

## **Chapter 9**

### Real Property, Estates, and Family Law

#### **Chapter Outline**

1. Introduction
2. Real Property
3. Wills, Trusts, and Estates
4. Family Law

#### **Chapter Objectives**

After completing this chapter, you will know:

- The difference between real property and personal property.
- How one acquires, holds, and transfers ownership rights in property and what procedures are involved in the sale of real estate.
- Devices used in estate planning and the laws and procedures that come into play when property is transferred on a person's death.
- The legal rights and obligations of parents and children.
- How marital property and debts are divided when a marriage is dissolved.

## Chapter 9 Real Property, Estates and Family Law

### Chapter Outline

#### I. INTRODUCTION

- A. The topics of real property, estates, and family law are distinct bodies of law but are oftentimes interrelated.
- B. Many paralegals today specialize in these areas.

#### **What Is It?**

Next time you move, look at the document regarding your housing. Is it a lease? Is it a rental agreement? Is it a purchase with numerous documents, including a HUD statement, mortgage, or loan agreement?

#### II. REAL PROPERTY

- A. The law has divided property into two classifications: real property and personal property.
- B. Real Property
  - i. *Real property*, or *real estate*, is land and all things attached to the land, as well as the minerals below the surface of the land and the air above the land.
- C. Personal Property
  - i. *Personal property* is all other property. Personal property can be either tangible or intangible.
    - 1. *Tangible* personal property has physical substance, such as a television set or a car.
    - 2. *Intangible* personal property represents a set of rights and interests but has no real physical existence, such as stocks or bonds.
- D. Ownership Rights in Property
  - i. Property ownership is often viewed as a “bundle of rights.” One who owns the entire bundle of rights is said to own the property in *fee simple*.
    - 1. An owner in fee simple is entitled to use, possess, or dispose of the real or personal property however he chooses during his lifetime.
  - ii. Eminent Domain
    - 1. Under the power of *eminent domain*, the government has a right to take private property for public use as long as the government compensates the owner for the value of the land taken.
  - iii. Easement
    - 1. Property owned in fee simple may also be subject to an *easement*, which is the right of another to use the owner’s land for a limited purpose.
  - iv. Concurrent Ownership

1. *Tenancy in common* is a form of co-ownership in which two or more persons own undivided interests in certain property. The interest is undivided because each tenant has rights in the whole property. If a tenant in common dies, the tenant's ownership pass to his heirs.
2. A *joint tenancy* is a form of co-ownership where two or more persons own undivided interests in property with the "right of survivorship." When a joint tenant dies, that tenant's interest passes to the surviving joint tenant(s).
3. In a *tenancy by the entirety*, the co-owners are husband and wife. The spouses cannot separately transfer their interests in the property during their lifetimes.
4. In a few states, *community property* is all property acquired during the marriage; each spouse technically owns an undivided one-half interest in the property.

v. Life Estates

1. A *life estate* is an interest in real property that is transferred to another for the life of that individual.

vi. Future Interests.

1. A *future interest* is an interest that will only arise in the future—where property has been conveyed conditionally or for a limited period of time.

E. The Transfer and Sale of Real Property

i. Contract Formation: Offer and Acceptance

1. The common-law contractual requirements of agreement (offer and acceptance), consideration, contractual capacity, and legality all apply to real estate contracts.
2. The buyer normally gives a sum of money, called *earnest money*, along with the offer.
3. Once the offer is submitted to the seller, the seller can accept the offer, reject it, or modify its terms.

ii. The Role of the Escrow Agent

1. The *escrow agent* can be a title company, bank, or special escrow company.
2. The escrow agent acts as a neutral party in the transaction and facilitates the sale between the buyer and seller.

iii. Financing

1. Most buyers need to secure financing to pay for the real property.
2. The loan for the property is called a *mortgage*.

iv. Inspection of the Premises

1. Buyers may have the premises inspected to see if there are any problems of defects.
- v. Title Examination and Insurance
  1. A *title examination* involves checking county records to determine whether claims on the property exist that were not disclosed by the seller.
  2. The history of past ownership and transfers of the property is summarized in a document called an *abstract*.
- vi. The Closing
  1. The *closing* is coordinated by the escrow agent.
  2. A *deed* is the instrument conveying the ownership of the real property.
  3. *Closing costs* include fees for services performed by the lender, the escrow agent, and the title company.

