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# Trusts and Estates Newsletter

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## Disputes Involving The Family Castle (or Cabin)

Thoreau's cynical, perhaps insightful, observation over 150 years ago is certainly true today: owning real property, whether a castle or a cabin, carries many responsibilities or even burdens.

Every fledgling law student learns that real estate is valuable because it is unique. Because every parcel is one of a kind, real estate disputes can present challenges beyond the usual squabbles over money. Throw in complex family dynamics, and you have a recipe for particularly contentious and emotional litigation.

Conflicts between family members involving real estate can arise in many ways. When the family members cannot resolve the conflicts on their own, litigation is often necessary to achieve a resolution. Most of the time, the litigation process will spur parties to reach a settlement on their own. But when emotions—whether rational and irrational—run high, or if the land at issue is very valuable, a trial is often necessary to settle a dispute.

The following scenarios describe some common ways family members sue each other over real estate and some legal concepts that often arise in such litigation.

### Complaint to Set Aside a Conveyance

A fairly common family dispute involving real estate occurs when an elderly or infirm person conveys real estate shortly before his or her death.

For example, Mom is a widow with two adult children, Ann and Tom. Mom is experiencing the early stages of Alzheimer's Disease. She still lives at home, but requires some assistance with her daily needs. She generally recognizes people but has trouble with short-term memory and has "good days and bad days." During this time, Mom signs a deed that conveys her house to her daughter, Ann.

Mom dies six months later without a will. If Mom had not conveyed the house to Ann, the house would pass to Ann and Tom in equal shares. But because Ann has a deed, she claims the house is hers.

Tom may consider filing a complaint to set aside a conveyance against Ann that alleges Mom did not have the mental capacity to understand the transaction. Tom may also allege that because Mom was vulnerable, Ann committed fraud against Mom or unduly influenced Mom to convey the property to Ann. Tom would need facts, likely obtained through expert medical testimony, to support his claim that Mom did not understand what she was doing. If a court finds that Mom did not have the legal capacity to convey the property, the court may set aside the conveyance. The property would then pass through the intestacy law to Mom's heirs. Under this scenario, Ann would still inherit half the property. If a court finds that Mom understood the consequences of the conveyance, Tom may be out of luck and Ann would get to keep the property.

### Petition to Partition

Another common problem results when someone executes a will leaving real estate to more than one person.

For example, Mom leaves her house to her two children, Tom and Ann. Tom has lived in the house his entire life and continues to live in the house for several years after Mom's death. During that time he pays taxes, utilities and maintenance costs. After several years, Ann wants her share of the house. What happens if Tom refuses to buy out Ann's fair market interest or refuses to sell the house and split the proceeds?

Ann may file a petition to partition. Such a petition asks the court to appoint a commissioner, usually an experienced real estate attorney, to sell the property through a private sale (usually where one owner buys out the other), a public sale (usually through a real estate agent) or a public auction (where the house is sold to the highest bidder). The commissioner pays the expenses of the sale, including his fee, from the sale proceeds and then usually distributes the net sale proceeds proportionately to the record owners.

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*"Our houses are such unwieldy property that we are often imprisoned rather than housed in them."*

*—Henry David Thoreau, Walden: Economy, 1854*

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MIRICK O'CONNELL

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Tom may seek an upward adjustment to his net share for expenses he has paid to maintain the house. Ann may counter that she is owed additional sums for her fair market share of rent for the time Tom lived rent-free in the property as well as half of the fees and expenses associated with bringing the petition. In the absence of an agreement, a court will determine an equitable distribution of the sale proceeds.

## Adverse Possession

Sometimes even a record owner can unwittingly lose ownership of a parcel of property.

For example, Mom has lived in her house for forty years. She has paid the taxes, utilities and maintenance costs. She has acted in all respects as the owner and has represented to the world that the house was hers. When Mom dies, her executor, Tom, discovers that the deed to the house has been in Uncle Joe's name for over forty years.

Even though Uncle Joe may be the record owner of the house, Tom, as executor, could bring a claim to quiet title against Uncle Joe under a theory of adverse possession. In order to prevail, Tom would have to prove that Mom occupied the property in an open, exclusive, notorious and non-permissive manner for more than twenty years. If Tom can prove these elements, a court may award title to Mom's heirs, to the exclusion of Uncle Joe, through the doctrine of adverse possession.

## Resulting Trust/Purchase Money Conveyance

Problems can also occur when someone pays for a house, but allows someone else to take title.

For example, Mom plans to buy a house. Using a power of attorney, Ann attends the closing on Mom's behalf and uses Mom's money to buy the house. At the closing, the deed is put in Ann's name. Mom and Ann both live in the house and contribute to expenses.

When Mom dies, Tom maintains that the house should be included in Mom's estate. Ann argues that the house was a gift to her. Tom argues that the acquisition was really a purchase money conveyance, i.e., one party paid the entire purchase price even though another party acquired title. Tom would argue that the court should impose a resulting trust for the benefit of Mom's estate because there is a general presumption that one who pays for property does so for her own benefit. If Tom and Ann cannot work out a compromise, litigation might be necessary to determine Mom's intent.

## Breach of Fiduciary Duty/Constructive Trust

Disputes between adult children and step-parents are a big source of probate litigation.

