

Family law issues and the purchaser client: Are you aware of these?

In a LAWPRO webzine we published last year, we discussed the impact of family law issues on wills and estate litigation (to read that article, please click [here](#)). Wills and estates is not the only practice area that is subject to family law complications – real estate practice can also be. In this article, we've highlighted some of the family law issues that can complicate a home purchase.

Considering the proportion of Canadian marriages and common-law unions that end in separation, a large number of real estate purchasers, every year, will be ex-spouses. In some of these cases, issues related to a purchaser's separation or divorce – issues which may not be immediately identified by a real estate lawyer – have a potential impact on the transaction. Alternatively, where a separated client is purchasing property with a NEW partner, succession planning and other issues may require special consideration.

Problems outside the real estate scope of practice

Many of the family law issues that can complicate a real estate transaction are outside the scope of a real estate lawyer's retainer.

Problems with a purchaser's mortgage eligibility, for example, often come to light either before the purchaser begins house hunting, or during the negotiation of an Agreement of Purchase and Sale. Since the majority of buyers hire a lawyer AFTER execution of a binding agreement, there are significant limits on what a real estate lawyer can do to remedy problems with financing eligibility that were not properly addressed before execution.

In these cases, real estate lawyers should be particularly vigilant in their communications with clients about the scope of the retainer, making it clear that the client may require separate representation to handle his or her outstanding family law problems.

A general awareness of these issues can, however, be helpful for real estate lawyers, if only to support good lawyer-client communications.

Problems with mortgage eligibility

Unfinished family law business can affect a potential purchaser's eligibility for a new mortgage loan. Here are some of the potential problem scenarios:

Mortgage conditional on binding order or agreement

In considering an applicant's mortgage eligibility, lenders are expected to inquire about the borrower's family status. If the borrower is separated, the advance of mortgage funds will often be conditional on proof of a binding divorce order that addresses the division of property, the matrimonial home, and support; or on a binding separation agreement.

Where the buyer negotiates with the help of a real estate agent, there is a good chance that the agent will take steps to ensure that the buyer will be able to meet the condition. If it appears that there may be difficulties in this regard, the agent will likely urge the buyer to avoid signing a binding Agreement of Purchase and Sale until the necessary order or separation agreement is in place.

The agent will also likely be knowledgeable about the difference between a (non-binding) mortgage pre-approval, and a mortgage commitment, and will be able to explain this distinction to the purchaser.

Where a purchaser negotiates without an agent, however, the purchaser may not be sufficiently aware of these issues to protect him or herself. If the vendor's agent fails to investigate the details of the mortgage commitment (or if there is no agent on the vendor's side either), the purchaser could potentially find him or herself bound to a contract that he or she cannot fulfill. Breaking the bad news, in these circumstances, may fall to the real estate lawyer.

Debts of purchaser's former spouse

Another issue that can cause problems is the impact of the bankruptcy of a client's ex-spouse when such bankruptcy occurs before the parties' financial affairs are fully severed. In bankruptcy cases, a purchaser may find him or herself fully liable for a joint debt or on a guarantee, and this increase in debt liability, if it emerges close to the time of closing, may affect the buyer's mortgage eligibility, and his or her ability to close the deal.

Support obligations

Where a would-be purchaser has spousal or child support obligations, these too may affect his or her eligibility for a mortgage. While most purchasers and their lawyers anticipate that lenders will assess a potential mortgagor's debt load, credit rating, and income when considering mortgage eligibility, the impact of support obligations may not come as readily to mind. Lenders, in fact, do take these liabilities (or potential liabilities) into consideration – it's one of the reasons for making the advance of mortgage funds conditional on proof of a divorce order or signed separation agreement. Guidelines for lenders may recommend that where a borrower has support obligations, the payments be deducted from income when calculating borrowing capacity.

Problems with the right to proceeds

Sometimes the purchase of a new property by a newly-separated party may be contingent on the sale of a different property owned by that party and his or her ex-spouse. Occasionally, an issue arises with respect to the prospective purchaser's right to proceeds from that sale. Depending on closing dates, a problem with access to proceeds has the potential to derail the purchase transaction.

Establishing a separated or divorced party's right to proceeds is a family law issue. A client who needs to take action to establish such a right must be advised to consult with a qualified family law lawyer.

Nevertheless, real estate lawyers may be able to save a client the surprise, inconvenience (and sometimes damages) associated with this problem by asking questions, as early as possible after the lawyer is retained, about the client's arrangements with respect to closing funds. Where the answers to these questions seem to raise family law issues, a prompt referral to a family law lawyer may mean the survival of the purchase deal.