#### F. Leases

- i. A *lease* is a contractual agreement allowing a property owner (*the lessor*) to rent his property to another (*the lessee*).

#### G. Property Law and the Paralegal

- i. Paralegals need an understanding of the law governing real property.
- ii. In a small legal practice, a paralegal will work in handling real estate transactions.
- iii. In large law firms, paralegals may specialize in real estate transactions.

### Where Will It Go?

Consider your property. Where would you like it to go after you die? A will attempts to ensure property is transferred and distributed as you want.

If no will exists, intestate succession laws will govern distribution of an individual's property.

### III. WILLS, TRUSTS, AND ESTATES

#### A. Wills

- i. A *will* is the final declaration of how a person desires to have his property disposed of after death.
- ii. The maker of a will is called a *testator*.
- iii. A will is referred to as a *testamentary disposition of property*.
- iv. One who dies having made a valid will is said to have died *testate*.
- v. One who has died without a valid will dies *intestate*.
- vi. An *executor* is a personal representative named in a will

- vii. An *administrator* is a personal representative appointed by the court for the person who died intestate or who failed to name an executor in the will.
- viii. Laws Governing Wills
  - 1. To *probate* a will means to prove or establish its validity.
  - 2. The administration of the estate is supervised by a *probate court*.
- ix. Requirements for a Valid Will
  - 1. A will must comply with state statutory requirements and formalities or it will be declared void.
  - 2. If a will is declared void, the decedent's property will be divided according to state intestacy laws.
  - 3. Most states require the following:
    - a. The testator must have testamentary capacity.
    - b. The will should be in writing.
    - c. The will must be signed by the testator, usually at the end of the document.
    - d. The will must be witnessed.
    - e. In some states, the will must be "published" (an oral declaration by the maker to witnesses that this is his "last will and testament").
  - 4. The Probate Process
    - a. Probate procedures vary depending on the size of the decedent's estate.
    - b. Property can be transferred by *affidavit* (a written statement).
    - c. A majority of states provide for *family settlement agreements*, which are private agreements among the beneficiaries, to settle the distribution of the decedent's assets.
  - 5. Trusts
    - a. A *trust* involves any arrangement by which legal title to property is transferred from one person to be administered by a trustee for another's benefit.
    - b. The *settlor*, or *grantor* is the one creating the trust.
    - c. The *trustee* is the one administering the trust.
    - d. The *beneficiary* of the trust receives the trust property.
    - e. Living Trusts
      - 1) A *living trust*, or *inter vivos trust* is a trust executed by a grantor during his lifetime. This may be an estate-planning option by the grantor.

- 2) Living trusts can be *irrevocable* when the grantor permanently gives up control over the property.
  - 3) Living trusts can be *revocable* when the grantor retains control over the trust property during his lifetime.
  - 4) To establish a living trust, the grantor executes a trust deed, and legal title to the trust property passes to the named trustee. The trustee preserves the trust property, which (unless the trust is revoked) passes to the beneficiary on the grantor's death.
- f. Testamentary Trusts
- 1) A trust created by a will to come into existence on the settlor's death is called a *testamentary trust*.
  - 2) If the will establishing the trust is deemed invalid, so will be the trust.
- g. Special Types of Trusts
- 1) A *charitable trust* is designed for the benefit of the public, usually for charitable, educational, religious, or scientific purposes.
6. Other Estate-Planning Devices
- a. A person can hold title to certain real or personal property as a *joint tenant* with a spouse. This allows the surviving tenant to automatically inherit the deceased tenant's share of property.
  - b. Another way of transferring property outside the probate process is by making *gifts* to children or others while one is still living.
  - c. Many people take out *life insurance* policies, the proceeds of which go directly to the beneficiary outside of probate.
7. Estate Administration
- a. *Estate administration* is the process of collecting a decedent's assets, settling his debts, and distributing all remaining assets.
8. Wills, Trusts, and Estates and the Paralegal
- a. Paralegals working for general law practices may be required to handle matters relating to this practice area.

- b. Paralegals working for larger law firms may specialize in estate planning and administration.

