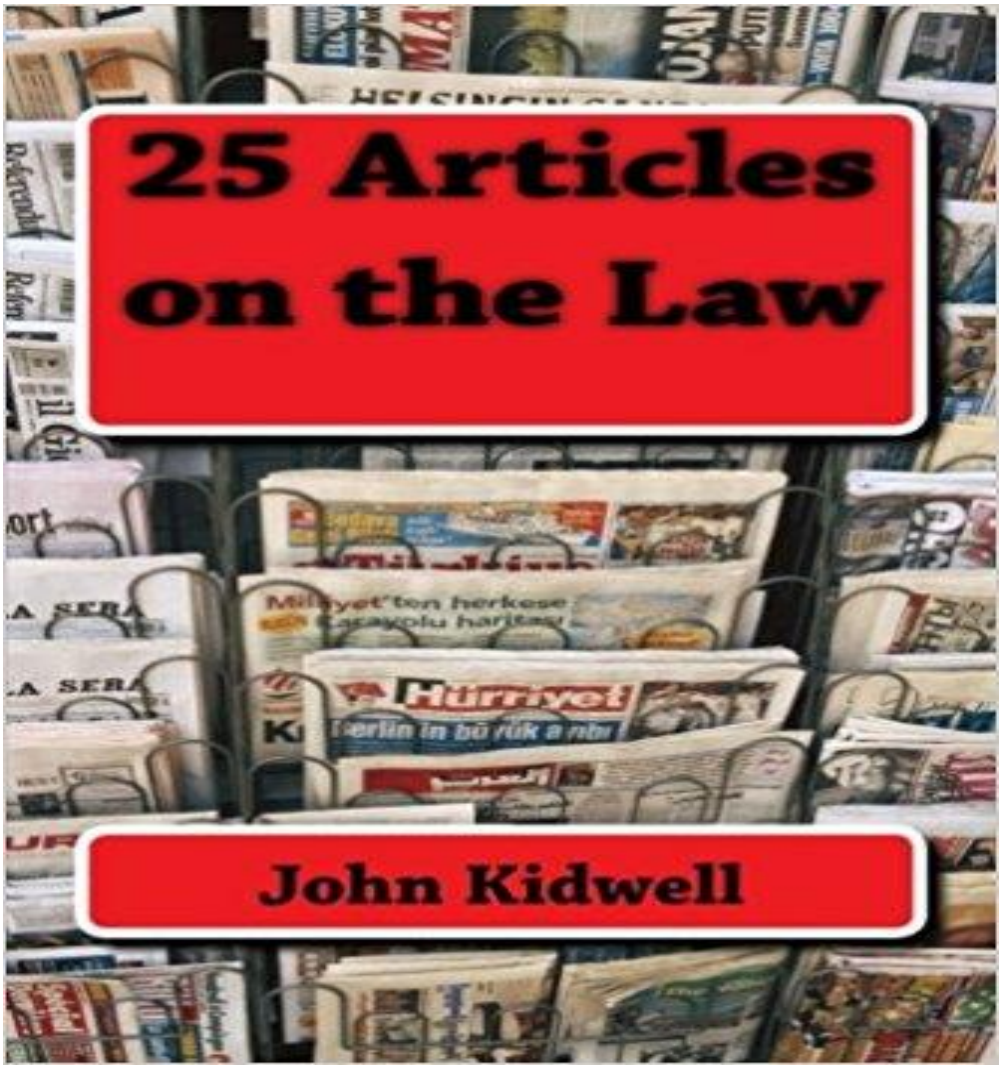
25 Articles on the Law
John Kidwell

25 ARTICLES ON THE LAW

BY

JOHN KIDWELL

FORWARD

John Kidwell, Esq., has written numerous articles on myriad legal subjects for community newspapers of common circulation in Northern Virginia. John took up the mantle of writing for local papers after his father, who had authored for years, passed away.

This book is a compilation of articles written by John and his father, Kent Kidwell, before him. John dedicates this book to his father's memory.

ABOUT THE AUTHOR

John Kidwell is the Owner and President of the Law Offices of Kidwell & Kent, in Fairfax, Virginia.

Mr. Kidwell writes a periodical newspaper column on legal topics in community newspapers published in Northern Virginia, and teaches courses in real estate law at real estate brokerages and financial advisory firms. He conducts seminars on real estate law and wills, trusts and estate planning throughout the area.

Mr. Kidwell is also a published author on the topic of law and politics.

In 2013 Mr. Kidwell was selected by the Heritage Registry of Who's Who as a top attorney in North America and as a pillar of the community for his work as an attorney and continued dedication to charitable contributions.

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A STRONG LEASE

I am the owner and landlord of a single family home in Fairfax, Virginia. I entered into a written lease agreement with the tenants but the tenants have not paid their rent for the last three months. What procedures do I follow to evict the tenants? Also, I used a form lease agreement that I downloaded off the internet, does that matter?

-Jeff, Alexandria, VA

First, I feel it is prudent to note that there are a number of facts not given in the above question that I would want to know before counseling anyone on how to proceed to evict a tenant, and I recommend that landlords seek the advice of an attorney at law before moving to evict their tenants.

Certain facts, such as how many properties the landlord currently leases are important to know, as those facts will determine which law will apply in the matter. For instance, dependent upon the number of properties leased by the landlord, the terms of the lease may or may not be subject to the Virginia Residential Landlord and Tenant Act, Virginia Code §§55-248.2 - 55-248.40, as amended.

Further, I would always want to review the lease agreement, if any, as the lease, which is a contract between the landlord and

tenant, can and often does waive and/or amend certain protective provisions within the Virginia Code. The inclusion or absence of certain provisions in the lease agreement will also let me know certain things such as whether the landlord can sue for attorney's fees, late charges, and the costs of suit.

For purposes of discussion, however, I will assume that the landlord rents only one single family residence in Virginia. As such, the provisions of the Virginia Residential Landlord and Tenant Act would not apply; the provisions of the Virginia Landlord and Tenant Act, Virginia Code §§ 55-217 — 55-248, would instead be applicable.

Therefore, assuming the lease agreement does not stipulate otherwise, the landlord will have to take the following steps to evict their unruly tenant: First, the landlord must serve a five day pay or quit notice upon the tenant notifying the tenant in writing of their default in the payment of rent. The five day pay or quit notice must further notify the tenant that should the default continue for five days after notice the landlord will require possession of the premises or the payment of rent and the tenant will forfeit their right to possession of the property.

In the event that the tenant fails to pay the amounts due within the five day period the landlord may file an unlawful detainer action in the county in which the property is located. Whether the case is filed in the general district court or circuit court of the county depends upon the amount of damages claimed and sometimes whether it is a residential or commercial lease. As abovementioned, the amount for which the landlord can pray for in damages depends upon the provisions of the lease agreement.

The unlawful detainer summons must be served upon the tenant, summoning them to appear at a particular hearing date and time to answer the summons. This is known as the first return. In the General District Court of Fairfax County the first return must be set for at least thirty days after the filing of the unlawful detainer and is always set for 9:30AM on a Friday.

The tenant will often not appear for the first return to admit or deny the assertions made in the unlawful detainer, in which case a default judgment may be granted for the amount prayed for in the unlawful detainer and for possession of the property. If, however, the tenant appears for the first return and denies the assertions made in the unlawful detainer, a trial will be set and pleadings may be ordered.

In an effort to keep this article short and to the point I have glossed over much of the above and so I caution readers that there are many factors I did not touch upon. For instance, the process of evicting a tenant does not end with simply obtaining an order of possession; after the appeals period a writ of possession must be handed down by the clerk of the court for the sheriff to execute. Further, the landlord must take additional steps to collect on the judgment, including but not limited to conducting debtor's interrogatories and garnishing the tenant's wages.

In regards to using a lease agreement downloaded from the internet: As a general rule, I would always be weary of downloading any legal form off the internet or purchasing them from a retail establishment. These "quick" forms are often insufficient for the purposes they are intended. More often than not, the forms cover the general concepts but leave out very important details that should be explicitly covered.

Landlords, in particular, should be weary of using form leases downloaded off the internet. Landlords take a very large risk when leasing their property, in essence subjecting their real estate to relatively unknown occupants. The landlord should do everything they can to protect their investment and the easiest way to do that is to use a lease agreement that explicitly covers details a downloadable form most probably will not. Details such as whether the prevailing party in a suit to enforce the terms of the lease will or will not be entitled to reasonable attorney's fees and court costs; provisions providing for the payment of late fees should rent not be timely paid; provisions explicitly delineating notice requirements,

subletting restrictions; articles covering holdover scenarios and much, much more.

A PICKY ARC

I live in a small subdivision in Western Fairfax County. I live on a pipe stem with six other houses. My lot and two of my neighbors' lots on our side of the road slope sharply from about the middle of our front yards to the pipe stem. My husband and I do not want to mow the area on the slope because it's hard to mow and actually a little dangerous so we planted ivy as a ground cover.

