

Illinois Legal Update

Insights and Developments in the Law

Spring 2008

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What Is Marital Property?

One of the more contentious aspects of a divorce can be dividing the divorcing couple's property. The Illinois Marriage and Dissolution of Marriage Act defines what property is subject to division ("marital property") and what property each spouse may keep

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("nonmarital property"). Similar to a bankruptcy proceeding, where a bankruptcy court identifies and gathers a debtor's assets for distribution to creditors, a divorce court will identify marital property for an equitable distribution between the divorcing spouses.

The law presumes that all real and personal property acquired by either or both spouses during the marriage is marital property. That presumption can be difficult to overcome. For example, even

though one spouse holds title to a house in his or her name only, it may be deemed marital property if it was acquired after the wedding date. If one spouse owns separate property, an increase in the value of that property or any income from it is also marital property. Gifts given to the couple are deemed marital property subject to distribution.

Property belonging to one spouse before the marriage remains his or her separate nonmarital property. Marital property does not include gifts to an individual spouse if the spouse can overcome the marital presumption by showing that the gift was not intended for both spouses. A spouse's individual inheritance is another exception to the general presumption, because an inheritance is considered nonmarital property.

However, nonmarital property can become marital property under the legal doctrine of transmutation. Nonmarital property can transmute to marital property or become a gift to the marriage if the couple treats it as such (for example, by titling one spouse's house in both names). If a couple commingles marital and

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Failure to Warn of Threats

A business deal gone wrong led the Illinois Supreme Court to hold that people generally have no obligation to warn others of the possibility that a third person might commit a crime.

The case involved a partnership formed to develop a strip mall. The deal went bad, and one partner was forced to sell his interest. He told some of the other partners that he was so unhappy that he planned to shoot the partner he blamed for his losses, but the other partners never warned the target. Eventually, the

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unhappy partner did as he had threatened and shot his former partner.

The partner who had been shot sued the other partners that knew of the threats, claiming that their knowledge gave rise to a duty to warn him. The case ultimately reached the supreme court, which disagreed with the argument and dismissed the case. The court found that the law only imposed a duty to take reasonable steps to protect people from crimes in limited circumstances, such as an inn-keeper-guest or a business-patron.

Because the partners were not related in a way that gave rise to a duty to protect, the court ruled that they were not obligated to warn the target. Specifically, the court found

that, although the parties were business partners, the shooting was not directly related to the partnership business, and the risk of not warning the target did not “arise from the particular nature” of the business. Because the shooting was not closely enough related to the partners’ business, the partners had

no legal duty to warn.

This case highlights an important point: Although carelessness causes injuries, a person is not liable for injuries to another unless he had a duty to act. If there is no duty, there is no liability, no matter what the connection between an act or omission and an injury.

Joy-Riding Teen Covered by Parents’ Insurance

We buy insurance to protect us against unexpected losses. Unless insurance protects against those losses, it is not worth very much. As a recent case shows, covered losses can occur even if you are doing something you should not be doing.

The case involved a teen who was visiting a friend who was housesitting for a teacher. They decided to “borrow” the teacher’s car without permission, and, while driving around, they had a collision. The visiting teen was badly injured.

His injuries were not covered by the owner’s insurance, because the teens did not have the teacher’s permission to drive the car. The injured teen then made a claim on his parents’ uninsured motorist policy, which the insurance company denied. It claimed that the injured teen had been “using” the teacher’s car, and the uninsured motorist policy did not cover injuries arising from “use” if the use was without permission. The teen

argued that he was merely a passenger, and so he had not been “using” the car but rather “occupying” the car, and therefore the policy should cover him.

The court agreed with the teen. It looked to the terms of the policy, which defined “use” as the “ownership, maintenance or use.” Because passengers usually do not own the vehicle and are not typically responsible for maintenance, the court found that the teen had not been “using” the vehicle. It went on to note that the purpose of uninsured motorist coverage was to provide coverage “on as broad a basis as possible where no other coverage is available,” and that accepting the insurance company’s argument would unnecessarily restrict coverage.

Although the teen made a bad decision, the insurance that his parents purchased protected him from some of the consequences of his decision, just as it is supposed to do.

Intrafamily Loans Subject to Tax Laws

For parents with the financial means to do so, there may be a natural impulse to help a child get started in his or her adult life by making a loan to the child, on terms that are favorable to the child. Notwithstanding the virtues of such generosity, the cold reality is that, if the terms are too favorable to the child, the loan could end up with some undesirable tax consequences.

The better choice may be to go forward with the loan, but with the child repaying the loan with enough interest to avoid the tax bite. Think of this approach as generosity tempered with practicality and as a borrowing position for the child that is closer to the “real world” marketplace.

For a loan from a parent to a child, the IRS measures the interest rate on the loan against a benchmark interest rate, the “applicable federal rate” (AFR), which it sets each month. Currently, that rate is about 5%. To the extent that the interest due on the loan is less than the interest calculated with the AFR, that amount will be “imputed” income to the parent, even though it was not in fact collected by the parent. The IRS will also treat the same amount as a gift to the child, requiring the filing of a gift tax return. (There would be no gift tax due, however, unless the parent had used up the \$1 million lifetime gift tax exclusion.) From the standpoint of the child’s taxes, he or she may be able to deduct the

amount of the imputed interest on a loan secured by a residence.