### **A Family Affair**

Family law involves many practice areas. It can include real estate, contract, debtor-creditor relations, and wills. Consequently, termination of a marriage requires detailed attention to these areas in drafting the necessary documents.

## IV. FAMILY LAW

### A. Marriage Requirements

#### i. Procedural Requirements

1. The parties must first obtain a *marriage license* from the state government, usually through the county clerk's office.
2. Many states also require a *blood test* to check for certain diseases.
3. Persons who are under age can marry with parental consent or if they are *emancipated*—having left home and supporting themselves.
4. A *marriage ceremony* is required in the majority of states; it must be performed by an authorized person.
5. The marriage license must be *recorded*.

#### ii. Same-Gender Couples.

1. No state currently legally recognizes same-sex marriages. In fact, about twenty-five states expressly prohibit such marriages.
2. In 2000, Vermont passed a law permitting homosexual couples to form "civil unions" for purposes of receiving state benefits, inheriting a partner's property, and medical treatment.

### B. Common-Law Marriages

- i. A *common-law marriage* is one in which the parties become married solely by mutual consent and without a license or a ceremony.
- ii. Today, only fourteen states and the District of Columbia recognize common-law marriages.

### C. Marital Duties

#### i. Financial Support

1. The law still holds that one spouse has a duty to support the other spouse and children financially by providing basics such as food, shelter, and medical care.

#### ii. Spousal Abuse

1. In all states, it is illegal to batter a spouse

2. A *restraining order* is a court order that requires one person to stay away from another.

#### D. Parental Rights and Obligations

- i. A *child* is an unmarried minor (under the age of eighteen) who is not emancipated.
- ii. Parents are obligated to provide food, shelter, clothing, medical care, and other necessities for their children.
- iii. Liability for Children's Wrongful Acts
  1. Parents are not liable for the wrongful acts of their children, *unless the actions result from the parents' negligence*.
  2. In half of the states, parents may be liable for their children's intentional torts.
- iv. Child Abuse and Neglect
  1. All states allow parents to physically punish their children within reason.
  2. All states prohibit sexual molestation and extreme punishment of children by anyone.
  3. Child neglect is a form of child abuse. Child neglect occurs when parents or legal guardians fail to provide for a child's basic needs, such as food, shelter, clothing, or medical treatment.
- v. Children Born out of Wedlock
  1. The law is evolving to provide added rights and protections for children born out of wedlock.
  2. One right is the right of the child to be supported by the biological father.
    - a. Paternity Suits
      - 1) An unmarried mother may file a *paternity suit* to establish that a certain person is the biological father of her child.
    - b. Inheritance Rights
      - 1) Under common law, an illegitimate child had no right to inherit.
      - 2) Today, generally, a child is treated as the child of the mother and can inherit from her and her relatives.
      - 3) The child is not regarded as the legal child of the father, for purposes of inheritance, unless paternity is established through a legal proceeding.

#### E. Adoption

- i. *Adoption* is a procedure in which persons become the legal parents of a child who is not their biological child.

- ii. Once the adoption is formally completed, the adoptive parents have all the responsibilities of biological parents.
- iii. *Foster care* is a temporary arrangement in which a family is paid by the state to care for a child for a limited period of time.
- iv. Requirements for Adoption
  - 1. Adoption laws vary from state to state, but there are three minimum requirements for an adoption to be legal.
    - a. The child's biological parents must give up their legal rights.
    - b. The adopting person must follow all state rules on adoption.
    - c. The adoption must be formally approved by a judge.
- v. Agency Adoptions
  - 1. Adoptions may be done through social-service agencies that are licensed by the state.
  - 2. Typically, in agency adoptions, the identities of the adoptive parents are kept confidential although, increasingly, state laws are allowing for disclosure of this information in certain circumstances.
- vi. Independent Adoption
  - 1. An *independent adoption* is one that is arranged privately.
  - 2. Because this adoption method has the potential for abuse, it is prohibited by some states.
- vii. Stepparent Adoption
  - 1. This occurs when a married partner adopts his or her spouse's children from a former marriage.
  - 2. Usually, the parental rights of the children's other biological parent are terminated either by consent or a court proceeding.
- viii. Court Approval and Probation
  - 1. All adoptions must be approved by the court.
  - 2. After the adoption, many states place the new parents on probation for a time to ensure that they are caring appropriately for the child's well-being.