For example, Mom owns a house. Step-Dad is Mom's second husband. Step-Dad and Mom hold power of attorney for each other. Step-Dad uses the power of attorney to convey title in the property from Mom to Mom and Step-Dad as tenants by the entirety (as common for most ownership for married couples). When Mom dies, Step-Dad claims the house is his.

Tom and Ann might sue Step-Dad to set aside the conveyance based on Step-Dad's misuse of the power of attorney for his own self-interest. Tom and Ann might argue that a constructive trust for the benefit of Mom's heirs should be established, despite the fact that it is in Step-Dad's name, because of the breach of fiduciary duty and Step-Dad's unjust enrichment. Step-Dad would likely counter that Mom gave him permission to convey the property to himself and that Mom wanted him to inherit the property upon his death.

## Will Contest

A challenge to a will, or even just a threat to challenge a will, can cause much distress.

For example, in her will, Mom leaves her house and all her assets to Tom and Ann. Their sister, Jane, is left out of Mom's will. Jane badgers Tom about her plight and threatens Tom with a will contest challenging the will. Frustrated and angered by Jane's behavior, Tom hastily signs a document that says as follows: "I give my interest in the house to Jane." But Tom never executes a deed conveying his interest in the property to Jane.

Later, Jane sues Tom to enforce the so-called agreement. Jane claims Tom breached a contract to give the property to her. She claims the consideration was her promise not to challenge Mom's will. Tom claims that the agreement is void because it lacks consideration and because it violates the statute of frauds, a law that requires that all transactions of real estate be specified in clear terms in writing. A court would determine whether Jane has any claim to the house.

## Conclusion

The stories above are based in part on actual litigation cases with which Mirick O'Connell has been involved. The outcomes depend very much on the specific facts of each case. The key facts in these types of cases usually involve people's intent. Proving anyone's state of mind is always challenging, particularly when key witnesses have died.

Aside from moving to a cabin on a pond in Concord, the best way to avoid such disputes is to convey real property, in consultation with an experienced attorney. Also, it is important to understand that in any dispute one must assess not only the financial consequences, but also the long term, and possibly irreparable, family consequences. ■

## 2008: By the Numbers

Here's a summary of some of the important tax benefits in 2008:

- Annual exclusion from gift taxes (the amount an individual may give to an unlimited number of donees each year) remains unchanged at \$12,000; the annual exclusion for gifts to a non-citizen spouse increases to \$128,000.
- Federal estate tax exemption remains at \$2,000,000 per person, and the estate tax rate remains the same at 45%. The federal gift tax exemption remains at \$1,000,000.
- Massachusetts estate tax exemption remains at \$1,000,000 per person.
- Maximum 401(k) and 403(b) contribution amounts remain at \$15,500 per year. Workers 50 years of age or older in 2008 can continue to contribute an additional \$5,000 to their 401(k) and 403(b) plans, bringing the total contribution amount to \$20,500.
- Basic IRA contributions amounts increase to \$5,000 (up from \$4,000) plus individuals 50 years of age and older can continue to make an additional \$1,000 "catch up" contribution.
- The annual amount of earnings subject to social security taxes increases to \$102,000 in 2008, up from \$97,500 in 2007.
- The kiddie tax threshold increases to \$1,800, and will apply to children 18 and younger (and will also apply to children under the age of 24 who are full time students).
- The lowest federal long term capital gain tax rate is reduced to 0%, which will continue through 2010 (for individuals in the 15% or 10% rate bracket). ■

## Do You Know Where You Live?

What may seem to be a simple question can become complicated for people who own more than one home, due to the imposition of state estate tax based upon domicile. Domicile for estate tax purposes can be a complex question that can have substantial tax consequences. Since Massachusetts and many other states have enacted their own estate tax laws in the past decade, the question of domicile can literally be worth tens of thousands to hundreds of thousands of dollars.

The Massachusetts estate tax applies to all individuals who are domiciled in Massachusetts (or who own real property in Massachusetts) at the date of death. The exemption amount from estate taxes in Massachusetts is \$1 million and not scheduled to increase. In addition, the Massachusetts estate tax rate begins at approximately 5% and rises to over 15% of the value of the estate. Moreover, the exemption amount is a disappearing exemption, meaning that if your taxable estate is in excess of \$1 million, your estate will pay tax on the first \$1 million as well.

Due to the Massachusetts estate tax, many individuals consider moving their domicile to states without an estate tax, such as Florida or Nevada. However, switching domicile can be complicated, especially if you still own real estate in Massachusetts and spend part of the year here.

If you are considering changing your domicile, here are some of the more important changes you can make in the jurisdiction of your new domicile:

- Obtain a driver's license
- Transfer title to automobiles and obtain license plates and insurance
- Register to vote, and actually vote
- Execute new estate planning documents reflecting the change in domicile
- File income tax returns reflecting your new address
- Open new bank accounts
- Change address on all credit cards
- File declaration of domicile forms (if available)
- Join clubs/religious organizations, and attend
- Change address on passport
- Spend more than half the year in your new domicile

Please keep in mind that even if all these changes are made, Massachusetts can still challenge your domicile and seek to tax your estate upon your death. Please consult with your tax advisors if you are considering changing your domicile to ensure that your change has the greatest chance for success. ■