ILLINOIS STATE BAR ASSOCIATION

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Real Property

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

Editor's Note

BY WILLIAM J. ANAYA & MICHAEL J. ROONEY

Beginning on Monday, April 11, 2022 Illinois homeowners can apply for up to $30,000 in assistance at www.illinoishousinghelp.org according to a news release form Governor JB Pritzker and IHDA. Applications must be completed by May 31, 2022. Full details are available at the website above. Applicants must have proof of ID, proof of household income, proof of occupancy, proof of ownership, and a statement of delinquency on mortgage, tax, insurance, and condo or HOA fees. Your clients may be in need, so please pass this information along to them.

This issue is packed with original articles and reprints of interest from other ISBA Newsletters, many of which were authored by current or former Real Estate Law Section Council members. As always, if you would like to be published, please choose a topic, write an article, and forward it to either Bill Anaya (wanaya@greensfelder.com) or Mike Rooney (mike@mjrooney.com) at your convenience. While we already have a couple of articles for May, we will be able to add your article to the list! ■

A Three-Pointer

BY MICHAEL J. MASLANKA

March Madness and all the bracket-busting is behind us, however, NBA playoffs are upon us, and everyone likes a three-pointer. Here are three points of interest for the practitioner:

1. In *Mayle, et al. vs. Urban Realty Works, LLC, et al.*, 2022 IL App (1st) 210470, the appellate court determined that the applicable statute of limitations under the Code of Civil Procedure for a violation of the Chicago Residential Landlord and Tenant Ordinance (RLTO) is five years, unless the violation clearly dictates a statutory penalty, which is penal in nature, and not remedial. To be penal, it must impose automatic liability, impose damages regardless of the actual damages, **and** set forth a specific amount of damages.
2. In *Old Second National Bank, N.A. vs. Karolewicz, et al.*, 2022 IL App (1st) 192091, the appellate court issued a very lengthy opinion, in a residential mortgage foreclosure case, that is a great read for anyone who loves statutory and rules procedure. Both parties filed a wide variety of motions in the circuit court, and both filed notices of appeal. In the end, the plaintiff's appeals were dismissed for lack of jurisdiction and the defendant's appeal was dismissed as moot. The

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timing of the filings of the motions to stay, motions to reconsider, and motions to extend, etc. was of crucial importance to the decision, as well as a reference to the circuit court's improper use of a *nunc pro tunc* order to attempt to give improper retroactive relief. The appellate court reminded the parties (and us) of the option of seeking Supreme Court Rule 183 relief, which allows the court to, "upon good cause shown, extend the deadline for doing an act required by rule even after the expiration of the time for acting." Somehow, the parties missed using that rule. Especially now, when the numbers of orders of possession in eviction and foreclosure cases may begin to multiply (post-pandemic), counsel can consider assisting homeowners and tenants by filing motions to stay enforcement and motions to extend possession, even if not 100 percent timely.

3. In *Wortham vs. Village of Barrington Hills*, 2022 IL App (1st) 210888, the appellate court affirmed a circuit court decision (really reviewing the decision of the administrative agency, here, the village's hearing officer's decision) that held that the homeowner violated, multiple times, a village zoning ordinance, by renting out his house for renter's short-term vacation purposes. The village's ordinances were analyzed from various perspectives. The appellate court agreed that the renting was not a "home occupation", which could have been allowed, and was tantamount to keeping a "lodging house", which was not allowed. The $32,000+ in administrative fines were upheld. So, if your client ever mentions an interest in possibly doing anything commercial with her property, go right to the village codes (health, zoning, building, etc.) and make sure that the project or use won't be in violation.

N. B. A lot of case law that we see published today, especially in the real estate, trusts, and estates areas, still cites to "old" case law. This also happens whenever the common law is involved. For whatever legal research purpose you have, now or later, be reminded that Illinois appellate court decisions prior to 1935 are not binding authority. Those from 1935 and later became binding authority pursuant to an amendment to the "Courts Act" (Ch. 37 of Ill. Rev. Stat.) in 1935. The pre-1935 case law may, however, still be considered as persuasive authority. ■

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.

Impossible, Impractical, Frustrating, or Simply Unfortunate: Illinois Commercial Leases in the COVID Age

BY R. KYMN HARP

On March 18, 2022, the Illinois Appellate Court issued its first opinion addressing efforts by a commercial tenant to escape liability under its lease by reason of the COVID-19 pandemic. *55 Jackson Acquisitions, LLC v. Roti Restaurants, LLC*, 2022 IL App 210138 (1st) is lengthy, factually detailed, and instructive. It is useful because it lays out the issues to be considered when the doctrines of impossibility, impracticability, and frustration of purpose are interposed as defenses to commercial lease enforcement.

The facts are not unusual for COVID era lease disputes.

Landlord and tenant entered into a multi-year commercial lease commencing on January 1, 2017 for the operation of a restaurant to sell "food for on and off premises consumption, including the sale of beer, liquor and wine, and ancillary items and uses found in other Roti establishments." The lease obligated tenant to conduct and operate its business in a "proper, lawful, and reputable manner", and to "comply in all matters with all laws, ordinances, rules, regulations, orders, and public authorities or officers exercising any power of regulation or supervision over tenant or the premises, or the use or operation thereof." Tenant timely opened its restaurant and operated its restaurant in compliance with the lease.

Fast forward to March 2020. On March 9, 2020, JB Pritzker, governor of Illinois, declared all counties in the state of Illinois as a disaster area in response to the outbreak of COVID-19. On March 11, 2020, the World Health Organization characterized the COVID-19 outbreak as a pandemic. On March 13, 2020, the President Trump declared a nationwide emergency pursuant to Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5127-5207 (the "Stafford Act") covering all states and territories, including Illinois. On March 18, 2020 the commissioner of health of the City of Chicago issued a Shelter in Place For COVID-19 Order. On March 20, 2020, the governor of Illinois issued Executive Order 2020-10 directing Illinois residents to stay at home. On March 26, 2020 the commissioner of health of the City of Chicago issued Order No. 2020-3 applying the governor's Stay-At-Home Order closing numerous public areas, restricting public and private gatherings, and restricting travel. On March 26, 2020, President Trump declared a major disaster in Illinois pursuant to Section 401 of the Stafford Act.

In the midst of the onset of the COVID-19 disaster, the tenant, Roti, "closed the premises" on Mach 18, 2020 and stopped paying rent.

In August 2020, the landlord filed suit for eviction and rent, alleging that Roti entered into a lease to rent the premises but failed to pay rent under the lease since March 2020. The landlord sought possession and $79,173.88 in past due rent as of the date of filing the complaint.

Roti defended the lawsuit by admitting it was a party the lease but arguing that it was essentially dispossessed on the premises in March 2020 and excused from performance of the lease because it was complying with public health orders. It also claimed that it was excused from performance because of civil unrest resulting in looting and rioting that began on May 28, 2020. Roti asserted that both the public health orders and the unrest "made it illegal and impossible or impractical for Roti to operate a restaurant at the premises as anticipated under the lease, its sole permitted use of the Premises."

Roti raised five affirmative defenses. An affirmative defense claiming COVID-19 constituted a physical casualty was rejected based upon the language of the lease. The other four affirmative defenses, as well as two counterclaims, were based upon the common law doctrines of impossibility or impracticability of performance, and commercial frustration of purpose. There was no applicable *force majeure* provision in the lease, resulting in only common law defenses being available.

Eventually, both the landlord and the tenant filed cross motions for summary judgment, which were heard on January 8, 2021.

Tenant Roti's motion for summary judgment was based primarily upon the common law doctrines of impossibility and frustration of purpose. It was supported by a sworn declaration alleging facts in support of its defense that the public orders relating to COVID-19 made it impossible or impractical to conduct business as a restaurant from the premises.

Landlord's motion for summary judgment argued that Roti had not established impossibility or frustration of purpose, and that Roti was in default, without legal excuse, for failure to pay rent as required by the lease. In support of Landlord's motion for summary judgment the Landlord filed a sworn declaration alleging that other restaurants or cafes in the vicinity of the premises remained open and operating during the COVID-19 pandemic and, in fact, a Potbelly and a Starbucks in the same building as the premises "are currently open for business and have been open during much of the pandemic." Roti responded that Landlord's sworn declaration did not specifically refute Roti's declaration that the public orders made it impossible and impractical to operate its business and noted

that other businesses "have different physical setups, business models, and management decision-making."

The trial court granted Roti's motion for summary judgment and denied Landlord motion for summary judgement based upon the doctrines of impossibility and frustration of purpose, noting that restaurants cannot make enough money to pay their staff during governmental restrictions for COVID-19 and opined that restaurants would not be profitable until they could return to full operational capacity. The trial court ruled that "the lease remains in full force and effect except that all rent payments by Roti are abated until the public health orders are lifted such that Roti can return to full operational capacity." The Landlord appealed.