## F. Marriage Termination

### i. Annulment

- 1. An *annulment* is a court decree that invalidates a marriage.
- 2. This means that the marriage was never in effect in the first place.
- 3. Examples of grounds for an annulment are a lack of consummation, *bigamy* (marrying one person while

being already legally married to another), or if the marriage was based on fraud or duress.

4. Children born during the marriage are considered legitimate in the eyes of the law.

## ii. Divorce

### 1. Fault-Based versus No-Fault Divorces

- a. A *fault-based divorce* is one where grounds are alleged, such as adultery, desertion, cruelty, or abuse.
- b. A *no-fault divorce* may be based on grounds of irreconcilable differences, living separately for a period of time, or incompatibility.
- c. The majority of states permit *both* fault- and no-fault based divorces.

### 2. Divorce Procedures

- a. A *petition for divorce* is filed with the appropriate state court.
- b. The petition is served on the other spouse, who must file an answer.
- c. The court holds a hearing to decide issues such as spousal and child support. After trial, the judge decides the terms of the parties' final divorce decree.

### 3. Negotiation and Mediation

- a. Very few divorces actually go to trial. Usually the parties settle differences prior to trial.
- b. If the parties agree to a settlement concerning contested issues, the agreement is put in writing and presented to the court for its approval.
- c. Divorcing spouses increasingly use mediation to settle disagreements. In some states, mediation of divorce cases is mandatory.

## G. Child Custody

- i. *Child custody* is the right to live with and to care for the children on an everyday basis.
- ii. The court may appoint a *guardian ad litem* to represent the interests of a child or mentally incompetent person before the court.
- iii. Factors Considered in Determining Child Custody
  1. The nature of the relationship and emotional ties with each parent
  2. The ability of each parent to provide for the child's needs and education and each parent's interest in doing so

3. The ability of each parent to provide a stable environment for the child
  4. The mental and physical health of each parent
  5. The wishes of the child.
- iv. Types of Custodial Arrangements
    1. The parent who has *legal custody* of the child has the right to make major decisions without consulting the other parent.
    2. Many states now provide for *joint custody*, or shared custody, of the children. Joint legal custody mean that both parents together make major decisions about the child.
  - v. Visitation Rights
    1. Typically, the non-custodial parent receives *visitation rights*—the right to have contact with the child.
    2. In some situations, the court may order supervised visitation to ensure the child's safety.
- H. Child Support
- i. The court will make provision for *child support*—the financial support necessary to provide for the child's needs.
  - ii. States now have official, standardized guidelines to determine child support.
- I. Spousal Support
- i. *Alimony* is money paid to support a former spouse.
  - ii. Texas has prohibited court-ordered alimony payments.
  - iii. Types of Alimony
    1. *Permanent alimony* must be paid until the former spouse remarries or dies.
    2. *Temporary, or rehabilitative alimony*, is designed to provide the ex-spouse with education, training, or job experience necessary to support himself or herself.
  - iv. The amount of the alimony award usually depends on the specific circumstances of the parties.
- J. Property Division
- i. A *property settlement* is the division of property of the parties divorcing.
  - ii. Most property settlements are guided by state law.
  - iii. *Marital property* is all property acquired during the course of the marriage, apart from inheritances and gifts received by one spouse.
  - iv. *Separate property* is property that a spouse owned before the marriage, plus gifts and inheritances acquired during the marriage.
  - v. *Community property* is recognized in nine states. This is property acquired during the marriage is owned equally by both parties, no matter which party acquired it.

vi. Equitable Distribution

1. All other states provide for *equitable distribution*—dividing property according to the equities of the case.
2. States consider factors such as the duration of the marriage, the health of the parties, and the needs of children in determining the equitable distribution.

K. Prenuptial Agreements

- i. A *prenuptial agreement* (also known as an *antenuptial agreement*) is a contract between the parties that is entered into **before** marriage and that provides for disposition of property in the event of a divorce or death of one of the spouses.
- ii. Most states now uphold prenuptial agreements.

L. Family Law and the Paralegal

- i. The opportunities for paralegals in the area of family law are extensive.
- ii. Paralegals involved in a general law practice will likely be involved in family law matters such as adoptions and divorce cases.