My problem is that one of my neighbors across the pipe stem does not like the ivy. She is on the Architectural Control Committee of the subdivision and she has persuaded the other two committee members to require us to dig up the ivy and plant grass. The Restrictive Covenants state that "Except for flower gardens, shrubs, and tress... all open lot areas shall be maintained in lawns or other ground cover approved by the Architectural Control Committee."

It seems ridiculous to me that we cannot plant ivy. Is there anything we can do legally?

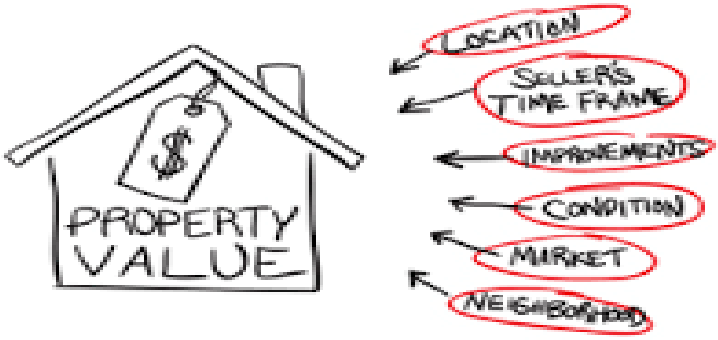
- Joyce, Clifton, VA

Restrictive Covenants are generally enforceable if they are reasonable in purpose and scope, and if they are fairly administered. In your case the question is whether it is reasonable for the Architectural Control Committee to withhold approval of ivy as a

ground cover on your property.

On its face, it seems ridiculous to me, too, that ivy is unacceptable as a ground cover, generally, or specifically on your lot. I wonder if there are other lots in your subdivision with ivy as a ground cover. If so, have those lot owners received ACC approval? If the ACC has not bestowed approval, have those lot owners been notified to uproot the unacceptable ground cover? Are you receiving discriminatory treatment? I wonder if there are any vegetable gardens in your subdivision. Is ivy objectively offensive or does it simply offend your neighbor's sense of aesthetics?

These are some of the questions that you might want to focus on when you appeal the decision of the ACC to the Board of Directors of your subdivision. A home owner who is aggrieved by a decision of an ACC has the right to appeal to the Board of Directors so that some small measure of due process is preserved in the administration of private laws.



A LOW APPRAISAL

I am in the process of refinancing my house, but the appraiser the mortgage company sent out has undervalued my property by at least $100,000. Is there anything I can do to remedy the situation?

- Alex, Mclean, VA

The job of a real estate appraiser is to determine the fair market value of real property. Fair market value is the amount a willing buyer will pay to a willing seller who is under no constraint to sell. There is room for subjectivity.

Appraising is an art, not a science. You should contact the appraiser who did your appraisal, if possible, and present to him the evidence which you believe substantiates a higher value on your property, such as recent comparable sales in your subdivision. Perhaps he will be persuaded to change his figure.

Reputable and competent appraisers will admit any error and change the appraised value. If he refuses to do so, you could commission an appraisal yourself and present that appraisal to your lender as evidence of the value of your house. You should be sure to employ an appraiser who is a member of the American Institute of Real Estate Appraisers.

Consider soliciting the preparation of a Broker's Price Opinion from a real estate agent in the area. Often times, these opinions can be provided to an appraiser and will give them information that they perhaps failed to consider before.

There is always the possibility, however, that the fair market value of your property really is significantly less than what you believe.

THE ESSENTIAL ESTATE PLANNING DOCUMENTS

I would like to plan my estate but have no idea where to begin. I have researched the topic on the internet and find only a dizzying array of differing advice. What documents would you recommend I have in place to insure that my wife and children are properly cared for should I pass away?

-Jerry, Alexandria, VA

Each person's estate requires individualized scrutiny, depending upon their goals, their financial situation and their health, and so I would always advise my readers to consult an attorney about their individual needs. Generally, however, there are three separate documents that one should always have when considering their estate planning. Those documents are as follows:

1. Last Will and Testament or Revocable Living Trust:

Most people, at least on a general level, are familiar with these documents. A will is a legal document expressing the desires of the

author (testator) with regard to the disposition of property after his/her death.

A Revocable Living Trust is an instrument created for the purpose of holding ownership to an individual's assets during his or her life and for expressing that person's desires for the disposition of their property after death. Revocable Living Trusts can have two beneficial features for someone's estate. A married couple with trusts in place can effectively double the estate tax exemption amount (the amount of net worth above which an estate is levied – currently $5 million) by setting up the trust in a certain manner. Probate can also be avoided with a trust.

If one dies without one of the above documents, they die intestate and his or her estate will be subject to the statutes of descent and distribution promulgated by the Code of Virginia. This should always be avoided, since, often, the statutes provide for the distribution of estates in ways that differ from the true desires of the deceased.

2. General "Durable" Power of Attorney:

A power of attorney is a legal document in which the grantor, or principal, grants to someone, known as the agent, the power to act as his or her "attorney-in-fact", authorizing the agent to act on their behalf in regards to all legal or business matters. A power of attorney may be "specific" or "limited" to one specified act or time, or it may be "general." Under the common law, a specific power of attorney becomes ineffective if its grantor dies or becomes "incapacitated," or unable to grant such a power because of physical injury or mental infirmity. However, under a General Durable Power of Attorney, the grantor specifies that the power of attorney will continue to be effective even if the grantor becomes incapacitated. Hence, the power of attorney endures incapacitation and is not specific to a particular act.

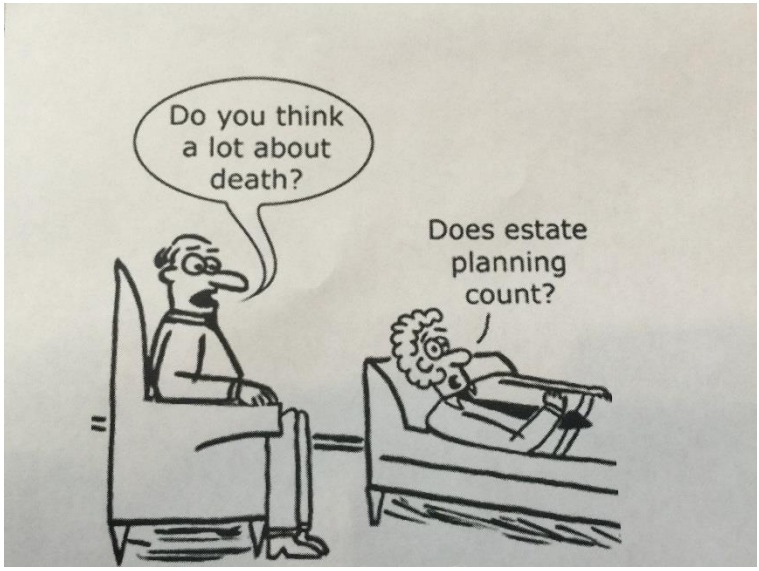
3. Advance Medical Directive:

The Advance Medical Directive is a two part document. The first part of the document is called the "Living Will." In a Living Will, the maker states that should an attending physician determine that providing life saving support would do nothing further than to artificially prolong the maker's life, then the maker directs the physician to withhold treatment, except for the provision of pain medication and the provision of water so that the maker may die comfortably.

The decision whether or not to have a Living Will in place is both a moral as well as a legal consideration. However, if you would prefer your money pass to your loved ones rather than to doctors and insurance companies, it is absolutely imperative to have a Living Will in place. Moreover, since the Living Will clearly and explicitly directs what shall be done should the fateful situation arise, executing the document takes the onus of the decision to terminate life prolonging procedures off of your loved one's shoulders.

The second part of the Advance Medical Directive is the Medical Power of Attorney. The Medical Power of Attorney is much like the General or Specific Power of Attorney, except that the principal appoints an individual to direct their health care decisions should the principal be unable to do so by reason of incapacitation. It is possible, by the way, to have a Medical Power of Attorney without a Living Will; it is when you combine both documents into one that it is an Advance Medical Directive.

With regard to the General Durable Power of Attorney and the Advance Medical Directives, they are both extremely important to have in place. If you do not have either of the documents in place when incapacitated, someone, such as a family member, must petition the court to become appointed guardian and/or conservator of your person and estate. This process is time consuming, costly, and public, but it can be avoided just by having these documents in place.



THE RESIDUARY CLAUSE

My mother passed away a few weeks ago and I am apparently named as the executor under her Last Will and Testament. She had assets in a number of different holdings with many different companies. Her Will says that the "rest residue and remainder" of her estate is to pass to myself and my two siblings. How do I know what constitutes the rest residue and remainder of her estate?