Addressing the doctrines of impossibility, impracticability, and frustration of purpose, the appellate court spelled out the conditions for application of each doctrine, noting that in each case the doctrines of impossibility, impracticability and commercial frustration are to be narrowly construed.

The doctrine of impossibility, the appellate court noted, excuses performance only if the performance is rendered objectively impossible because the subject matter of the contract is destroyed or by operation of law. The doctrine applies only if the parties did not and could not anticipate the circumstances creating the impossibility, the party claiming impossibility did not contribute to the circumstance, and that party demonstrates it tried all practical alternatives to allow performance. The person claiming impossibility has the burden to prove it.

The doctrine of impracticability applies only where, "after a contract is made, a party's performance is made impractical without its fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made. . ." As with the doctrine of impossibility, a party claiming impracticability is expected to make a reasonable effort to overcome obstacles to performance and will be excused only if performance is impractical despite reasonable efforts. A party seeking to excuse performance by reason of impracticability must show that it can operate *only* at a loss and that the loss will be so severe and unreasonable that failure to excuse performance would result in a grave injustice.

The doctrine of commercial frustration rests on the proposition that, "from the nature of the contract and surrounding circumstances" at the time the parties entered into the contract, the parties "must have known that it could not be performed unless some particular condition or circumstance would continue to exist." The parties must be deemed to have entered into the contract on the basis that "the condition or circumstance would continue to exist, so that the contract is construed to be subject to an implied condition that the parties shall be excused from performance if performance becomes impossible from such condition or circumstance ceasing to exist.

Applying the doctrines of impossibility, impracticability, and commercial frustration to COVID-19, the appellate court found "no genuine dispute that the parties did not and could not anticipate the circumstance allegedly causing impossibility—the COVID-19 pandemic and the public health orders—when they entered into the lease, nor that Roti did not contribute to the circumstances of the pandemic or the said orders." Similarly, the appellate court found "no genuine dispute that the allegedly frustrating event—again, COVID-19 and the orders—were not foreseeable when the lease was formed."

The appellate court noted that summary judgment is a drastic means of disposing of litigation and should be granted only where there is no genuine issue of a material fact. In reversing the trial court, the appellate court found that a genuine issue of material fact prevented entry of summary judgment for either party. Roti claimed that operating a restaurant from the premises during the pandemic was impossible. Landlord claimed other restaurants in the vicinity, including restaurants in the same building as the premises, were open during the pandemic. The factual issue was whether Roti's efforts established that Roti had tried all available practical alternatives to perform under the lease and that operating a restaurant during the pandemic was *objectively* impossible. To be excused, performance must be *objectively* impossible. To be objectively impossible, the facts must show that "*the thing cannot be done*." If the facts show only that "*I cannot do it*", the facts establish only *subjective* impossibility, which is not sufficient to excuse performance.

Accordingly, the appellate court reversed and remanded for further proceedings on Landlord's complaint and Roti's affirmative defenses and counterclaim. ■

The Value of the Transactional Attorney

BY CAMERON LYTHBERG

Unbeknownst to the general public, there is somewhat of a rivalry between the transactional attorney bar (corporate, real estate, estate planning attorneys) and the litigation attorney bar (criminal, divorce, civil, and personal injury attorneys). This rivalry tends to be friendly at best and passive aggressive at worst and both sides of the bar all too often don't see the value in the other side. I find that the general public all too often doesn't see the value of the transactional attorney. My answer of course, is that both sides more than earn their fee (as an attorney how could I say anything else?), but as the transactional attorneys appear to be targeted most often, I'd like to make the case for them now. I should mention that I have both a substantial transactional and litigation practice, so I personally have no dog in this fight, but I believe that this issue is particularly important.

All too often I see people use LegalZoom or another online legal document generator to get the legal language, or "legalese," they feel is needed to complete a real estate transaction, to form a business, or draft an estate plan. It seems simple enough. With the magic legal words at your disposal, why would you need an attorney? I find this question represents a commonly held misconception as to what it is attorneys actually do. While attorneys often do have the "legalese" you need, it's only a small part of where attorneys provide value. Rather it's our judgment, our diligence, and our experience that provides a value to consumers.

What if I told you I've once tried a case where two business partners drafted their own company formation documents and wrote that the company could only be dissolved by "the majority of the partners." Standard legal language sure, but see the problem? Each one represented 50% of the partnership and neither alone constituted a majority. Absent agreement among both partners, they could never dissolve their partnership (and in this matter they couldn't agree on anything). Another example is someone who tries to draft their own real estate contract and says they'll extend the closing date "upon buyer's request" forgetting the key second phrase "and seller's agreement to said request" and then might be stuck keeping their property off the market and under contract forever for a buyer that seems unable to get the funds needed to close. By far the worst mistakes I see are people who try to draft their own estate plans. These are almost always destined to go to probate court when that could have been avoided. All of these examples are people that had the proper "legalese" in their documents, but in all these examples it didn't help them and in many cases it hurt them instead.

These sloppy mistakes almost always wind up in court and for most people that means a headache and a large hit to their wallet. Many attorneys would charge a few hundred dollars for all of the services I listed above, but to litigate them after an issue occurs? The sky is the limit as to how much it could charge to clear it up, and it could take years. It's for that reason that I believe the best value for money spent is transactional attorneys. The upfront cost for something that could only "potentially" go wrong seems hard to swallow, but most of my litigation clients are in the position where they'd give quite a bit to go back and pay for an attorney before the problems started happening. The old saying is, "An ounce of prevention is worth a pound of cure," and I believe this applies to transactional work more closely than most other things. As I said earlier, I have a transactional and a litigation practice. In that sense, I'm like the FRAM oil filter man: Pay me now or pay me later. But wouldn't you personally prefer to avoid an expensive fight in court? ■

Cameron T. Lythberg practices law in Joliet where he concentrates in the fields of litigation, real estate transactions, estate planning, and advising closely held businesses on a wide variety of issues. He regularly presents seminars on topics within his practice areas to both bar associations and client groups. Cameron may be reached via email to cameron@lythberglaw.com or by telephone at 815-239-0200.

The Condominium Act Does Not Specifically Authorize all Authority for an HOA Board

BY KADIJAH HALL

A group of displeased condominium unit owners brought suit against their HOA Board seeking declaratory and other relief against the HOA and its board of managers, claiming that the Board's activities surrounding the investigation and negotiations of a proposed bulk sale of the condominium units, violated sections 15 and 19 of the Condominium Property Act. In addition, the owners claimed that the Board had also breached the common law fiduciary duties of disclosure, candor and loyalty owed to the unit owners. *Glazer v. The Private Residences at Ontario Place Condominium Ass'n, 2021 IL App (1st) 210156.* Date of Opinion February 18, 2022.

The position taken by the unit owners was that before the Board could legally undertake any form of negotiations to facilitate the bulk sale of the building, a sale that under the Act requires the approval at least two-thirds of the unit owners, and that the Board was obligated to seek owner approval first.

Losing at the circuit court level, the plaintiffs appealed to the first district appellate court.

The Board Was Not Obligated to Get Prior Approval From Unit Owners

The primary argument the plaintiffs made on appeal was that the Board was required to get approval from the unit owners prior to negotiating the terms of any bulk sale of Ontario Place. Examining the Act, the Court agreed with the Plaintiffs that the "approval" of a bulk sale requires the consent of no less than two-thirds of the unit owners, however, it concluded that it would be a mischaracterization of the language contained in the Act to impose that requirement on the Board's ability to investigate and negotiate a bulk sale. In particular, the court noted that the Act makes it clear that the Board is responsible for the overall administration of the property and under the act "shall exercise for the association all powers, duties, and authority vested in the association by law or the condominium instruments except for such power, duty and authority reserved by law to the member of the association."

Thus, while the ultimate decision to approve a proposed bulk sale ultimately falls upon the unit owners, the court held that the overall intent of the Act gives the Board all the powers necessary to fulfill its role. Thus, absent some reservation of rights to the unit owners or limitation on the Board's powers, the Act must be read to give the Board the authority to investigate and negotiate a bulk sale.

