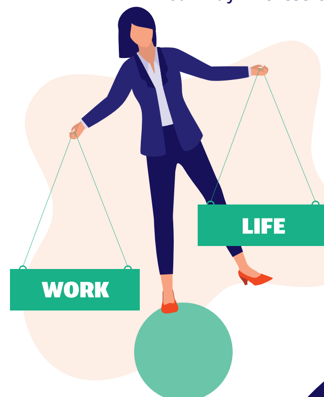
We are indeed in uncharted territory and many are wondering how to capture the learnings of the pandemic while integrating back into a new normal both at work and at home. During this dynamic discussion, work and life expert, Debbie Epstein Henry, will share recommendations, field questions, and facilitate breakout discussions on how to pursue our lives with vigor and ambition but also with a dose of reality. We will uncover ways to maximize opportunities, maintain productivity, and navigate our way in these times of transition. We will also explore how to delegate, relinquish control, and support each other to prioritize what really matters. We will leave this conversation inspired with strategies to embrace resilience and perseverance as a means to gain greater success and satisfaction. Join us to learn how to do our best and be our best as we develop a more reasonable outlook on a fresh life.



Speaker:

Debbie Epstein Henry

Founder, DEH Consulting, Speaking, Writing
Podcast Host, Inspiration Loves Company

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