-Jessica, Alexandria, VA

Despite the seeming simplicity of Jessica's question, it is actually quite loaded.

The provision Jessica speaks about in her mother's Last Will and Testament is commonly referred to as the residuary clause. Commonly, the clause will read as follows: "I hereby give, devise and bequeath all of the rest, residue and remainder of my estate and property of whatsoever nature or wheresoever situate to which I may be legally or equitably entitled or over which I may have a power of appointment unto my..." The question, then, is what constitutes the

residue of the testator's estate. Or, more succinctly, what does the residuary clause govern to pass in a testator's estate?

Property, both real and personal, passes in a number of different ways upon death. The best way to think of a Last Will and Testament, specifically the residuary clause, is as the catch net of a person's estate, literally catching and governing the passage of all property not passing by any other means. I will explain.

Property passes at death by any one of the following means: survivorship, contract, the testamentary provisions of a Last Will and Testament or a Revocable Living Trust, or by the provisions of the Virginia Code's Statutes of Descent and Distribution.

Let's start with survivorship. Many of my readers own real estate, perhaps with their significant other. It is likely, then, that the deed to their real estate vests title in them as "tenants by the entirety with common law right of survivorship" or, if unmarried, as "joint tenants with common law right of survivorship." For purposes of this discussion, we are concerned with the common law right of survivorship. Now, let's assume a husband dies. What happens to his real estate? If the deed is titled with common law right of survivorship, the other named individual on the deed, assumably his wife, automatically, by operation of common law, owns the property in its entirety. The husband's Last Will and Testament could state that the property goes to someone else, but this would not matter, as title takes precedence over a will.

What happens, though, if the husband has predeceased the wife and now the wife dies? How does the property pass to their children? In this example, the title does not provide for any common law right of survivorship to the children. As such, the passage of the property needs to be governed by some other document. In comes the Last Will and Testament. The real estate falls into the residuary clause of the will and passes pursuant to the terms of the will.

Another way property passes at death, as abovementioned, is by contract, or beneficiary designation. IRAs, 401ks, Investment

Accounts, Life Insurance policies, and even checking and savings accounts, can all pass by contract, provided beneficiaries or payable on death designees are named on the account.

Let's use a Life Insurance Policy for explanation. Assume that Jessica opens up a life insurance policy and names her husband as the primary beneficiary upon her death. Whoever holds that policy, let's say Smith Barney, is contractually obligated to pay the value of the life insurance policy to the named beneficiary upon Jessica's death. Again, her will could say it goes to John Doe down the street, but that would not matter. Contract takes precedence over a Last Will and Testament.

But, what happens if Jessica's husband has predeceased her? Smith Barney, when presented with Jessica's death certificate will realize that they are unable to pay the life insurance over to her husband as he is no longer alive. Smith Barney, in this example, would then have to look to some other document for direction as to whom they should pay the policy. In comes the Last Will and Testament. The Life Insurance Policy falls into the residuary clause of the will and passes pursuant to the terms of the will. The catch net of the estate!

The residuary clause of a Last Will and Testament also governs the passage of the testator's personal property, i.e. automobiles, family heirlooms, furniture, etc., assuming, however, that other provisions in the Last Will and Testament do not explicitly mention a particular item. For instance, if a will states that a specific car is to go to Uncle Bob, and the residuary clause provides that the residuary of the estate is to pass to the testator's children equally, Uncle Bob gets the car.

As a word of caution, I have glossed over the passage of property at death in an effort to minimize the length of this article. I always advise my readers to contact an attorney for counsel and assistance with the administration of any estate as well as in the preparation of estate documents.

CHRISTMAS AND JUSTICE

The sights, smells, and sounds of the holiday season conjure up images of warmth, security, home and hearth. The picture of a living room or family room decorated for the holidays with a fire flickering in the fireplace as children frolic in their pajamas around a brightly lit Christmas tree and the aroma of cinnamon spice wafts in from the kitchen warms our hearts and evokes memories of childhood celebrations of the holidays. "It's a Wonderful Life" or "A Christmas Carol" would be playing on the television (colored version), or seasonal music and carols would be playing on the stereo.

Unfortunately, not all scenes of domestic security endure the sometimes harsh reality of financial travail. A case in point is the near tragic circumstances experienced by a family represented by me. The husband and father lost his job because he had been injured in an automobile accident. The income of the wife and mother was not sufficient to pay all of the bills, including the mortgage on their home. They became delinquent in their mortgage payments and after several warnings the bank instituted foreclosure proceedings. Belatedly, the couple sought legal assistance, and fortunately the husband and father had not released the driver and owner of the other vehicle involved in the accident from liability for personal injuries.

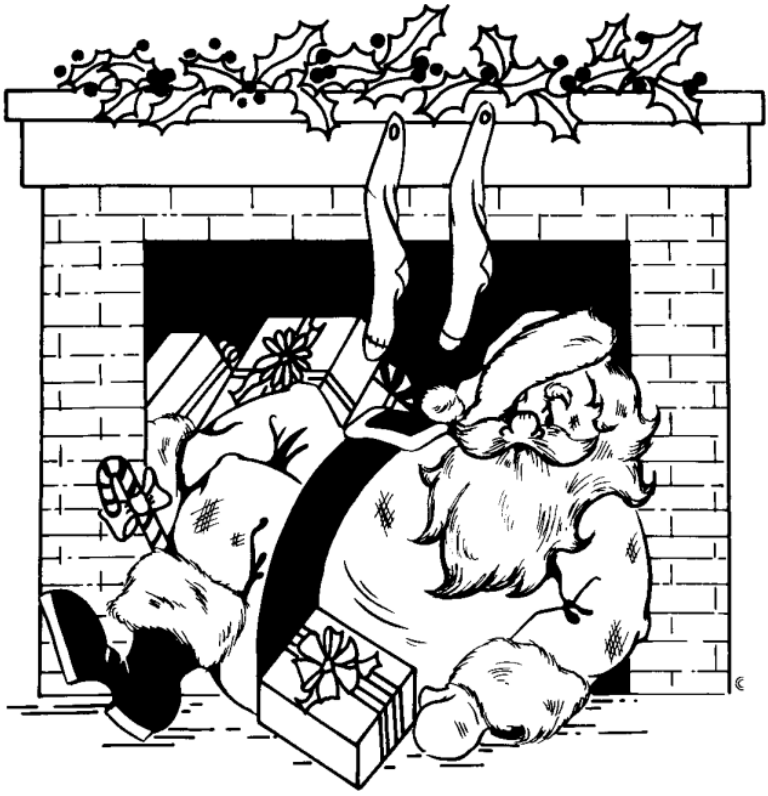
It turned out that the other driver was at legal fault so a lawsuit for personal injuries was filed seeking compensation for

medical expenses, lost wages, and pain and suffering. The pendency of the lawsuit did not pay the mortgage, however, so we had to seek other solutions. Fortunately, the wife's parents were able to loan the couple enough money to bring their mortgage payments current, and we were able to persuade the lender to halt the foreclosure proceedings, on the strength of the expectation that my client would receive a substantial settlement for his personal injury claim, or a significant jury verdict. The problem was that the resolution of the lawsuit would take over a year from the time suit had been filed, so interim financial support was required. Again, the wife's parents were able to assist, though at a hardship to them.

My clients were able to keep their home, the husband and father received a substantial monetary settlement of his personal injury claim, the wife's parents were repaid, and during the year of litigation, the husband and father was able to rehabilitate himself through difficult and painful physical therapy.

The contrasting scenes of security and bliss on the one hand and anxiety and pain on the other remind me of the fragility and tenuousness of our possessions and positions, and engender in me the spirit of humility and thankfulness that is especially appropriate for this season of the year.

Merry Christmas and Happy New Year.



SANTA GOT STUCK IN THE CHIMNEY

What would happen if Santa Claus got wedged in the chimney of my house, or if he tripped over a rug in the family room and broke his arm? Would I be liable? What could I do to protect myself from being sued?

What if Christmas carolers tripped over something in my front yard? Could they sue me for personal injuries?

As a property owner in Virginia would I be responsible for accidents that might happen in my house or in my yard?

-Melissa , Falls Church, VA

You must have been Christmas shopping at one of our crowded local malls, or sitting in traffic on one of our local roads in order to be in such a joyous Christmas mood. Or perhaps your name is really Ebeneezer and your contemplation is on haunting fears of

future trouble.

You must first determine the legal status of Santa when he visits your home. Santa, and the carolers, can be on your property in the capacity of trespassers, licensees, or invitees. The duty you owe them differs according to their status.

Trespassers are those who come on your property without your permission, express or implied. To trespassers you owe only the duty to refrain from intentionally injuring them.

Licensees are those who enter your property for their own convenience or benefit. To licensees you owe the duty to warn of hidden defects or dangerous conditions on the property.