Even if the Board's Disclosure of the Letter of Intent and Appraisal Were Material, the Board Did Not Breach a Duty in Failing to Disclose the Documents

The plaintiffs took the approach that the letter of intent and the appraisal were on a nonexclusive list of documents, and the Board had a duty to disclose the appraisal and the letter of intent, even if those documents were not listed in the Act, because they were, "material." The Board made the appraisal report accessible to all owners through an online portal. The court noted since the appraisal report was accessible to the owners, the Board did not breach a duty in failing to disclose the appraisal report. In examining the Act, the court took the position that there is nothing in the Condominium Property Act to conclude that section 19 had a non-exclusive list, which covers the letter of intent and the appraisal. Furthermore, the plaintiffs also alleged they had suffered damages because the letter of intent was not disclosed. However, the court concluded even if it assumed the letter of intent was material and should have been disclosed, the sale of the condominium was opposed by the owners. Thus, since the sale of the condominium was opposed, the plaintiffs suffered no injury from any alleged breach of the Board's fiduciary duty to disclose documents.■

Kadijah Hall is real-estate, estate planning, and business attorney serving residents in the Greater Chicago region. Presently she is a managing attorney of the VL Law Group where she assists clients with planning their affairs, updating and correcting their property records, representing buyers in real estate transactions and helping clients create their businesses. She is passionate about helping people acquire homeownership through real estate transactions.

How I Spent My Spring Break

BY MICHAEL J. ROONEY

First of all, a *mea culpa:* yes, I'm one of the members of the Senior Lawyers Section Council for whom this is my first article in our newsletter this ISBA bar year.[1] With apologies, though, I'm also a co-editor of the Real Estate Law Section newsletter this year and that group publishes a newsletter each month during the bar year (excluding, perhaps, the summer). A publishing schedule like that requires lots of articles and so I've written one in every issue so far and begged RELCS members for their own articles. I know that doesn't help our Senior Lawyers newsletter, though, and so I'm finally getting around to doing my duty in this arena![2]

Second, of all, as a mostly retired guy, I don't really get (or need) a spring break. While still active in a number of bar groups and working on an IICLE project, I can take a "break" whenever I darn well feel like it without being concerned about anyone else who may not like it. But this year I was invited by the youngest grandchild (and final one, according to all the parents of my grandchildren) to join her and her dad for spring break. Since her mom is a CPA and since spring break takes place in March, that's "busy season" for accountants[3] and the result is that spring break for their family has become a daddy-daughter bonding trip. Well, when the youngest granddaughter[4] invites you to join her daddy and her, I'm not going to be the guy to decline!

Third of all, I'm **not** an avid fisherman. In fact, I fish once a year, whether I need to or not.[5] Each year my son and I go to the White River in Arkansas to fish for rainbow trout. He **is** an avid fisherman – mostly self-taught from years of reading In-Fisherman magazine. When he was younger[6] I highly encouraged lots and lots of reading. Now, I'm not saying he was allergic to reading schoolbooks, but they had little attraction for him. I don't remember how we came across the first In-Fisherman issue, but for him it was love (and deep, thorough reading) at first sight. What's better than something he loved to read? Something that came to him in the mail each month without fail! So, I guess it's my fault he's an avid fisherman even though I am not.

Because he loves to fish, I suppose it's not a big surprise that his daughter loves to fish – and someday may grow to love smoking meat just as much as her daddy does. The daddy-daughter bonding spring break trips have come to include fishing, hiking, horseback riding and s'mores around the campfire. Invite me? I'm all in!

Now when I tell you the destination was in southeast Oklahoma, I am confident many of you will rapidly conclude I have completely lost whatever real estate competence you ever thought I might have possessed. Oklahoma? Scenic? Really? Oh man, absolutely! Now the good news is that they had been there on previous spring break outings. In fact, my son first went there right after high school and really roughed it, tent camping with his buddies. No tents for us, though. Rather, an extremely nice VRBO[7] complete with all the bells and whistles. I had seen pics from their earlier trips, so I was prepared – or so I thought.

Here's a hint: many of our generation[8] have spent time in Hot Springs, Arkansas, an old-time, scenic resort destination favored by former presidents (old-time ones) and those seeking the medicinal properties of the, well, hot springs located there. Hot Springs, AR, is located in the Ouachita Mountains.[9] Those "mountains"[10] occupy a portion of northwest Arkansas and stretch into southeast Oklahoma. They were formed by the collision of the North American Plate and the South American Plate and the resulting subduction of the latter, raising and buckling the interface between those plates. Details. Details.

Near Broken Bow, OK, is Beavers Bend State Park, surrounding a dam[11] on the Mountain Fork River. That was our headquarters for a few days of fishing, hiking, horseback riding, along with the aforementioned s'mores. With the assistance of a couple[12] of fishing guides, we fished for the rainbow trout with which the river is stocked.[13] When with the guides, we fly-fished and when not with them, we used ultra-light tackle from the banks. I'm pleased and proud to report that the granddaughter beat both of us menfolk in total catch. As a not-frequent fisherman, I must say that the fly-fishing experience was fabulous and I can see how people get addicted to it.[14] Walking the rocky bed of a stream in waders was also a learning experience and the old guy was glad to have some others around in case of disaster which, fortunately, did not occur.

We ate at what have become granddaughter's favorite restaurants, cooked steaks on the grill and visited the trinket shops.[15] I highly recommend this little corner of southeast Oklahoma as a destination. Period. It boasts beautiful scenery, fantastic fishing, outdoor activities galore and, if you're as lucky as I was, those s'mores by the campfire with a grandchild.[16] ■

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.

1. Well, after I sent in this article, I was advised that this issue of the Senior Lawyers newsletter will include a reprint of an article from this year's Real Property newsletter **and** that reprints count toward my obligation to author articles for the Senior Lawyers Section. So I got that going for me, which is nice!
2. And, for those of you who have not already written an article, the most difficult chore for me was deciding on a topic not related to my area of concentration as a lawyer.
3. Those of us who were always busy during our serious working years cannot help but note that the initial letters of "busy season" are B.S. Coincidence? I think not!
4. And final grandchild, remember.
5. But 2022 will see me on at least two fishing trips, counting spring break.
6. And he's the youngest of my three children.
7. Vacation Rental By Owner – yes, one of those online internet deals.
8. And our parents' generation.
9. Which I had always pronounced "wha-cheetah-ta" but which the locals in Oklahoma pronounced "wash-a-taw" and I confirmed that the locals are correct with my friend Dr. Google.
10. Not that any of us flatlanders can belittle any mountains, but these are not like the Rockies. I must say, though, that when you are there in the woods and along the rivers and streams the scenery is spectacular and very like parts of the Colorado Rockies.
11. The dam forms Broken Bow Lake.
12. Literally the husband-and-wife team of Trey and Mo (or Morgan as the granddaughter called her because she thought her name was too pretty to be shortened to Mo).
13. And for those of you who are not fisherpersons, whenever I complain about a dry spell without catching any fish, my son reminds me, "Dad, they call it 'fishing' and not 'catching' for a reason!"
14. Not much danger of me becoming addicted, though, as my fingers don't do well with any knot-tying, much less something as cantankerous, as invisible, and as uncooperative as fishing line!
15. Note that nearby Hochatown is Sasquatch-central in Oklahoma!
16. Or grandchildren!!

Public Act 102-0068: New Changes to the Real Property Transfer on Death Instrument Act (755 ILCS 27/1 et seq.)—Part II

BY RICHARD F. BALES

Editor's Note: The following article has been published in two parts with the first part published in February's newsletter. The editors thank Dick Bales for contributing to this newsletter a detailed discussion of the differences between old and new TODI law, providing a title company's perspective on application of TODI Act amendments, and providing examples with commentary as to how the statute is applied. For additional resources on the TODI Act amendments, please see Charles B. Brown and Nathan Hinch's article in this month's Illinois Bar Journal and Michael J. Fleck's article in ourAugust 2021 newsletter.

Section 65

Section 65 has been drastically rewritten. This section concerns the effect of the TODI at the owner's death.

Note that Section 65 uses the term, "designated beneficiary." Again, see Section 5 of the Act. A designated beneficiary is a person designated to receive real property under a TODI. (A "beneficiary" is a person that simply receives real property under a TODI.) I have bolded the substantive changes in new Section 65.

Old Section 65:

(a) Except as otherwise provided in the transfer on death instrument, in this Section, or in the Probate Act of 1975 or any other Act applicable to nontestamentary instruments, on the death of the owner, the following rules apply to residential real estate that is the subject of a transfer on death instrument and owned by the owner at death:

(1) Subject to the beneficiary's right to disclaim the transfer, the interest in the residential real estate is transferred to the beneficiary in accordance with the instrument.

(2) If a designated beneficiary fails to survive the owner or is not in existence on the date of the owner's death, then except as provided in paragraph (3) the residential real estate shall pass to the owner's estate.

(3) Unless the owner provides otherwise, if the designated beneficiary is a descendant of the owner who dies before the owner, the descendants of the deceased designated beneficiary living at the time of the owner's death shall take the residential real estate per stirpes. If the designated beneficiary is one of a class of designated beneficiaries, and any member of the class dies before the owner, the members of the class living when the owner dies shall take the share or shares which the deceased member would have taken if he or she were then living, except

that if the deceased member of the class is a descendant of the owner, the descendants of the deceased member then living shall take per stirpes the share or shares which the deceased member would have taken if he or she were then living.