Asking about the source of closing funds may seem "personal" or intrusive, but it can protect not only the client but the lawyer as well. Family law issues aside, irregularities with respect to the source of closing funds can be an important red flag for real estate fraud. "Insufficient investigation" of the details of a transaction is an significant category of errors or problems that result in professional liability claims reported to LAWPRO; for example, this error was behind nearly 29 per cent of real-estate based claims reported to LAWPRO in 2011.

Family law "unhappy surprises" related to a party's right to proceeds from a sale include:

- an order that proceeds from the sale of a jointly-owned property be divided unequally as between the spouses (with less than expected going to the potential purchaser). Such an order may be unknown to the real estate lawyer, and may have been forgotten by or misunderstood by the client;
- a writ of execution filed against the prospective purchaser's ex-spouse and exigible against a jointly-owned property. This should be discoverable early on, but if valid, may exhaust the proceeds;
- the late discovery that title to a property about to be sold or recently sold is not, as believed by the real estate lawyer, held in joint tenancy, but rather by the parties as tenants in common – perhaps in unequal shares. (For more information see our comment on *Hansen Estate v. Hansen*, a recent decision about severing tenancies, also in this newsletter.)

Client purchasing property with a new partner

Some clients who have separated from previous spouses seek a lawyer's services when purchasing a property with a new partner. These purchases deserve special treatment, because separated or divorced clients' circumstances often involve additional complications.

Succession planning

Where proposed co-owners had previous relationships, ownership of a new property in joint tenancy will not always be appropriate. Each party may intend that, on his or her death, children from a previous union will inherit their parent's share of the property. The right of survivorship that is created by a joint tenancy may put these intentions in jeopardy should the parties' wills be inconsistent, or should the surviving party change his or her will after the death of the first party.

Where a real estate lawyer becomes aware that a purchaser client has particular objectives with respect to succession rights, the client should be encouraged to consult a lawyer experienced in wills and estates law. Where independent legal advice for joint purchasers is in order, this may mean referrals to two separate estates lawyers!

Once the client has had the appropriate advice, the real estate lawyer can assist in supporting the parties' estate planning intentions by arranging for the parties to take ownership as tenants in common instead of as joint tenants.

If the parties have been recently married, the real estate lawyer may also want to point out that marriage automatically revokes one's will. Recommending that clients make new wills once the real estate transaction is completed is advisable in these cases. According to a survey commissioned by LAWPRO, 56 per cent of Canadians do not have wills. Among those who did report having wills, 13 per cent indicated that the decision to create a will was prompted by the purchase of a home or condo (for a summary of the survey results, click [here](#)). For real estate lawyers who also draft wills, this presents a business development opportunity; for those who don't, it's an opportunity to make a referral to a colleague who does.

Independent legal advice

Where new partners with dependents from previous unions purchase a property together, their interests may not converge as closely as would those of a couple who are purchasing during their first marriage. To prevent challenges to the transaction at a later date, a lawyer may want to recommend that one of the parties obtain independent legal advice before completing the purchase.

Unequal contributions

In many cases, partners buying a property together may contribute unequally toward the down payment, and/or may plan on contributing unequally to mortgage payments after the purchase. Sometimes, the parties expect that one or the other will use his or her individual funds to pay for extensive renovations.

In these cases, the partners may want to see the unequal pattern of contribution reflected in their ownership rights, in case, for example, the relationship breaks down and the property needs to be sold.

One way to address such a request is by arranging for the parties to take title, in unequal shares, as tenants in common. An alternative would be to refer the parties to a family law lawyer who can ensure that the parties' intentions are reflected in a domestic contract – ideally BEFORE the real estate transaction is finalized.

Conclusion

We at LAWPRO often see references to “a simple real estate transaction”, often coupled with suggestions that such transactions can safely be entrusted to parties other than an experienced lawyer. As an errors and omissions insurer, and as the creator of TitlePLUS title insurance, we know that there is no way to identify with confidence, at the first meeting with a purchaser client, how simple or complex a proposed transaction will be.

Ontario family structures are more complex and diverse than ever before, and family law issues can impact a very large proportion of real estate transactions in the province. Real estate lawyers can benefit from a general understanding of these issues. Where appropriate, clients should be given clear information about the limits of the real estate lawyer's retainer. For assistance with legal issues outside that retainer, clients should be referred to family or estates lawyers as soon as a complication becomes apparent.

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