Invitees are those who are invited to come on your land. To Invitees you owe the duty to maintain your property in reasonably safe condition for the visit and to warn of any unsafe conditions which are not open and obvious. The invitation need not be express but may be inferred where the visit is for the mutual benefit or advantage of the parties, or where the landowner is to receive a benefit for the visit.

In what category do your believe the law would place Santa Claus? Certainly his altruistic Christmas Eve visits would be a benefit to you, and to your children. I wonder what the legal consequence would be were he to leave a bundle of switches or a bag of coal, though. Would that alter his category? Would that make him a trespasser and not an invitee? Could it be said that naughty boys and girls would benefit, nevertheless?

In the final analysis, if Santa Claus were to bring legal action for damages due to personal injuries suffered on your property, you could defend on the grounds that he has assumed the risk and is guilty of contributory negligence.

After all of these centuries of Christmas Eve visits, Santa surely should know whether your chimney would accommodate his girth, and that it is possible to trip over rugs in a room lit only by

lights from a Christmas tree and flickering embers from a fire in the fireplace.

Merry Christmas, everyone.

DEAD MAN ON A DEED

My husband died five months ago. He had a Will which named me as his sole beneficiary, but since everything that he owned was owned jointly with me, the lawyer I consulted told me that I did not have to probate the Will.

I did not ask the lawyer about selling our house, though; that is, how to transfer the deed to my name so that I could sell it.

At the time of my husband's death I planned to stay in the house. Now I am thinking of selling and moving to a condominium apartment closer to where my daughter lives.

Can you give me any guidance as to how I can transfer the deed to my name? Do I have to probate the Will?

- Susan, Sterling, VA

If you and your late husband owned the house as tenants by the entirety with common law right of survivorship, then you do not have to probate his Will in order to transfer title to the property to you.

The way you owned the house would be described in the deed where you and your late husband acquired the property, and the language would have to be specific. That is, the granting clause would have to recite that your sellers are conveying the property to you "as tenants by the entirety with the common law right of

survivorship."

The nature of your ownership of the house would then permit you to convey it without having the deed transferred to your name first. The so-called "And Being" clause in your deed would recite that the property you are now conveying is the same property that was owned by you and your late husband as tenants by the entirety with common law right of survivorship, and that your husband has now departed this life and left you as the sole surviving tenant by the entirety.

DISCLOSE THE GHOST?

It was a dark and stormy night in late October. Jagged lightening bolts illuminated the blood red leaves of the great oak tree in the front yard. Deafening claps of thunder shook the windows and siding of the house. Rain pounded down. The wind howled.

Then there was silence. The wind died down, the rain stopped, the storm had passed.

Then the screaming began.

The eerie sound originated from the attic.

John and Jane Doe huddled together under the covers in their master bedroom. They knew that for the next several hours the poltergeist that inhabited their attic would descend to the main house, overturn tables, knock pictures from the walls, scream at them and their children, before returning to the attic and falling silent for another year. It happened every year around Halloween. They knew, also, that they could no longer endure the ghost. They had to sell their house.

Before meeting with their real estate agent, Mr. & Mrs. Doe met with me to determine whether they would be required to disclose the existence of the poltergeist to prospective purchasers.

I explained to them that if they provided a statutory disclaimer they would not have to reveal the existence of the phantom, but if they were asked whether their house were haunted, they would have to disclose the truth.

One of my associates pointed out that under Virginia law no cause of action arises against a seller for failure to disclose that the subject real property was the site of "An act or occurrence which had no effect on the physical structure of the real property, its physical environment, or improvements located thereon, or a homicide, felony, or suicide." Such property is also known in the law as stigmatized property.

However, the physical manifestations of the ghost, the tipping over of furniture, knocking down of pictures, were physical effects which took the haunting out of the definition of merely stigmatized property.

I advised Mr. & Mrs. Doe that it would probably be prudent to disclose the noisy spirit rather than invite a lawsuit for misrepresentation, the damages for which could be the cost of an exorcism. Besides, most people believe ghosts are surreal or imaginary phenomena, anyhow.

Happy Halloween!

TRICK, TREAT OR TORT?

With Halloween fast approaching my mind seems to be stuck contemplating questions stemming from haunting visions of future trouble.

What would happen if a teenager decided to trick me instead of asking for a treat and injured himself while sneaking into my house? I ask because someone was lurking outside my house a few nights back. Funnily enough, I honestly think they ran away because they thought the life-size Dracula cutout in the window was my husband's silhouette. But what if he'd actually snuck in, saw the Dracula and flinched, slipping to break his arm? Would I be liable? What could I do to protect myself from being sued?

What if a trick-or-treater tripped over something in my front yard? Could they sue me for personal injuries?

As a property owner in Virginia would I be responsible for accidents that might happen in my house or in my yard?

-Marcus, Fairfax, VA

Your specters abide in the realm of tort liability. Tort in this

context means a civil wrong other than breach of contract, and not a sugary delight.

You must first determine the legal status of the tricking teenager when he visits your home. The tricking teenager or trick-or-treaters, can be on your property in the capacity of trespassers, licensees, or invitees. The duty you owe them differs according to their status.

Trespassers are those who come on your property without your permission, express or implied. To trespassers you owe only the duty to refrain from intentionally injuring them. To this there are even exceptions.

Licensees are those who enter your property for their own convenience or benefit. To licensees you owe the duty to warn of hidden defects or dangerous conditions on the property known by you to exist.

Invitees are those who are invited to come on your land. To Invitees you owe the duty to maintain your property in reasonably safe condition for the visit and to warn of any unsafe conditions which are not open and obvious. The invitation need not be express but may be inferred where the visit is for the mutual benefit or advantage of the parties, or where the landowner is to receive a benefit for the visit.

In what category do you believe the law would place the tricking teenager? Certainly he would be a trespasser, and, as such, you would owe him no duty to warn him of the auspiciously placed Dracula cut out.

And what of the trick-or-treaters? Could it be said that a parade of children dressed as ware wolves and action heroes flocking to your front door would be a benefit to you? Spiritually perhaps? I wonder what the legal consequence would be were they to egg your house instead of simply smiling for a handout, though. Would that alter their category? Would that make them trespassers and not invitees or licensees? And what of the fact that they are coming to

your house, pillow sack in hand, hoping for a handful of candy, offering little to nothing in return? There definitely is a benefit to the trick-or-treater.

I would argue that trick-or-treaters are licensees and that to them you would therefore owe only the duty to warn them of hidden defects or dangers on the property. Perhaps you should put up a sign "Beware of Dracula".

Happy Halloween.

ONLINE OFFER?

I saw an advertisement on Craigslist for a car which the owner was asking $7,000.00 for. It was a "for sale by owner/as is" deal.

I thought I'd buy the vehicle as a birthday present for my wife so I made an offer to the owner to buy the car.

After several days of negotiations, the owner told me that he had decided not to sell the car to me for $7,000.00. He offered to sell it to me for a higher price. I refused and told him I thought he was guilty of false advertising. He would not change his mind so negotiations stopped.

I am not a lawyer, but I always thought that once someone made an offer and it was accepted the offer could not be withdrawn.

What do you think?

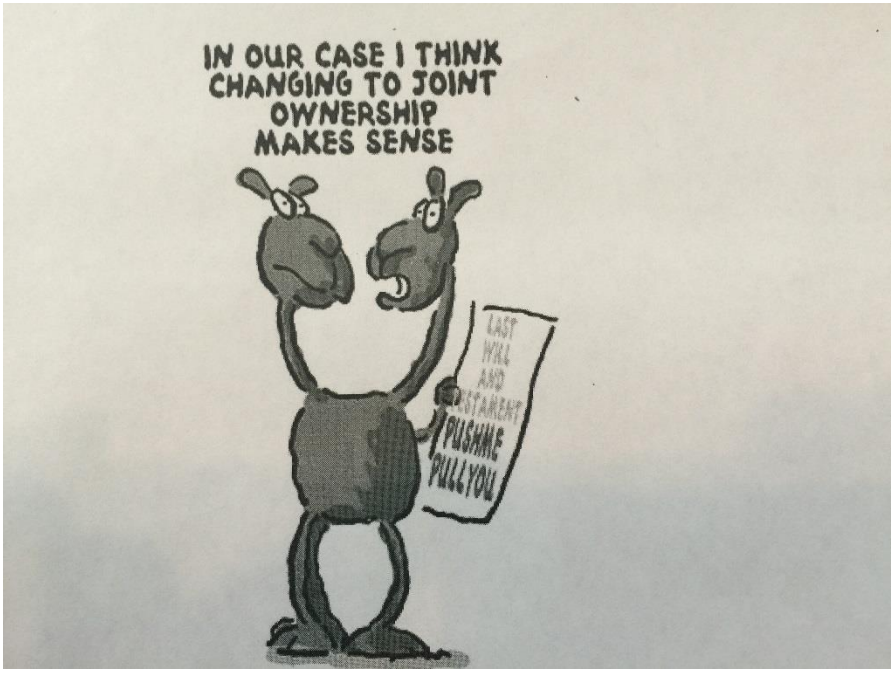
- Penelope, Reston, VA

You are correct that once an offer has been accepted it may not be withdrawn. This concept of offer and acceptance as the foundation of a binding agreement is a basic tenant of contract law.