(b) Subject to the Probate Act of 1975 and the Conveyances Act, a beneficiary takes the residential real estate subject to all conveyances, encumbrances, assignments, contracts, options, mortgages, liens, and other interests to which the residential real estate is subject at the owner's death.

(c) A transfer on death instrument transfers residential real estate without covenant or warranty of title even if the instrument contains a contrary provision.

(d) If there is no sufficient evidence of the order of the owner and designated beneficiary's deaths, otherwise than simultaneously, and there is no other provision in the transfer on death instrument, for purposes of this Section, the designated beneficiary shall be deemed to have predeceased the owner.

New Section 65:

(a) Except as otherwise provided in the transfer on death instrument, in this Act, in the Probate Act of 1975, or in any other Act applicable to nontestamentary instruments, on the death of the owner, the following rules apply to the real property that is the subject of a transfer on death instrument and owned by the owner at death:

(1) Subject to the beneficiary's right to disclaim the transfer, the interest in the real property is transferred to the beneficiary in accordance with the instrument.

(2) If the owner has identified 2 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.

(3) 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.

(4) 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.

(5) 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.

(b) Subject to the Probate Act of 1975 and the Conveyances Act, a beneficiary takes the real property subject to all conveyances, encumbrances, assignments, contracts, options, mortgages, liens, and other interests to which the real property is subject at the owner's death.

(c) A transfer on death instrument transfers real property without covenant or warranty of title even if the instrument contains a contrary provision.

(d) If there is no sufficient evidence of the order of the owner and designated beneficiary's deaths, otherwise than simultaneously, and there is no other provision in the transfer on death instrument, for purposes of this Section, the designated beneficiary shall be deemed to have predeceased the owner.

Commentary

Section 65(a)(2): Two designated concurrent beneficiaries take equal shares with no rights of survivorship. That is, if the beneficiaries are simply, "John Smith and Jane Smith," then once the owner dies, John and Jane will each own a 50% interest in the land with no rights of survivorship.

Note that 65(a)(2) is conditional—the two designated beneficiaries own equal interests with no rights of survivorship *if* the owner has identified the beneficiaries to receive concurrent interests in the real property. This suggests that a drafter of a TODI is not precluded from indicating either fractional interests or ownership in joint tenancy for two or more beneficiaries. Indeed, such a conclusion is consistent with Section 20 of the Act, already discussed.

Remember that one can have fractional interests, and one can have joint tenancy, but one cannot have unequal fractional interests in joint tenancy property. The reason for this stems from the so-called "Four Unities" of time, title, interest, and possession.

That is, joint tenants have to have one and the same interests accruing by one and the same conveyance, commencing at the same time, and held by one and the same undivided possession.[17]

Section 65(a)(3) and Section 65(a)(5): If the owner has named a single designated beneficiary, and that beneficiary dies before the owner dies, or if that beneficiary is an entity that does not exist at the time the owner dies (e.g., a defunct partnership), then the real estate passes to the owner's estate. However, if the designated single beneficiary dies before the owner dies, and if the beneficiary is a descendant of the owner, then the then-living descendants of the deceased designated beneficiary take the deceased designated beneficiary's share of the real estate *per stirpes*.

Section 65(a)(4) and Section 65(a)(5): If the owner has named two or

more designated beneficiaries to receive concurrent interests, and one or more, but less than all, of these beneficiaries die before the owner dies, then the interests of those deceased beneficiaries are transferred to the other remaining designated beneficiary or beneficiaries in proportion to the other remaining designated beneficiary's or beneficiaries' respective interest or interests in the real estate. However, if the designated beneficiary who dies before the owner dies is a descendant of the owner, then the then-living descendants of the deceased designated beneficiary take the deceased designated beneficiary's share of the real estate *per stirpes*.

Section 65(a)(5): if a designated beneficiary dies before the owner dies, and if this designated beneficiary is a descendant of the owner, then the then-living descendants of the deceased designated beneficiary take the deceased designated beneficiary's share of the real estate *per stirpes*.

Summary of New Section 65

- Unless otherwise indicated, two or more designated beneficiaries taking title to concurrent interests take title in equal and undivided shares with no rights of survivorship.[18]
- If there is only one designated beneficiary, and the designated beneficiary is an entity that does not exist at the time of the owner's death, then the property passes to the owner's estate.[19]
- If there is only one designated beneficiary, and that beneficiary is not a descendant of the owner, and if that beneficiary dies before the owner dies, then the property passes to the owner's estate.[20]
- If there are two or more designated beneficiaries to receive concurrent interests, and those designated beneficiaries are not descendants of the owner, and one or more, but less than all, of these designated beneficiaries die before the owner dies, then the interests of those deceased designated beneficiaries are transferred to the other remaining designated beneficiary or beneficiaries in proportion to the other remaining designated beneficiary's or beneficiaries' respective interest or interests in the real estate.[21]
- If a designated beneficiary is a descendant of the owner, and he dies prior to the owner, then the property passes to the then-living descendants of the pre-deceased designated beneficiary, *per stirpes*.[22]

But remember new Section 65(a)(1). See the bolded language below:

> (a) Except as otherwise provided in the transfer on death instrument, in this Act, in the Probate Act of 1975, or in any other Act applicable to nontestamentary instruments, on the death of the owner, the following rules apply to the real property that is the subject of a transfer on death instrument and owned by the owner at death:
>
> (1) Subject to the beneficiary's right to disclaim the transfer, the interest in the real property is transferred to the beneficiary in accordance with the instrument.

That is, the attorney drafting the TODI can circumvent the rules in Sections 65(a)(2) and following as to predeceased beneficiaries by carefully drafting the TODI.

See also Section 21:

- If a trust was the designated beneficiary of the TODI, then unless the TODI provides otherwise, a revocation or termination of the trust before the owner's death causes the land to pass to the owner's estate.

Attorneys should remember that the rules for predeceased designated beneficiaries have now significantly changed. Compare the summary of new Section 65, above, to the summary of the old Section 65, which is below:

Summary of Old Section 65

- If a beneficiary who is not a descendant of the owner dies prior to the owner, then the property passes to the owner's estate.
- If a beneficiary who is a descendant of the owner dies prior to the owner, then the property passes to the then-living descendants of the pre-deceased beneficiary, *per stirpes*.
- If a beneficiary who is not a descendant of the owner dies prior to the owner, and that beneficiary is one of a class of beneficiaries (e.g., all of the children of the owner's best friend Fred), then the remaining members of the class living at the time of the owner's death take the share of the pre-deceased beneficiary.
- If a beneficiary who is a descendant of the owner dies prior to the owner, and the beneficiary is one of a class of beneficiaries (e.g., all of the owner's children), then the descendants of the pre-deceased beneficiary living at the time of the owner's death shall take the share of the pre-deceased beneficiary *per stirpes*.

Section 66

Section 66 is all completely new. It concerns a totally new concept for TODIs: a spouse renouncing a TODI. This section is very similar to the section on will renunciation that is found in the Probate Act.[23]

Section 66 of the Act is below:

> New Section 66:
>
> (a) Unless the right to renounce is waived by the owner's surviving spouse, a transfer on death instrument may be renounced by the owner's surviving spouse. If renounced, the surviving spouse is entitled to a one-third interest in the real property transferred by the transfer on death instrument if the owner leaves a descendant or a one-half interest in the real property if the owner leaves no descendant. The surviving spouse may waive his or her right to renounce by executing a waiver as part of the transfer on death instrument. Notwithstanding the foregoing, a surviving spouse does not have the right to renounce a transfer on death instrument that transfers the owner's interest in real property to a trustee of a trust created under

the owner's will or otherwise that is for the sole benefit of the surviving spouse during his or her lifetime.

(b) In order to renounce the transfer on death instrument, the owner's surviving spouse must file, in the recorder of deeds office where the transfer on death instrument is recorded, a written instrument signed by the surviving spouse setting forth a description of the real property and declaring the renunciation. The instrument shall be filed within 7 months after the date of the owner's death, 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.

(c) If a transfer on death instrument is renounced under this Section, any future interest that is to take effect in possession or enjoyment at or after the termination of an estate or other interest given by the transfer on death instrument to the surviving spouse takes effect as though the surviving spouse had predeceased the owner, unless the transfer on death instrument expressly provides that in the case of renunciation the future interest shall not be accelerated.

(d) If the surviving spouse of the owner renounces the transfer on death instrument and the interests transferred to other persons are thereby diminished or increased, upon petition by a beneficiary, the court shall abate from or add to any interest transferred in such a manner as to apportion the loss or advantage among the beneficiaries in proportion to their respective interests.

Commentary

Section 66(a) states that the surviving spouse of the owner can renounce a TODI. If the spouse renounces the TODI, the spouse is entitled to a one-third interest in the real property transferred by the transfer on death instrument if the owner leaves a descendant or a one-half interest in the real property if the owner leaves no descendant.