Exceptions

There are two important exceptions to this scenario. If the amount of the loan to a relative does not exceed \$10,000, and the loan is not used for an income-producing investment, the IRS will not impute any interest. In addition, loans of up to \$100,000 do not lead to imputed interest if the borrower’s net investment income in a given year does not exceed \$1,000.

To avoid the income tax or gift tax ramifications for all kinds of intrafamily loans, the simplest approach is to use an interest rate that is at least as high as the AFR. Also, although it may seem unduly formal among relatives, it is advisable to set forth the terms of the loan in a written agreement, signed by all parties. Not only does this protect against faulty memories, but it decreases the odds that the IRS will consider the entire transaction to be a gift rather than a loan.

Scaffold Accidents and Injuries

Construction workers have one of the most dangerous occupations, with thousands of people killed on jobsites every year and many more injured. Some of the most common construction accidents involve scaffolds or other types of lifts. These accidents can be very serious and usually result either from falls due to defective scaffolding or from objects plummeting from scaffolding that injure a worker below.

Unfortunately, suits involving injured construction workers are often more difficult to handle than other kinds of injury cases. An injury or death at a construction site involves the acts of many workers employed by different companies, each of whom is pointing at someone else as the party responsible. The question of liability can turn on whether a party is the property owner, the general contractor, the subcontractor, or someone else. Because of these complexities, it is vital to have a lawyer involved in a construction injury case ASAP.

If you or a loved one has been injured on a construction site, contact our office and let us go to work for you.

Resolution of legal issues depends upon many factors, including variations of facts and interpretations of Illinois law. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

The Murky Waters of Wetlands Protection

It has been over a year since a splintered United States Supreme Court issued a decision on the scope of the federal government's jurisdiction under the Clean Water Act to regulate wetlands. In that time, confusion has reigned as lower courts have interpreted the decision. The Act, now 35 years old, prohibits dumping certain pollutants into the "waters of the United States," which are defined as "navigable waters." Property owners of isolated wetlands have the "murky" task of determining whether their property is protected or not.

The question before the Court was whether wetlands into which fill material was deposited were "navigable waters." The Court set forth a confusing standard to guide the analysis. On the one hand, it said that the term "navigable waters" includes only relatively permanent, standing, or flowing bodies of water, not intermittent or ephemeral flows of water, and that only those wetlands with a continuous surface connection to such waters are covered by the Clean Water Act. At the same time, it said that wetlands may be protected by the Act if they have a "significant nexus" to navigable waters or could "affect the chemical, physical and biological integrity of other covered waters." Lower courts have been split as to which standard to apply.

In an effort to clarify, the Environmental Protection Agency and the U.S. Army Corps of Engineers have published a Guidance that identifies those waters over which the two agencies will assert jurisdiction categorically and on a case-by-case basis. (Go to www.epa.gov.) Essentially, the agencies have not picked one of the competing stand-

ards from the Supreme Court over another, but instead will use both of them.

There definitely will be assertion of Clean Water Act authority over wetlands that abut tributaries that come within the "relatively permanent" standard. This refers to tributaries that typically flow year-round or that have continuous flow at least seasonally. Wetlands adjacent to waters not fitting in the

"relatively permanent" category will be assessed on a case-by-case basis, using the "significant nexus" test. Perhaps eager to make some kind of pronouncement that is unequivocal, the authors of the Guidance also state that Clean Water Act authority will not be stretched so far as to cover swales, gullies, and ditches that drain only uplands and do not carry a relatively permanent flow of water.

Marital Property

Continued from page one.

nonmarital property so that it is impossible to separate them, the property transmutes to marital property. However, property acquired during the marriage in exchange for property owned by one spouse prior to the marriage is nonmarital property, such as a car purchased entirely with one spouse's premarital savings. The distinction lies in carefully maintaining premarital property separate from marital property so that it will retain its nonmarital character.

To preserve the nonmarital status of property, a spouse should act consistent with that intent. For example, a spouse should maintain sole title to inherited property or gifts. Also, a spouse should keep accurate records that demonstrate the nonmarital character of certain property. Nonmarital accounts should be kept segregated from marital accounts, and financial records should separately reflect the appreciation of and income earned on nonmarital property.

To avoid a court's intervention and the statutory definitions of marital and nonmarital property, a couple may determine how property is to be distributed by preparing a valid, written agreement. A couple's agreement defining marital and nonmarital property may take the form of a prenuptial agreement, or a couple may enter into such an agreement during the marriage.

Did You Know?

Illinois is now a smoke-free state. Smoking is prohibited in almost all enclosed public places and workplaces, and within 15 feet of an entrance. Smoking is not restricted in private homes, retail tobacco stores, rooms used only by smokers in nursing homes, and designated hotel sleeping rooms. Violations of this new law carry a minimum \$100 fine.