In your case, however, I would consider that the online advertisement constituted an invitation by the owner for an offer.

The advertisement did not contain all of the material terms necessary to amount to a complete offer. It was your response that constituted the offer. You indicate that you negotiated with the seller for several days over the terms of your offer, and that a meeting of the minds of the parties did not result. I would be interested to know the details of your negotiations. If they involved questions such as whether the seller would make repairs to the car or other such material matters, it would be very clear no offer and acceptance of that offer had occurred.

Had your response to the advertisement been a written, all cash offer to purchase the property in "as is" condition, or "with all faults", your response arguably would have more closely resembled a true offer and acceptance. Nevertheless, I would still consider the advertisement to be an invitation for an offer.



WHAT'S THE TITLE?

Can you explain the different ways people can own real estate in Virginia? When my wife and I bought our home recently, our real estate agent told us simply that the settlement attorney would prepare the deed in a proper way. We didn't know what that meant. When we went to settlement on the house there were so many papers to sign that we forgot to ask the attorney about the deed and how we were going to own the house. I suppose that we should have paid closer attention to what was going on at settlement, but we had the moving van waiting with our furniture, and there were a few walkthrough problems that had to be worked out, so in the heat of the moment we forgot to ask how we were going to own our house. Also, we did not get a copy of the deed.

-John and Karen, Sterling, VA

When I handle residential real estate settlements, I make a point of showing the purchasers the deed of bargain and sale and advising them of the way in which they will be taking title to the property. For example, I will say "Mr. And Mrs. Smith, this is the deed to your new house which Mr. And Mrs. Jones have just signed. We have prepared the deed so that you will take title as tenants by the entirety with common law right of survivorship. What that means is that if one of you were to die, the survivor would automatically become the sole owner of the house by virtue of survivorship and without the necessity of probating a Last Will and Testament. If this way of taking title is inconsistent with your estate plans, or becomes inconsistent with those plans in the future, the deed can be changed, easily and inexpensively."

I also advise my settlement clients that they will receive a copy of each and every document that they will sign at settlement to take home with them, and that if they have any questions regarding those documents, I ask that they not hesitate to call me, and that I will be happy to explain anything that they do not fully understand.

I am confident that the attorney who handled your settlement would welcome a call from you and would be glad to explain to you the way in which you and your wife took title to own your home. I would guess that you own your house as tenants by the entirety with common law right of survivorship, however. The other ways of taking title are as joint tenants, tenants in common and as trustee with or without full powers, and a few more esoteric ways.

THE PROCESS OF PURCHASING A HOME

I want to buy a house, but I've heard so many horror stories. What is the process?

-Jackie, Annandale, VA

Purchasing real estate is actually quite simple. What follows is a brief and general description of the process.

The first step, of course, is to find the piece of real estate you want. The easiest way to do this is to employ the services of a local real estate agent who will have access to a multiple listing system. However, if you feel confident that you can find the real estate you want on your own, you can always do so, and even take advantage of some realtor websites that post specifics about the properties they are selling.

When you find that perfect piece of real estate, and assuming you are not paying all cash from your own funds, you will need to apply for a loan and provide the seller of the real estate a loan commitment or approval letter.

Once you have a ratified contract there are a number of things to take into consideration, such as contingencies. Some contracts are contingent upon financing, hence the need for a loan commitment or approval letter. Other contingencies include an inspection contingency. This means that the purchaser has a stipulated number of days, usually seven or so business days, to have the property professionally inspected for defects. If the inspection report shows a number of defects, major or minor, then the purchaser can either agree to purchase the property as is, or negotiate with the seller to have the seller repair or cover the expenses for repairing any defects. If the seller and purchaser cannot come to a meeting of the minds, the contract will most likely be considered null and void.

It is important to note that whether any contingencies apply, including the above, depends entirely upon the wording of the contract of purchase and sale. As such, the contract should always be read carefully. If you feel uncomfortable with the contract or do not understand any of the terms, it is prudent to contact a real estate attorney for clarification and counsel.

As a purchaser of real estate you can chose the settlement company that you want to conduct the transaction. In order to so, you will put the name of the settlement company, such as my firm, Kidwell & Kent, in the line in the contract calling for a settlement agent. Then you will need to send a copy of the ratified contract to the settlement company. If you are working with a realtor, he or she will probably be doing all of this for you.

Once the settlement company receives the ratified contract, they will coordinate with all parties: the seller, purchaser, lender and real estate agent, to make sure the transaction can be consummated on the settlement date. The settlement company will order a title examination to determine whether or not there are any judgments or liens on the real estate, that real estate taxes have been paid, and that the sellers are in fact the record owners, among other things. If there are any title defects, the settlement company will work with the sellers to rectify them before settlement.

At the day of settlement, you will show up at the settlement company to sign a pile of paperwork. If there are any walk-through items that have not been properly tended to by the time of settlement, the parties will work out a solution such as escrowing the funds necessary to pay for the fixing of any defects in the property that have not yet been fixed.

As a purchaser, where you used to sign a HUD 1 (Housing of Urban Development) settlement statement showing all of the monies that will exchange hands to complete the transaction, you now sign a similar Closing Disclosure. Some of the fees you will be required to pay as a purchaser include, but are not limited to, lender's fees, recording charges, title insurance, hazard insurance, title binder and examination fees, and a settlement company transaction fee. You will also sign the loan documents.

I should note, again, that the above is simply a brief overview of the process of purchasing real estate in Virginia and I have deliberately left out some details and considerations to minimize the length of this article.

THOSE NOXIOUS TREES

There is a huge oak tree in my neighbor's yard and its roots are pushing through my home's foundation, causing considerable damage. Also, the tree blocks the view from my deck to a nearby common lake. My neighbors refuse to cut the tree down. What are my options?

-Angela, Alexandria, VA

The law of "noxious" trees has recently changed in Virginia.

For sixty-nine years, the precedent set by the case of *Smith V. Holt* held that when it appears a sensible injury has been inflicted by the protrusion of roots from a noxious tree or plant onto the land of another, the landowner has, after notice, a right of action at law for

the trespass committed. The court went on to say, however, that when it appears that the roots and branches of a tree protrude onto adjoining land, and that no "sensible injury" has been inflicted, the landowner is not entitled to pursue any remedy in a court of equity. In that instance, then, the landowner would be bound by the rule prevailing at common law which held that the landowner would bear the burden of protecting himself from protruding roots or branches.

For those many years, this meant that a landowner could only sue for an actual trespass and damage to their property already caused by a tree or other plant. Short of filing suit for actual damages, the landowner could cut back the branches of a neighbor's tree to the extent that they hung over the property line.

In the 2007 case of *Fancher v. Fagella*, the Supreme Court of Virginia held that encroaching trees and plants may be regarded as a nuisance when they cause actual harm or pose an imminent danger of actual harm to adjoining property, overruling Smith v. Holt.

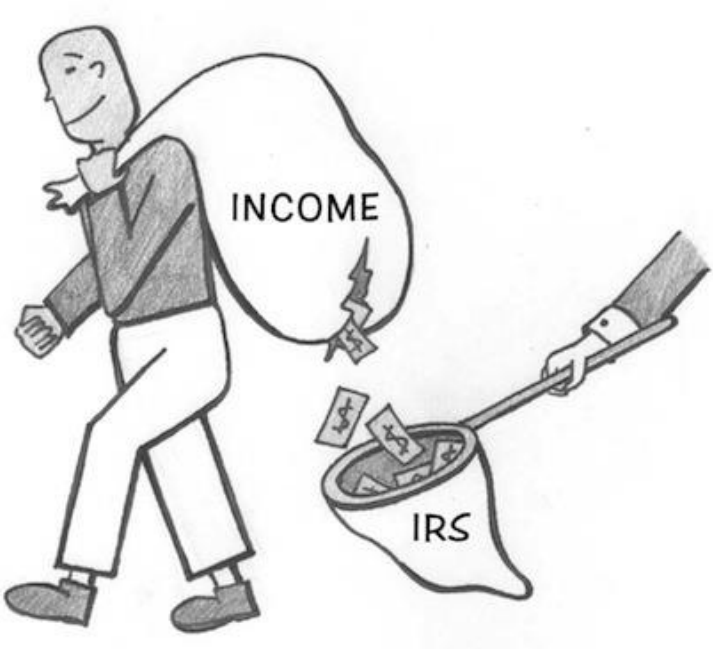
As such, this now means that you can request the court require your neighbor cut down or otherwise trim the tree so as to alleviate the imminent danger of actual harm to your property. Of course, you are required to show, by clear and convincing evidence, that actual damage to your property is in fact imminent.