Section 66(a) also states that a spouse "may" waive the right to renounce the TODI by executing a waiver "as part of the transfer on death instrument." But the use of the word "may" suggests that a surviving spouse could also waive the right to renounce the TODI by executing a waiver after the other spouse died.

Section 66(a) also indicates that a surviving spouse cannot renounce a TODI that transfers the real estate to a trustee of a trust created under the owner's will or created by any other means if the trust is for the sole benefit of the surviving spouse during his or her lifetime.

Section 66(b): In order to renounce the TODI, the owner's surviving spouse must record a renunciation within seven months after the owner's death, or within such additional time as a court might grant pursuant to 755 ILCS 5/2-8. The recording of the renunciation operates as a complete bar to any claim of the surviving spouse under the TODI.

Section 66(c): The wording of this section is taken directly from the renunciation provisions found in the Probate Act.[24] Section 66(c) of the Act addresses "possession" and "enjoyment" and not "title" to the property. This concept is key to understanding this section.

Here again is the wording of Section 66(c):

> New Section 66(c):
> (c) If a transfer on death instrument is renounced under this Section, any future interest that is to take effect in possession or enjoyment at or after the termination of an estate or other interest given by the transfer on death instrument to the surviving spouse takes effect as though the surviving spouse had predeceased the owner, unless the transfer on death instrument expressly provides that in the case of renunciation the future interest shall not be accelerated.

Now consider this example that illustrates the application of new Section 66(c):

> Example (Courtesy of attorney Charles Brown, DeKalb, Illinois): Assume that Adam and Betty are married, but it is the second marriage for both of them. Adam owns the marital residence in his name alone. Adam executes a TODI which provides Betty with a life estate in the marital residence with remainder to his son Carl by a previous marriage.

The TODI also provides that if Carl predeceases Betty, then the home goes to Carl's children per stirpes, but subject to postponement of possession until the children attain age 21. (Remember, pursuant to Section 65(a) of the Act, the attorney can add other provisions or conditions to the TODI.) Carl has three children all under the age of 21.

The TODI further provides that if any interest in the real estate becomes transferable to a person who is under the age of 21, the transfer shall be made for the benefit of that person to his or her legal guardian, if any, otherwise to a parent, if living, or if none living, then to his or her nearest living adult kindred as custodian for the minor under the Illinois Uniform Transfers to Minors Act until the age of 21.

Assume Carl dies before Adam, but Adam does not change the TODI. If Adam then dies and Betty renounces the TODI, Betty is treated as having predeceased Adam, which vests title in the three minor children. However, the TODI postpones possession until the children attain age 21.

Therefore, the custodian designated for the minor children takes possession of the property and controls its use and enjoyment until the children attain age 21. (Mr. Brown notes that in most cases, the custodian will probably need to sell the property to satisfy Betty's share and retain the balance of the proceeds for the benefit of the minor children until they reach age 21.)

The TODI in the above example created a life estate in favor of the designated beneficiary. This is now permissible because

of Section 20 of the Act, which states that "[a]n owner may transfer real property by a transfer on death instrument to one or more beneficiaries in any form of ownership valid under State law, concurrent or successive, absolute or conditional, contingent or vested, effective at the owner's death."

It appears that Section 20 may give rise to some unusual and complex TODI beneficiary issues. Attorneys might want to discuss any such TODI with their favorite title company counsel before having it executed and recorded.

Section 66(d) states if the surviving spouse renounces the TODI, and the interests of other persons are diminished or increased as a result of the renunciation, then upon the petition of a beneficiary, the court will adjust the interests to apportion the loss or increase.

Section 66 does not put any TODI conditions on spousal renunciation. That is, that a spouse can renounce a TODI regardless of whether the spouse is a designated beneficiary in the TODI. This position is consistent with the Probate Act as it relates to will renunciation.[25]

Section 85

Section 85, which deals with the rights of creditors, has been completely revised with all new language:

Section 85 is below:

> New Section 85:
>
> 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.

Commentary

Upon the death of the owner, a beneficiary of a TODI acquires the land subject to possible claims against the estate of the deceased owner. These claims may be enforced against the land. That is, Section 85 indicates that a creditor of the decedent may enforce a claim against the land transferred by a TODI.

How does Section 85 indicate this? Section 85 states that a TODI beneficiary is subject to creditor's claims in the same manner that a beneficiary of a revocable trust is subject to claims, as set forth in Section 505 of the Illinois Trust Code.[26]

Section 505 of the Illinois Trust Code reads in part as follows, and Section 505(a)(1) and Section 505(a)(5) indicate that "the property of a revocable trust is subject to claims of the settlor's creditors":

> Sec. 505. Creditor's claim against settlor.
>
> (a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:
>
> (1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors to the extent the property would not otherwise be exempt by law if owned directly by the settlor…
>
> (5) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

Thus, a beneficiary of a TODI acquires the land subject to possible claims against the estate of the deceased owner, and these claims may be enforced against the land.

Section 90

Section 90 concerns time limitations on the right to set aside or contest the TODI.

Section 90 is as follows:

> New Section 90:
>
> (a) An action to set aside or contest the validity of a transfer on death instrument shall be commenced within the earlier of 2 years after the date of the owner's death or 6 months from the date letters of office are issued pursuant to the Probate Act of 1975.
>
> (b) A bona fide purchaser or mortgagee for value shall take the real property free and clear of any action, claim, liability, or contest if the transfer to the bona fide purchaser or mortgagee for value occurs prior to the recording of a lis pendens under Section 2-1901 of the Code of Civil Procedure or prior to the filing of the a [sic] notice of renunciation pursuant to Section 66 of this Act.

Commentary

The real substantive difference in new Section 90 relates to the fact that now the spouse of a deceased owner can renounce the TODI. Thus, Section 90 has been expanded to add that a bona fide purchaser or mortgagee for value takes the property free and clear of any spousal renunciation as long as the delivery of the deed or the execution and funding of the mortgage occurs prior to the recording of the notice of renunciation.

Note again the wording of the statute:

> A bona fide purchaser or mortgagee for value shall take the real property free and clear of any action, claim, liability, or contest if the transfer to the bona fide purchaser or mortgagee for value occurs prior to the recording of a lis pendens…

The statute states that a *transfer* of the land is prior to the *recording* of the spousal lis pendens. The statute indicates that if a designated beneficiary were to convey the land to a bona fide purchaser on day one, the renouncing spouse recorded a lis pendens on day two, and the deed to the bona fide purchaser was recorded on day three, the unrecorded deed (day one) would take precedence over the recorded lis pendens (day two).

It is, however, perhaps unfortunate that the drafters of the Act refer to "the *transfer* to the . . . mortgagee for value" in Section 90. Why? Consider the case of *Harmes v. Sprague*:

In this case, Adam and Baker held title as joint tenants. Adam, by himself, mortgaged the property. Adam then died. The court ruled that upon the death of Adam, who was the sole mortgagor, Baker then owned the property as sole surviving joint tenant, free and clear of the mortgage.[27]

Therefore, the mortgage did not sever the joint tenancy. This case established Illinois as a *lien theory state* and not a *title theory state*. That is, this case makes it clear that a mortgage is a *lien* on the land. A mortgage is not a *conveyance* of the land.

Section 95

Section 95 concerns the preparation of the TODI. There are two small but significant changes:

> Old Section 95: A transfer on death instrument or its revocation shall be prepared only by an Illinois licensed attorney. Nothing in this Section, however, shall prohibit an owner from preparing his or her own transfer on death instrument or revocation.
>
> New Section 95: A transfer on death instrument or its revocation shall be prepared only by a licensed attorney. Nothing in this Section, however, shall prohibit an owner from preparing his or her own transfer on death instrument or revocation, or shall render the transfer on death instrument void for failing to be prepared by a licensed attorney.

Commentary

Section 95 now provides that any licensed attorney (not just an *Illinois* licensed attorney) can prepare a TODI. The section also states that the failure of a TODI to be prepared by a licensed attorney does not in and of itself render the TODI void.

One must remember, however, that there are still some things that will void the TODI:

One: There are still limitations on who can prepare a TODI. Section 35 states that an agent "under a durable power of attorney or other instrument creating an agency" cannot prepare a TODI. Because the statute states that such an agent "does not have the authority" to create a TODI, Section 35 suggests that a TODI executed by such an agent is void.

Two: Section 40(a)(3) states that the TODI must be recorded before the owner's death. Section 40(b) indicates that if the TODI is recorded after the owner's death, the TODI is void.

Some attorneys believe that if a TODI is delivered to the Recorder's office, but the Owner dies before the Recorder stamps a number on it, the TODI is nonetheless recorded. However, see 55 ILCS 5/3-5024, below. Would a disgruntled heir argue that a TODI, delivered to the Recorder's office but bearing no "certificate" at the time the Owner died, is not a recorded TODI?