A warning: This does not mean that you can waltz over to your neighbor's yard and take an axe to their trees. You must avail yourself of the law by brining suit for an affirmative injunction to remedy the situation. And, as before, you are permitted to trim the tree branches to the extent that they hang over your property line.

In response to Angela's question, seeing as how the roots from the neighbor's oak tree are pushing through her foundation, an actual trespass and not just an imminent danger is present. She can't cut the tree down herself, but she can bring suit for that very remedy.

Angela also mentioned that the tree blocks her view to a nearby lake. Aesthetics alone is not sufficient for obtaining a court order to remove the tree.

Now, the above is simply a recount of the law pertaining to noxious trees. A pragmatic solution in these matters, whether it involves a situation of overgrown hedges, dead and leaning trees or unsightly shrubbery, is to simply ask the property owner to do the neighborly thing and prune their plants as necessary. It's when they refuse that you should avail yourself of the law.



STEPPED UP BASIS?

Several years ago my husband inherited a house in Loudoun County from his mother. He never lived in the house and rented it out to tenants. The tenants want to buy the house now, but we are worried about income taxes or capital gains taxes if we sell the house. My husband's mother owned the house for nearly 25 years. She paid only about $5,000 for the house and now it is worth over $400,000.

Since my husband has never lived in the house, I have been told that he can't avoid paying capital gains taxes. Also, he is in his thirties and I have been told that he can't avoid paying the taxes as being over 55.

Do you have any suggestions or advice?

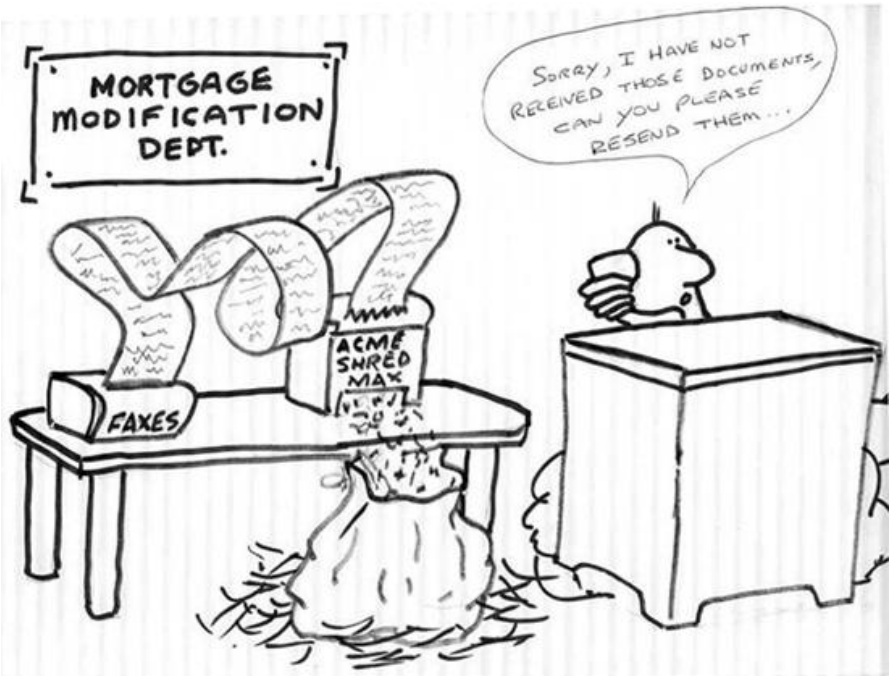
-Elsie, Reston, VA

You should consult with an attorney who is familiar with income, estate, and capital gains taxation, or with a CPA for specific details and individual advice.

You should know, however that the gain on the sale of the property will be measured by the amount of the sale's price over your husband's basis in the property. Basis, normally, is the cost of the property plus capital improvements. Since your husband inherited the house from his mother, the relevant basis is not what his mother paid for the property 25 years ago, but the fair market value of the property as of the date of the death.

To simplify, if the value of the house was $300,000 when your husband's mother died several years ago and he inherited the property, and the current value is $400,000 then the capital gain would be $100,000. The tax on the gain will be the same as the tax on ordinary income under the new laws which abolish the capital gains preference.

Please consult with your tax advisor to determine the relevance of alternate valuation dates, recapture of depreciation, and other factors involved in your individual case. Such factors may affect the determination of the exact basis figure, though in general the determination will be arrived at as described above.



SHORT SALE V. FORECLOSURE

I recently received a notice of intent to foreclose from my lender, which has prompted me to research alternatives to foreclosure. I've read some about short sales. What are the advantages to proceeding with a short sale instead of allowing my house to go into foreclosure and what is the short sale process?

-Samantha, Fairfax, Virginia

First, a word of caution Samantha: in that your lender has already sent you a notice of intent to foreclose, you may not have enough time to sell your house or be approved for a short sale.

The short sale process can be long and arduous, often taking six months or more. For this reason alone, a short sale is not advisable for buyers who need to move into a home expeditiously and it can be extremely stressful for sellers falling behind on their mortgage. Furthermore, the majority of short sales ultimately are not approved by the lender. That being said, a short sale is an extremely

powerful tool that can be utilized by property owners to minimize the negative effect of a mortgage deficiency.

A short sale is the sale of real estate in which the proceeds fall short of what the owner owes on his or her current mortgage. Because the lender is being asked to accept less than the owner owes on their mortgage, the lender must approve the sale. This, however, does not mean that a contract signed between a seller and borrower is not ratified. Rather, the contract is ratified and is contingent upon the lender's approval.

However, prior to the owner listing the property as a short sale the lender must approve the owner for a short sale. In order to make the determination as to whether they will allow the owner to sell the property short of what is owed on the mortgage, the lender will require the following documentation: two years tax returns (first 2 pages) from all borrowers (1040, Schedule A and C if applicable); last two years W-2's from all borrowers; the two months most recent bank statements from all borrowers (all accounts); two months most recent pay subs; and a letter of hardship.

In essence, a Letter of Hardship is meant to convince the lender that it is in their best financial interests to allow a short sale instead of instituting foreclosure. It is advisable that owners consult with an attorney at law to draft the hardship letter.

Once the owner is approved for a short sale, the property can be listed on the market for a short sale. The listing agent should list the property as contingent upon third party approval. Often, the agent will list the property as pre-approved for a short sale. This is misleading and incorrect. At this point in the process the lender has merely allowed the property to be sold via a short sale. The lender must endorse a particular contract for an actual short sale to be approved.

Once a contract between a purchaser and seller is ratified, the ratified contract is submitted to the lender for approval. The lender will conduct a Broker's Price Opinion (BPO), in order to determine

whether they will approve the contract. Often, the lender will request that realtor commissions be reduced, the purchase price be raised, and that settlement cots are also reduced, thus minimizing the amount they will be shorted. All of this "negotiation" takes time and is exacerbated when a second mortgage with a different lender than the first exists.

A short sale can be complicated, not just as a result of the lender's requirements, but also because of many other considerations. A seller should be very careful not to agree to anything before consulting an attorney at law for counsel as to the advisability of going through with the short sale.

On its face, a short sale can seem like a great alternative to foreclosure. A homeowner who loses a home to foreclosure is ineligible for a Fannie Mae backed mortgage for five to seven years, depending on whether the house sold was the seller's primary residence, while a homeowner who successfully negotiates a short sale will be eligible for a Fannie Mae backed mortgage after only two years. A foreclosure remains as public record on an individual's credit history for ten years or more and lowers the individual's credit score by 250 to 300 points, while a short sale is not reported on a credit history and lowers a credit score by only 50 to 100 points.