> Sec. 3-5024. Certificate of time of filing. When any instrument in writing is recorded in the recorder's office, the recorder shall indorse upon such instrument a certificate of the time (including the hour of the day) when the same was received for recordation (which shall be considered the time of recording the same), and the book and page in which the same is recorded. The recorder shall sign the certificate or shall affix his facsimile signature thereto.
>
> The certificate, when signed by the recorder, or to which he has affixed his facsimile signature, shall be evidence of the facts therein stated.[28]

On the other hand, see *Cook v. Hall*.[29] This case suggests that mere delivery of the TODI to the Recorder is sufficient in terms of its validity:

> "We are, however, of the opinion, that the requisition is only directory to the recorder, and that its performance is not indispensable to the validity of the deed. The grantee, who has actually presented his deed to the recorder for the purpose of having it registered, ought not to be prejudiced by the mere failure of the officer to make the proper entry. The recorder is to make the entry, and not the party interested in the conveyance. All the party can do in order to have his deed recorded, is to take it to the office, and deliver it to the recorder. When he has done this, he cannot be charged with any default or negligence. The deed is then, in contemplation of law, filed for record. The entry by the recorder is the evidence of the filing. The deed ought not to be invalidated, and the title defeated, by the mere omission of the recorder to perform the ministerial duty of making the entry of the filing of the deed for record."[30]

Three: Section 40(a)(2) indicates that the TODI "must state that the transfer to the designated beneficiary is to occur at the owner's death." Section 40(b) indicates that if the TODI does not contain this language, the TODI is void.

Four: Section 45(b) and 45(c), previously discussed, indicates that a TODI may be void if it is not witnessed by at least two credible witnesses.

Five: Section 45(a) states that the witnesses to the TODI must use attestation language that reads "substantially" as follows:

> That on the date thereof the owner executed the transfer on death instrument in the presence of the witnesses; that the owner's execution was his or her own free and voluntary act; and that at the time of the execution, the witnesses believed the owner to be of sound mind and memory.

Section 40(a)(1)(ii) states that the TODI "must be executed, witnessed, and acknowledged in substantial compliance with Section 45."

Section 40(b) states that "[t]he failure to comply with any of the requirements of subsection (a) will render the transfer on

death instrument void."

Thus, it appears that the failure of the TODI to "substantially" contain this witness attestation language contained in Section 45(a) would void the TODI.

Six: The new definition of "Owner" in Section 5 makes it clear that a trustee of a trust cannot execute a TODI. It appears, then, that a TODI executed by a trustee of a trust is a void TODI.

Possible Attorney Concerns

Section 5 of the new Act defines "real property" as "an interest in realty located in this State capable of being transferred on the death of the owner." This definition is vast but it is nonetheless not all-encompassing.

The definition of "residential real estate" in Section 5 in the original 2012 Act included "units in residential cooperatives." When the Act was amended for the first time in 2015, this definition was amended to delete any reference to cooperative apartments. The drafters of this 2015 legislation undoubtedly realized that the occupant of a cooperative unit does not own the unit. Rather, generally and broadly speaking, a corporation may own the real estate, and the occupant may own shares of stock in the corporation.

New Section 5 in Public Act 102-0068 carries forward this deletion; Section 5 in the new Act does not contain any reference to cooperatives. This is consistent with the rest of the Act, as amended by Public Act 102-0068:

> An "owner" is defined in Section 5, as amended, as "an individual who owns an interest in real property." A cooperative unit owner generally owns shares of stock, not real property.
>
> "Real property" is defined in Section 5, as amended, as "an interest in realty located in this State capable of being transferred on the death of the owner."

Is a cooperative apartment an interest in real estate? Yes, it probably is; the occupant of the co-op often occupies the unit pursuant to a lease. However, a co-operative unit is not an interest in realty that is capable of being transferred on the death of the owner. Why is that the case? Section 5 of the Act defines an owner as "an individual who owns an interest in real property." The occupant of the co-op unit does not own the co-op. The occupant of the co-op generally owns shares of stock. The occupant probably leases the co-op, possibly from the corporation that owns the entire co-op building. It seems clear that the Act cannot be used to transfer a co-op. In fact, it also seems clear that a lessor of real estate cannot use a TODI to transfer any leasehold interest.

All of this indicates that the attorney must remember that despite the broad language in the definition of "real property" in Section 5, and the broad language of Section 20, there are nonetheless some limitations on what can be transferred by a TODI.

Possible Title Company Concerns

It is likely that Public Act 102-0068 may give rise to at least a few title company concerns. Here are three possibilities:

One: Section 95—Preparation of the TODI

Under Section 95 of the old Act, only an Illinois licensed attorney and the owner could prepare a TODI. The title examiner could easily determine if the preparer of a TODI was an Illinois licensed attorney by going to https://www.iardc.org/lawyersearch.asp.

Old Section 95 never actually stated that if a non-Illinois attorney who was not the owner prepared the TODI, the TODI was void, but one could argue that the implication was there.

That implication, if it existed, is now gone. Public Act 102-0068 amends Section 95 of the Act, indicating that if a non-attorney prepares a TODI (in violation of the Act), the TODI is not void. Will this mean that there will be more non-attorney prepared TODIs in 2022 and subsequent years? A TODI prepared by the TODI beneficiary raises the possibility of undue influence. If the beneficiary prepared the TODI and the TODI beneficiary is a non-family member and also a former caregiver of the owner, then pursuant to the Presumptively Void Transfers to Caregivers Act, codified as 755 ILCS 5/4a-5 *et seq*., there is a rebuttable presumption that the TODI is void if it transfers property to a caregiver on or after the death of an owner and the fair market value of the transferred property exceeds $20,000.[31] Note that a "transfer instrument" as defined in this Act includes a transfer on death instrument.[32]

Title examiners should be concerned about non-attorneys preparing TODIs, especially if the TODIs are prepared and recorded shortly before the owner dies. Did the designated beneficiary prepare the TODI? If not, what is the relationship between the designated beneficiary and the party who prepared the TODI? When the title examiner reviews the TODI, the examiner should look to see who prepared the TODI. In this regard, see 55 ILCS 5/3-5022:

> No recorder shall record any instrument affecting title to real estate unless the name and address of the person who prepared and drafted such instruments is printed, typewritten or stamped on the face thereof in a legible manner, but the validity and effect of the record of any such instrument shall not be lessened or impaired by the fact that it does not comply with the provisions of this Section.

Two: Section 66—Spousal Renunciation of the TODI

The issue of spousal renunciation of a TODI can arise in several different ways:

- When the owner or the owner's attorney prepares the TODI, the spouse can execute a waiver of the right to renounce the TODI, which can be part of the recorded TODI. In that event, it appears that there should be no title company concern about possible spousal renunciation if asked to insure the sale of the property immediately after the owner has died.
- If the spouse of the deceased owner records a "written instrument" renouncing the TODI, the spouse is entitled to a one-third interest in the real property transferred by the transfer on death instrument if the owner leaves a descendant or a one-half interest in the real property if the owner leaves no descendant. Whether or not the spouse chooses

to take this statutory share, will the title company want the spouse to execute a recordable "satisfaction of renunciation," thus abrogating the previously recorded notice of renunciation executed by the spouse, if the title company closes the sale of the real estate?

- Even if the spouse does not immediately record a written instrument renouncing the TODI, the spouse has seven months after the date of the owner's death, "or within such additional time as a court having jurisdiction of the real property may grant" to renounce the TODI.

If the deceased owner was married, and the recorded TODI does not contain a waiver of the right of the owner's spouse to renounce the TODI, and the spouse has not executed and recorded an instrument renouncing the TODI, will the title company want to have the spouse sign a waiver if the beneficiary intends to close the transaction during the seven month "right to renounce" period of Section 66(b) of the Act, as possibly extended by the court's granting of "additional time?" (If so, there seems little reason to record the waiver to put third parties on notice of the spouse's waiver of the right to renounce, as the seven month "window to renounce," even if extended, is relatively short.)

Section 66 of the Act indicates that there is no absolute "seven-month recording rule" for recording the renunciation. Will there be times when a title company might not be able to obtain a spousal waiver of renunciation? Will title companies have to develop a policy as to when it is safe to not require a spousal renunciation of a TODI? If so, consider the following:

Section 66 of the Act states that "[t]he instrument [of renunciation] shall be filed within 7 months after the date of the owner's death, *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.*" [emphasis added]

Section 2-8 of the Probate Act states that the time for filing the will renunciation is within seven months after the admission of the will to probate, or, "within such further time as may be allowed by the court if, within 7 months after the admission of the will to probate or before the expiration of any extended period, the surviving spouse files a petition therefor setting forth that litigation is pending that affects the share of the surviving spouse in the estate."[33]

If seven months have elapsed from the time the owner died, and the surviving spouse has not recorded an instrument of renunciation, and if the spouse has not filed a petition in the circuit court (possibly but not necessarily in the spouse's probate case) within seven months, and the court has not previously granted any "additional time," would the title company then be able to waive any title exception for the right of the spouse to renounce the TODI?