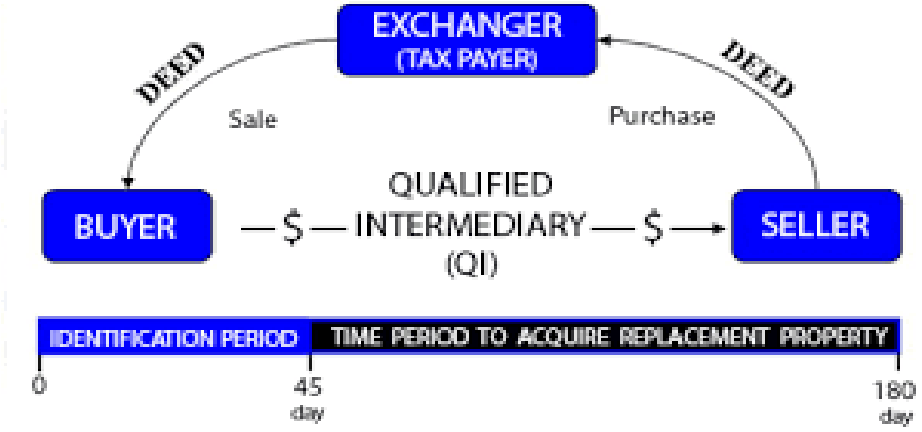
But, there is another factor to consider in determining whether to pursue a short sale as an alternative to foreclosure or bankruptcy: taxes. The IRS wants to make sure that its taxpayers do not get a free lunch, and so, they may tax as a personal gain any debt forgiven by the lender. When the individual borrowed the money they were not required to include the loan proceeds in income because they had an obligation to repay the lender. When that obligation is subsequently forgiven, such as in a short sale, though, the amount the individual received as loan proceeds is, in some instances, reportable as income because they no longer have an obligation to repay the lender. As such, a certified personal

accountant or tax attorney should be consulted to determine if taxable income will need to be reported as a result of a short sale.

However, lenders often will not forgive the debt. Often the lender's short sale approval letter will explicitly leave open the lender's right to pursue a deficiency judgment. Sometimes the lender will require the seller to execute a promissory note in an amount equal to the difference between the short sale payoff and the current principal amount of the mortgage shorted.

In other cases the lender will seek to re-impose the note and deed of trust if the sellers or buyers participated in fraud. Title Insurers will not insure the buyer's new loan with that condition. Lenders further seek to require the settlement agent to notify the lender if the property is re-sold within thirty (30) days of settlement, a condition which seeks to bind the settlement agent, who is not party to the contract. It is for these reasons that an attorney at law should be consulted prior to agreeing to the terms of a lender's short sale approval letter.

In short, pun intended, a short sale can be a viable and often advisable alternative to foreclosure. However, there are many factors that should be taken into consideration prior to making the decision to pursue a short sale, as well as to determine whether or not a short sale is feasible in any particular situation.



LIKE KIND EXCHANGES?

Our real estate agent tells us that we can avoid paying capital gains taxes if we exchange our rental house for other rental property and that we do not have to exchange them at the same time. How does that work?

- Mr. Levy, Oakton, VA

Internal Revenue Code Section 1031(a) governs tax free exchanges.

The general rule is that no taxable gain is realized when property held for productive use in a trade or business is exchanged for "like kind" property.

With respect to real estate, the rule is the same. Real estate held for use in a trade or business or for investment may be exchanged for like kind real estate on a tax free basis. If the real property falls into either definition, it may be exchanged for other real property which falls into either category. Unimproved land held as an investment can be exchanged from a commercial office building, for example. Residential rental property can be exchanged for farm property.

Residential real estate used as a principal residence may not be exchanged for other residential real estate. Such real estate is not deemed to be owned for productive use in a business, nor for investment. Nor, may it be exchanged for real estate held for productive use or investment because those properties are not of "like kind".

It is not necessary for like kind properties to be exchanged simultaneously. If a person sells qualifying real estate, he has 45 days from the date of the sale to identify like kind exchange property, and 180 days from the date of sale to acquire exchange real property. Under Internal Revenue Code Sec. 1031(a) those time limits are magical. They may not be violated. The date of the sale refers to the date of settlement and not the date of contract formation. The date of acquisition refers to the date of settlement on the purchase of the exchange property.

Further, it is imperative that the proceeds of sale be held by an escrow agent, beyond the actual or constructive control of the seller during those magical time frames.

MOTOR BOATS ON THE STREET

There are several large motor boats parked along the streets in our subdivision. They have been there for quite a while. One of them has been parked there since last summer.

My question is whether I should ask the Board of Directors of the Homeowners Association to force the owners of the boats to remove them. I remember reading your columns in the past that you are not very fond of taking action against homeowners who are in violation of covenants.

Our covenants specifically bar motor boats, trailers, and large trucks from being parked on the streets in our development. Is there any legal reason why the Board of Directors should not do something, or why I should not complain?

-Mrs. Henriques, Sterling, VA

I can think of no legal reason why you should not file a complaint with the Board of Directors and/or the covenants enforcement committee.

As I have written before, I believe that restrictive covenants are beneficial. They help maintain property values in subdivisions by prohibiting obnoxious activities and practices such as parking trucks,

trailers and large boats on the streets, and by prohibiting the erection of unsightly specified strictures.

The problem that I have with restrictive covenants involves the enforcement by architectural control committees of guidelines regarding external modifications or improvements to homes in the subdivision where the guidelines require that the modifications be "harmonious" with the existing neighborhood structures and styles. Such a standard permits subjectivity and places homeowners at the mercy of the committees' sense of aesthetics. Sine homeowners associations have the power to enforce restrictive covenants by fine, lien, and through the courts, they function as private government. When they enforce vague or subjective standards they violate the spirit if not the letter of due process of law.

Due process of law is a fundamental concept of freedom. It has been developed and nourished over the centuries as a bulwark against governmental intrusion into the affairs of its citizens. It seems to me that we should not delegate to private governments intrusive powers that we do not permit public government to exercise.

THE MECHANIC'S LIEN

We are having a problem with a home improvement contractor which we hired to build a deck on our house. The contractor has not done the job the way he promised he would do it. He has not placed the steps where he said they would be placed, he has not put up the kind of lattice that he said he would provide, and he has not cleaned up all the debris that he left in the yard.

We have not paid him his last draw and he has threatened to file a mechanics' lien against our house if we do not pay him. Our question is: What is a mechanics' lien and can he file it?

- Mr. Holt, Arlington, VA

A Mechanics' lien is a statutory remedy given to contractors, material men, and suppliers who perform labor or furnish materials for the construction or improvement of real property. The lien is a security interest in the real property which can be judicially enforced in a lawsuit brought by the claimant. The ultimate goal of a suit to enforce a mechanics' lien is the court ordered sale of the real property to satisfy the amount of the lien.

As stated in Virginia case law, the purpose of the mechanics' lien law is to give those who have enhanced the value of real property a lien on the property to the extent that their labor and materials have added value to it.

Your home improvement contractor could file a lien against

your house and a suit to enforce the lien, if he were to do so in accordance with the time limitations set forth in the Virginia code, but whether his lawsuit would succeed, or not, would depend on whether he performed in accordance with his contract with you.

The mechanics' lien remedy is statutory, but the foundation of the lien is a contract. The contract must be properly performed by the home improvement contractor before his mechanics' lien could be successfully enforced.

LEAKY BASEMENT

After a recent rain storm we had, we discovered a leak in one of the walls in the basement of our house. We bought the house over a year ago but this is the first time that we have had the problem with a leak.

We called the real estate agent who handled the sale of the house to us but she was not able to help us. She said that the sellers had moved from this area and that the contract did not specify that the basement not have a leak in any case.

We believed that we were buying a house in good condition and we though that the contract would protect us.

We do not know how much we will have to pay to fix the leak but it does not seem fair that the sellers are not responsible and that we will have to bear the whole cost.

Do we have any rights or any way to make the sellers pay to fix the leak?

- Edgar, Herndon, VA

Your rights are defined by the sales contract you signed with the sellers, by statutory law, by case law, and by common law. If your contract provided that you were to accept the property in its present physical condition, except for covenants regarding appliances, heating, air conditioning, and plumbing systems being in good working order at settlement, as most residential real estate sales contracts provide, then you would have no contractual remedy against the sellers.

Since the rule of *caveat emptor*, or let the buyer beware, still controls in Virginia with respect to resale houses, you would have no statutory, nor case law, nor common law remedy against the sellers simply on the basis that the basement had a water intrusion problem. The present physical condition of the property which you contractually accepted included the water intrusion condition.

If, however, the existence of the problem constituted a latent defect in the property, and if the sellers knew of the problem and concealed its existence, then you may have a cause of action for fraud and misrepresentation against the sellers.

You should consult with an attorney about your specific situation.

UNRELEASED JUDGMENT

We are in the process of selling our house and we have run into a problem. The lawyer who is handling the settlement says that her title examiner found a judgment against my husband. The judgment was a small one in favor of a credit card company. The settlement lawyer tells us that we have to get the judgement released from the court records. My husband says that he paid the judgement many years ago but he does not have a receipt or a canceled check. We have contacted the credit card company but they are dragging their feet, saying that they will look into it and have someone call us. The problem, they say, is that the judgement is so old that they need to look into closed records.

The judgment is 12 years old and my husband payed it long before we were married 8 years ago and bought our house 5 years ago.

We don't want to delay going to settlement and we need all of our sales proceeds to settle on the new house we are buying. The settlement lawyer suggested that we put in escrow with her the amount of the judgment, plus 12 years of interest, but if we did that we would not have enough money to settle on our new home.