- From time to time, title companies have had to deal with homestead issues when a man and wife are married, only one spouse owns the home, but the other spouse has moved out and apparently abandoned the homestead. Later, the owner/occupant spouse wants to mortgage the home, but the lender (and the title company) is concerned about the absent spouse waiving homestead pursuant to 735 ILCS 5/12-904. Will this type of fact situation be a problem with spousal renunciation? Consider this example:

Example: Adam and Betty are married. They have an adult child, Charlene. Adam owns the home in which they live. The relationship between Adam and Betty is troubled, and eventually Betty moves out of the home. One month later Adam executes a TODI with Charlene as the designated beneficiary. Two months later Adam dies. Charlene already has a home of her own, and so she wants to sell the home as soon as possible. But Betty has at least seven months to renounce the TODI, and nobody seems to know where Betty is. Will the title company make Charlene wait seven months before closing, or will it underwrite the risk and close the transaction without first obtaining a waiver of renunciation from Betty? Would it make a difference if Betty moved out a year earlier instead of three months earlier? What if Betty moved out a year earlier and nobody knows where Betty is?

All of this concern about spousal renunciation may be much ado about nothing. A spouse has been able to renounce a will for years, and title companies have handled it.[34] But title examiners (and real estate attorneys) know that truth (and real estate closings) is stranger than fiction; who knows what might happen in the coming years?

But more importantly, as indicated above, when the Act was amended, Section 90 was expanded to add that a bona fide purchaser or mortgagee for value takes the property free and clear of any spousal renunciation as long as the delivery of the deed or the execution and funding of the mortgage occurs prior to the recording of the notice of renunciation. Thus, ultimately, spousal renunciation may prove to be only a "title gap" issue—what are the chances that a spousal renunciation will be recorded between the date of the title commitment and the date of closing?

Three: Section 20—The Nature of Beneficiary Ownership

As indicated above, Section 20, as amended, expands the nature of TODI beneficiary ownership:

> Old Section 20:
>
> An owner may transfer residential real estate by a transfer on death instrument to one or more beneficiaries as owners,

concurrently or successively, and upon any contingency, effective at the owner's death.

New Section 20:

An owner may transfer real property by a transfer on death instrument to one or more beneficiaries in any form of ownership valid under State law, concurrent or successive, absolute or conditional, contingent or vested, effective at the owner's death.

In addition, the definition of "owner" in Section 5 has been changed to indicate that an owner merely has to own "an interest in real property":

Old Section 5 definition of "owner":

'Owner' means an individual who makes a transfer on death instrument.

New Section 5 definition of "owner":

'Owner' means an individual who owns an interest in real property.

What does this mean to the nature—and complexity—of TODIs in the future? Consider again Section 65(a)(1), which has existed almost unchanged since the Act became law in 2012. It shows that the designated beneficiary's path to real estate ownership is subject to any conditions or provisions set forth in the TODI. See the bolded wording below of Section 65(a)(1):

(a) **Except as otherwise provided in the transfer on death instrument**, in this Act, in the Probate Act of 1975, or in any other Act applicable to nontestamentary instruments, on the death of the owner, **the following rules apply** to the real property that is the subject of a transfer on death instrument and owned by the owner at death:

(1) Subject to the beneficiary's right to disclaim the transfer, the interest in the real property is transferred to the beneficiary in accordance with the instrument.

And now there is more. As of January 1, 2022, the Act will be applicable to all real property, not just residential real property. As of January 1, 2022, an owner of not just real property, but "an interest in real property" may draft a TODI giving a designated beneficiary real property "in any form of ownership valid under state law." What will that form of ownership be? A life estate? A remainder interest? When the Act first became law in 2012, some seasoned veterans in the title insurance industry worried that because of Section 65(a)(1), some TODIs might be so convoluted and complex that the land might be uninsurable. With these new changes to the Act, will these concerns be voiced again, ten years later?

Conclusion

Public Act 102-0068 dramatically and significantly changes the Transfer on Death Instrument Act. It will be interesting to see how TODIs are drafted after January 1, 2022.■

1. *See Minonk State Bank v. Grassman*, 103 Ill. App.3d 1106 (1982) and *Illinois Law and Practice*, "Joint Tenancy," Section 2.
2. 755 ILCS 27/65(a)(2).
3. 755 ILCS 27/65(a)(3).
4. *Id.*
5. 755 ILCS 27/65(a)(4).
6. 755 ILCS 27/65(a)(5).
7. *See* 755 ILCS 5/2-8.
8. *See* 755 ILCS 5/2-8(c).
9. *See* 755 ILCS 5/2-8(a): "If a will is renounced by the testator's surviving spouse, whether or not the will contains any provision for the benefit of the surviving spouse, the surviving spouse is entitled to the following share of the testator's estate after payment of all just claims: 1/3 of the entire estate if the testator leaves a descendant or 1/2 of the entire estate if the testator leaves no descendant."
10. The drafters of the Illinois Trust Code relied on *Rush University Medical Center v. Sessions*, 2012 IL 112906 in drafting Section 505(a)(5) of the Code, which makes a settlor's revocable trust subject to any deficiency in the settlor's probate estate. The issue in *Sessions* concerned "the common law rule that a person cannot settle his estate in trust for his own benefit so as to be free from liability for his debts."
11. *Harmes v. Sprague*, 107 Ill.2d 215 (1984).
12. 55 ILCS 5/3-5024.
13. *Cook v. Hall*, 6 Ill. 575 (1844).
14. *Id.* at 579.
15. *See* 755 ILCS 5/4a-10(a).
16. *See* 755 ILCS 5/4a-5(3).
17. 755 ILCS 5/2-8.
18. *See* 755 ILCS 5/2-8.
19. *See* 45 Ill Reg 15934.

Tax Deed Epilogue

BY JOHN C. ROBISON, JR.

EDITOR'S NOTE: In the December 2016, Volume 43, No. 2 Edition of the Mineral Law Newsletter, Mr. Robison discussed in detail the issues involved in the acquisition of mineral interests by tax deeds. The following article is a postscript to the conclusions previously stated by Mr. Robison.

Lessors in oil and gas leases reserve a royalty, known as a "lessor's royalty," the nature and terms of which are specified in the royalty clause in the oil and gas lease executed by the lessor. It is interests in this lessor's royalty that are listed in ad valorem statements, taxed, sold for delinquent taxes, and purchased by buyers at tax sales.

To determine the nature and terms of the royalty interest purchased at the tax sale, it is necessary to examine the royalty clause in the specific oil and gas lease executed by the lessor whose lessor's royalty has been sold. A typical royalty clause in an oil and gas lease provides in relevant part as follows:

The royalties to be paid by Lessee are: (a) on oil, and on other liquid hydrocarbons saved at the well, one-eighth of that *produced* and *saved* from said land, same to be delivered at the wells or to the credit of Lessor in the pipe line to which the wells may be connected, ... (Emphasis added.)

The royalty clause entitles a lessor to only a specified portion of the oil after it has been severed from the land by production. Because this right to receive a portion of produced oil is for a finite period of time (*i.e,* the life of the oil and gas lease), it is an accrued royalty, which is personal property. *Hardy v Greathouse,* 406 Ill. 365, 372-373, 94 N.E.2d 134, 138 (1950); *Logue v Marsh,* 50 Ill.App.3d 493, 496, 365 N.E.2d 1159, 1161 (4th Dist. 1977). Whether a lessor's royalty should be taxed as an interest in real property in the first instance is an issue for another day.

In short, a purchaser of a royalty interest at a tax sale in essence acquires the lessor's royalty, which entitles the purchaser to receive payments for produced oil from the lessee until the lessor's royalty terminates upon the lapse of the oil and gas lease in which the lessor's royalty originated. ■

When Does a Denial Create a Question of Fact? Eviction vs. Non-Eviction Standards

BY ADAM B. WHITEMAN

A rose might always be a rose. However, a denial is not always a denial. This is particularly true when dealing with a denial filed in general litigation matters versus a denial filed in eviction cases. In a general litigation matter, a mere denial, standing alone, will not be sufficient to prevent judgment on the pleadings if the answer admits to all the material facts of the cause of action. However, a defendant in an eviction case has two opportunities to create a question of fact—the first in the pleadings, the second at the eviction hearing. Two Illinois cases have been found which fail to recognize this distinction and cite the eviction standard in a non-eviction setting.