It doesn't seem fair that we have to get the judgment released since it was paid off years ago, although we can't prove it today, and

since the credit card company should have released it years ago.

Do you have any advice?

- Jamie, Great Falls, VA

Normally, it is necessary for any judgments of record against home sellers to be released of record so that they can convey good, clear, marketable and insurable title to the purchasers of the property.

There is a possibility, however, that the judgment in your case does not attach to or affect your house. Since the judgment was entered and recorded before you and your husband were married, and before you acquired the house, and since the judgment was against him only, if you and your husband took title to the property as tenants by the entirety with common law right of survivorship, then the judgment would not attach to your property and it would not have to be released.

Conceptually, when spouses acquire property as tenants by the entirety with common law right of survivorship, both own the entirety of the property and there is no separate interest of one spouse in the jointly owned property for a judgment against that spouse to attach. I suggest that you look at your deed to see if you took title as tenants by entirety with common law right of survivorship, and if so, then you should discuss the matter further with the settlement attorney.

This incident also illustrates the importance of ensuring that any judgment that you pay is released, and that you get a copy of that release for your own records.

THE EFFECT OF A FORECLOSURE ON A PREEXISTING TENANCY

I signed a lease and moved into a spacious townhouse in Herndon, Virginia two months ago only to receive a notice meant for the landlord in my mailbox indicating that the property was sold at foreclosure on January 6th. I'm concerned because I have spent considerable monies moving in, I just completed my change of address, and my kids are enrolled in school. Can the bank evict me?

-Jessica, Herndon, VA

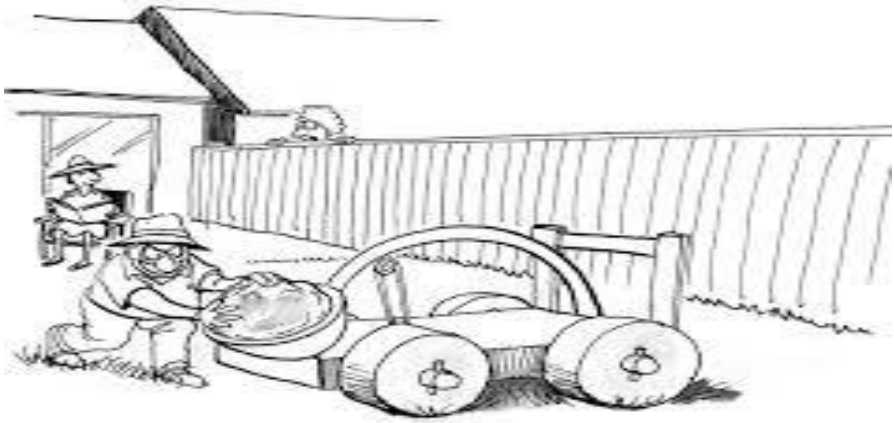
The situation Jessica finds herself in has unfortunately become all too common in this turbulent economy. There is no doubt that it is unfair for individuals or families in this situation to be required to move, especially when they just moved in.

However, the fact remains, that the lease agreement is between the tenant and the former landowner. The tenant's right to stay in the property is contingent upon the landlord's ability to grant possession and that right is vitiated by the foreclosure of the property.

However, there is a Public Law, effective May 20th, 2009, that most tenants are unaware of and which protects them in this exact situation.

Public Law 111-22, specifically Section 702: Effect of Foreclosure on Preexisting Tenancy, provides that in the case of any foreclosure on a federally-related mortgage loan or any dwelling or residential property after May 20th, 2009, any immediate successor in interest in such property pursuant to the foreclosure shall be entitled to possession of the property only upon the expiration of 90 days subsequent to the delivery of a notice to vacate to any bona fide tenant.

In Jessica's case, then, this means that the new owner, be it the bank or a third-party, must provide her 90 days advance notice to vacate the property and she is entitled to possession until the expiration of said 90 days.



"I hope our fence won't cause a conflict."

THE ENCROACHING FENCE

While we were away on vacation last summer our neighbors put up a fence around their back yard. Out of curiosity, I looked at our house location survey to see how close to our property the fence was, and I am practically certain that our neighbors' fence crossed over our lot line by several inches.

I don't want to make a big deal about this situation and I don't want to ask our neighbors to move the fence, but I am concerned about what might happen if I sell my house and I need to know what my legal rights are under these circumstances. I can't understand how the mistake was made.

I haven't raised the matter with my neighbors yet. What do you suggest?

-Richard, South Riding, VA

I suggest you consult with an attorney for specific legal advice for the precise reason that concerns you; that is, how the sale of your property might be effected by the existence of your neighbors' fence encroachment.

To speculate as to how the mistake occurred, it is possible

that your survey is inaccurate, or that the company that erected the fencing misjudged the boundary lines in the process of construction.

Assuming, however, that the fence does constitute an encroachment on your land, and understanding that you do not wish to require your neighbors to remove the fence, I would suggest that you and your neighbors consider entering into a written agreement wherein you agree to permit the encroachment for a certain period of time, or in perpetuity if you so desire (though I would caution against that), and your neighbors acknowledge that they are using a portion of your property for their fence with your express consent and permission. The written agreement would prevent your neighbors from acquiring ownership of a sliver of your land by prescription or adverse possession.

The agreement should be acknowledged by you and your neighbors before a notary public and should be in recordable form, that is, capable of being recorded among the land records in the county in which your property is located.

ESTATE PLANNING AND IRA's

My father, a widower, recently passed away and his IRA listed me as beneficiary. I've been told that a big income tax may befall me as a result. Is this true and what are my options?

-Jeffrey, Fairfax, VA

For many people, the IRA is the largest part of their estate and certain actions by an IRA designated beneficiary could result in unintended taxes. Because the question does not state as such, I will assume the following facts: your father was over 70.5 years old and he was taking the annual required minimum distribution.

Sometimes the best option is for the beneficiary to re-title the IRA in their own name, continue the required minimum distributions based upon their own life expectancy, and thereby continue the deferral of income taxes. The account would be re-titled to "John (Doe) deceased, {date of death}, IRA for the benefit of Jessica (Doe), Beneficiary". It is possible to stretch out the payment period for decades, thereby allowing the IRA investment fund to grow while deferring taxes. Furthermore, even if the designated beneficiary is under the age of 59.5, there is no 10% early withdrawal penalty.

Another option is to simply withdrawal all of the funds, pay the large income tax bill, and terminate the IRA. This option may work for some people, dependent upon your income tax situation, but I advise always consulting a CPA or Tax Attorney first.

As a note, when setting up an IRA, ALWAYS, designate a contingent/successor beneficiary. Otherwise, should the primary beneficiary predecease you, the IRA will escheat to your estate, pass pursuant to your Last Will and Testament, or other testamentary document should you have one, and the option to stretch the payments out will be lost.

THE INCAPACIATED SPOUSE

My husband has been confined to a nursing home. He is 81 years old and in very poor health, having suffered several strokes.

I am trying to sell our jointly owned home. I need to sell it to raise money, and also, I do not need to live in such a large house. I am 77 years old, and I find it difficult to take care of the house.

My legal problem is that I have been told by the real estate agent that I contracted to market the house that my husband will have to sign the papers to sell the house since his name is on the title. The administrator at the nursing home and my husband's doctor tell me that my husband is too ill to sign any papers, although my husband is willing to sign whatever I ask him to sign.

I really don't know what to do, can you help me?

- Sharon, Vienna, VA

As in all such situations you first should consult with an attorney. Without establishing an attorney/client relationship I am unable to advise you specifically and in the context of the fiduciary relationship.

I can tell you, however, that as a general proposition, if your husband is mentally incompetent then he is incapable of executing

any legal document. Incompetency is a question of fact. The result of the condition is legal disability.

It is probable that you will be required to petition the circuit court in the county or city which your home is located to appoint a conservator and guardian for your husband. The legal guardian can receive authorization from the court to sell your husband's interests and assets.

There are ways to avoid the situation which you describe by steps taken and legal documents executed before incompetency occurs, to include the execution of a durable power of attorney, and I would recommend that my readers consider taking those steps, if their attorneys concur.

Owner of a long established family law firm, attorney John Kidwell, gives us a collection of articles previously published in community newspapers in Northern Virginia. Quick and witty, each article delves into a different area of the law, lending for a fun, informative, read.

In addition to managing his law firm, Mr. Kidwell teaches courses on real estate law at local commercial and residential real estate brokerages and Financial Advisory firms. He conducts seminars on real estate law and wills, trusts and estate planning throughout the area.

Mr. Kidwell is a published author on the topic of law and politics and in 2013 he was selected by the Heritage Registry of Who's Who as a Top Attorney in North America and a pillar of the community for his work as an attorney and continued dedication to charitable contributions to the community.

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