Putting it in Context

Whether it is from the view of a defendant or a plaintiff, it is always a best practice to look for ways to end the fight early in the process. One often overlooked method is to request judgment on the pleadings. The rule provides as follows:

> "Any party may seasonably move for judgment on the pleadings." 735 ILCS 5/2-615(e) (West 2016). Judgment on the pleadings is proper when (1) the pleadings disclose no genuine issue of material fact and (2) the moving party is entitled to judgment as a matter of law. (citations) For purposes of resolving the motion, a court should consider as admitted all well-pleaded facts as set forth in the pleadings of the nonmoving party and any fair inferences drawn therefrom." *Core Construction Services of Illinois, Inc. v. Zurich American Insurance Co*., 2019 IL App (4th), 180411, 24.

In other words, if the complaint and answer reveal that there is no genuine issue of material fact, you can seek an end to the lawsuit based on the pleadings alone, without any need for further discovery or motion practice. A key question, though, is how do you determine if there is a "genuine issue of material fact"? A defendant might admit to every factual allegation in a complaint and then simply deny liability of the amount claimed. Is that denial, standing alone in the answer, sufficient to prevent judgment on the pleadings?

The General Rule

The general rule is that "once a statement of fact has been admitted in the pleadings, it constitutes a judicial admission, it is

binding on the party making it, and it makes it unnecessary for the opposing party to introduce evidence in support thereof because it has the effect of withdrawing the fact from issue." *State Security Insurance Co. v. Linton*, 384 N.E.2d 718, 721 (1st Dist. 1978). The core of the issue is whether an admission withdraws an issue from dispute. Thus, "a denial of an allegation in an answer or an affirmative defense will preclude judgment on the pleadings when denial raises issues of material fact." *Continental Casualty Co. v. Cuda*, 715 N.E.2d 663, 667 (1st Dist. 1999).

The Exception to the Rule in Eviction Cases

This general rule does not apply in eviction cases. The defendant in an eviction case is not strictly bound by admission made in a written answer to a complaint. Defendants have a second chance to present more defenses at the eviction hearing itself. In fact, a defendant does not even need to file an answer in an eviction case. Specifically:

> In actions for eviction …the defendant must appear at the time and place specified in the summons. If the defendant appears, he or she need not file an answer unless ordered by the court; and when no answer is ordered, the allegations of the complaint will be deemed denied, and any defense may be proved as if it were specifically pleaded.

S. Ct. R. 181(b)(2).

By way of example, *Samek v. Newman*, 518 N.E.2d 422 (1st Dist. 1987), is an eviction case involving a motion for judgment on the pleadings. In denying the motion, the court explained that "The assertion of [a] defense, albeit at the hearing rather than in their pleadings, raises the possibility of the existence of an issue of fact precluding judgment on the pleadings." *Samek v. Newman*, 518 N.E.2d 422 (1st Dist. 1987).

In sum, in an eviction case, a denial standing alone in an answer prevents judgment on the pleadings because the defendant gets another chance to present additional defenses at the subsequent eviction hearing. No such right exists in non-eviction cases. A denial does not stand alone in a non-eviction case. It stands next to other admissions contained in the answer and must be weighed accordingly.

Two Cases Which Incorrectly Cite the Eviction Pleading Standard

I recently represented a creditor in a collection matter. The defendant admitted all the material allegations in the complaint such as the terms of the contract, the conduct which breached the contract, and the damages arising out of that breach. However, the defendant then denied liability in his answer. He did not file any counterclaims or affirmative defenses. Seeing this response, I filed a motion for judgment on the pleadings. In response to my motion, the defendant then cited an eviction case, *Godellas v. Godellas*, 296 N.E.2d 876 (2nd Dist. 1973), for the proposition that a 'denial standing alone' will preclude judgment on the pleadings. The defendant also cited two other cases which cited Godellas but in a non-eviction setting. Those two cases were *Zipf v. Allstate Ins. Co.*, 369 N.E.2d 252, 256 (1st Dist. 1977), and *Allis-Chalmers Credit Corp. v. McCormick*, 331 N.E.2d 832 (4th Dist. 1975). I argued in reply (successfully) that Zipf and Allis-Chalmers did not state the correct test to apply when addressing a motion for judgment on the pleadings in a non-eviction setting.

The problem started with Allis-Chalmers. The plaintiff in Allis-Chalmers sought to recover the balance due on a lease of machinery. The defendant's answer asserted a defense that the equipment did not perform or operate properly. As a result of this asserted defense, judgment on the pleadings was properly denied. What was improper, was the standard used by the court in reaching this result. Specifically, the court made the following citation of authority:

> "Such denial standing alone is sufficient to preclude the entry of judgment on the pleadings (*Godellas v. Godellas*, 11 Ill. App.3d 871, 296 N.E.2d 876)…."

The court's reliance on this language in Godellas was incorrect. First, no such language appears in the Godellas decision. Second, Godellas was an eviction case brought against a husband and wife and the court determined that the wife should not be bound by the husband's admissions in his pleadings and that her denial of liability and special defenses she raised in her own separate answer and at the eviction hearing was sufficient to preclude judgment on the pleadings.

In sum, Allis-Chalmers got the right result because it identified a material issue of fact which precluded judgment on the pleadings, but it should not have cited Godellas—an eviction case—as a means to reach this result.

As an example of how a poor citation to authority can become magnified by later courts, we can look to the case of *Zipf v. Allstate Ins. Co.*, 369 N.E.2d 252, 256 (1st Dist. 1977). The plaintiff in Zipf brought suit against her insurance company ("Allstate") to recover benefits under her personal injury protection contract. As the basis of its ruling, the court stated, "The pleadings and the record…do not set forth any medical expenses nor the income lost for a determination of the weekly benefits to which plaintiff may be entitled." *Zipf v. Allstate Insurance Co.*, 369 N.E.2d 252, 256 (1st Dist. 1977). Accordingly, judgment on the pleadings was denied because of the fact that "[t]he amount of liability is not determinable from the pleadings." *Id.* This holding is correct. It applies the correct standard which is to deny judgment on the pleadings when there are disputed issues of material issues of fact.

Again, though, the problem is not with the ultimate holding, but with the fact that the court cites the wrong test. Zipf cites Allis-Chalmers for the proposition that:

> A denial of the amount claimed, standing alone, is sufficient to preclude the entry of judgment on the pleadings. *Allis Chalmers Credit Corp. v. McCormick* (1975), 30 Ill.App.3d 423, 331 N.E.2d 832." *Zipf v. Allstate Ins. Co.*, 369 N.E.2d 252, 256 (1st Dist. 1977).

As explained above, Allis-Chalmers mis-stated, and mis-applied, the ruling in Godellas. Godellas did not stand for the proposition that a "denial standing alone" will preclude judgment on the pleadings in a

commercial case. Allis-Chalmers was wrong to characterize the Godellas decision in this way, and Zipf was wrong to rely on Allis-Chalmers for this proposition. Godellas was an eviction case where one of the defendants raised five special defenses to the action in her written answer and an additional sixth special defense at the hearing on plaintiff's motion for judgment on the pleadings. She raised more than a "mere denial."

Correct Citation of *Godellas*

A more refined analysis and application of Godellas is provided by the 1st District case of *Samek v. Newman*, 518 N.E.2d 422 (1st Dist. 1987). Like Godellas, Samek is an eviction case involving a motion for judgment on the pleadings. In denying the motion, the court cited Godellas for the proposition that "[t]he assertion of [a] defense, albeit at the hearing rather than in their pleadings, raises the possibility of the existence of an issue of fact precluding judgment on the pleadings." *Samek v. Newman*, 518 N.E.2d 422 (1st Dist. 1987).

The *Samek* case correctly recognized that (1) the defendant in *Godellas* did raise defenses precluding judgment on the pleadings, and (2) the defendant in *Godellas* had the right to present those defenses at a hearing in addition to the pleadings.

In Practice

For this reason, it is important to carefully check that the citations you are relying on accurately state the law. Reviewing a common set of decisions regarding a legal concept is a better practice than simply finding one case that supports your contention.

As shown above, an attorney reviewing the Allis-Chalmers and Zipf decisions might conclude that a mere denial of liability in a written answer standing alone is sufficient to withstand a motion for judgment on the pleadings in a commercial litigation matter. But that is not a correct statement of the law. Both *Allis-Chalmers* and *Zipf* asserted a pleading standard in eviction cases which is different than other types of litigation because in an eviction case, the defendant has two opportunities to present their defenses, first in the written pleadings, and second at the eviction hearing. That is why a denial standing alone in a written pleading will be sufficient to overcome a motion for judgment on the pleadings in an eviction case.

No such right exists in non-eviction cases. A denial does not stand alone in a non-eviction case. It stands next to other admissions contained in the answer and must be weighed accordingly. As shown in the Continental case, a denial of liability does not negate judicial admissions and will not prevent judgment on the pleadings if that denial fails to raise an issue of material fact.■

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