



Law Notes



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Informational Newsletter of the Law Office of Henderson, Howard, Pawluk & McNamara, P.A.

Legal Tidbits

Did you know that it was once illegal in Minnesota:

- For a person to cross state lines with a duck on top of his head.
- To drive down Lake Street in Minneapolis in a red car.
- To eat hamburgers in St. Cloud on Sundays.



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PURCHASING REAL ESTATE – GETTING WHAT YOU PAID FOR

There is an old saying that states, “you get what you pay for”. But when buying real estate you may not get everything you thought you purchased. How can that happen you say?

Well, let’s start at the beginning. There is a principle of real estate law called the “law of fixtures”. Under this principle, items that are permanently affixed or attached to the real estate are considered part of the real property and ownership passes to the buyer at the time of purchase.

Items such as garbage disposals, dishwashers and light fixtures are generally considered “fixtures” and remain with the

property.

Things that are not permanently attached are considered personal property and belong to the sellers and may be removed. Some of these items include window treatments such as curtains and drapes and consumer products such as televisions, office equipment and microwaves ovens.

Problems arise, however, when buyers believe they have purchased certain items that the sellers believe they can remove from the property.

An example of one hotly contested item is the dining room chandelier. Sellers often believe that they can take the chandelier with them, which because of its attachment is a permanent fixture.

There is an easy way to prevent

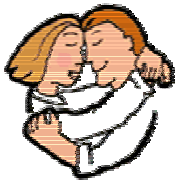
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such problems. The purchase agreement should clearly set out the disposition of any item likely to cause ownership problems.

Buyers should not overlook any item as too trivial for discussion or negotiation.

Sellers should identify any items they wish to remove from the real estate, clearly describing the item in detail.

By planning ahead, buying or selling real estate should not present a problem with the ownership of "fixtures".



PALIMONY AND CO-HABITATION AGREEMENTS

by Julie M. Pawluk,
Esq.

"My boyfriend/girlfriend/brother and I purchased property together, and now we cannot agree on how the property should be used." Or, "Now I want to sell the property and he won't agree. What can I do?" The fact is that unless you have a written co-tenancy agreement with the other party, it may be very difficult and costly to have the court sort this out.

This problem becomes particularly important in a case where the parties believe that they own property together, and each is contributing to the mortgage payments, but the property is titled in only one of their names. In that case, the party whose name is *not* on the title would have no claim to receive any of the equity out of the property when it is sold, or in the

event that the parties should break up, without such an agreement. This very inequitable result can be easily prevented by the parties signing a co-tenancy agreement prior to moving in together.

A co-tenancy agreement should cover each party's rights to possession and use of the premises, along with how the property will be handled in the event the parties decide to sell the property or one party wishes to move out. In regards to the use of the property, the agreement should cover things such as: how the parties will share the expenses, including monthly payments, taxes and insurance, and improvements and repairs; what should happen if one of the parties voluntarily leaves the premises and how that affects their contribution for expenses; what should happen if one party wishes to sell their interest in the property; what happens if one party has not contributed his or her appropriate share to the expenses; what happens if one party wishes to make improvements to the property that the other party does not agree with; what happens if one of the parties wishes to bring in additional tenants or other occupants or pets; how the tax benefits of property ownership will be divided between the parties; and in the event of a homeowner's association, who will have the right to exercise their vote.

It is much more difficult to sort out these issues "after the fact", in the absence of a prior written agreement. It may even end up in court, which can be a time-consuming and costly procedure for everyone involved. This can be avoided by discussing these issues before they *become* an issue, and putting it in writing.

NEW RULES OF SEXUAL HARASSMENT IN THE WORKPLACE

by Thomas R. Howard, Esq.

Recent cases from the Supreme Court have changed some of the old rules regarding proof of sexual harassment in the workplace. To avoid liability in your business and to be aware of your rights, we will review some of the new rules that apply to sexual harassment in the workplace.

Proof of Harassment. Contrary to the old rule, where the employee had to show that he or she was discriminated against or punished for resisting sexual advances, the Court recently ruled that harassment can be proven even when the employee is treated like other employees in terms of salary or promotion. The old rule applied in the case of Paula Jones' suit against President Clinton for sexual harassment, which was thrown out because even though the President may have made sexual advances, Ms. Jones failed to show that she had suffered at her job as a result of refusing him.

Ignorance as a Defense. Under the old rule, if a manager was not informed by the employee of the harassment, the manager normally would not have been held responsible for the actions of the harasser. Now, the manager can be held liable for the harasser's actions even if he or she did not know of the harassment unless the company has a strong, published, and effective system of dealing with harassment problems. Even where the employer can show that it had a clear policy against harassment, the case went against the employer when the Court ruled it did not show that the policy was published to all employees and effectively enforced.

Who Do You Tell If You Have

Been Harassed. Under the old rule, all you normally had to do was tell someone in management that you had been harassed. Now, under the current cases, you should tell a person who has decision-making power if you have been sexually harassed in the work place. It does not count if you inform fellow employees at the same level that you are at, you must notify a supervisor or management person with duties and authority in the harassment area.

These rules further refine the emerging rules of sexual harassment in the workplace leaving us with several clear principles. First, if you are the employer, make sure that you publish your anti-harassment position, let employees know who to contact if there is harassment, and have a published, effective method of investigating and dealing with harassment claims. Secondly, make sure that, when and if a harassment claim is made, that there is a proper investigation and follow-up on that claim. Lastly, if you are the employee, make sure that you tell someone with the proper authority and position that you have been harassed so that you have made and given effective notice of the harassment. Sexual harassment rules in the workplace are confusing and changing all the time, but these principles should give you good direction for operating in your workplace.

ESTATE PLANNING LAW CHANGES

by Chad E. Henderson, Esq.

You may have heard about the changes made to the federal estate and gift tax law that are being phased in over the next few years. (Minnesota law does not have a gift tax law). Under the current federal estate and gift tax law, there has been an increase in values excluded from

the tax. The table below shows the amounts to be excluded in the coming years.

Year of Gift	Amount Excluded	Rate on Excess
2002	\$1,000,000.00	41-50%
2003	\$1,000,000.00	41-49%
2004	\$1,500,000.00	45-48%
2005	\$1,500,000.00	45-47%
2006	\$2,000,000.00	46%
2007/2008	\$2,000,000.00	45%
2009	\$3,500,000.00	45%
2010	Repealed for one year	
2011 and later	\$1,000,000.00	41-55%

Every adult U.S. citizen, single or married, has the exclusion available to them. If you are married, each spouse has the \$1 million exclusion in addition to the unlimited marital deduction. With proper planning, a married couple can cause a \$2 million estate to pass free of estate tax. By the year 2009, a married couple will be able to pass a \$7 million estate free of estate and gift tax. The estate tax will then be repealed in 2010 and reinstated in 2011.

Currently, there is an \$11,000.00 gift tax annual exclusion available to everyone. Utilizing the annual exclusion every year would permit a person to give up to \$11,000.00 to anyone they chose to receive it and it would not require a gift tax return, nor would it result in any gift tax. Any amount in excess of \$11,000.00 given by one person to another would result in a gift tax return being required to report the excess gift, which would then be deducted from the person's estate tax exclusion amount. It is interesting to note that when a gift is made, if any tax is due, it is payable by the donor (giver) of the gift, and not the donee

(recipient) of the gift. It is the gift tax return that is done by the donor that determines the amount of tax, if any, that is to be paid by them.

Under the current law, the lifetime limit for gifts is \$1 million and it will remain at that amount. If you have questions about the law changes or are ready to move forward with your own estate plan, please contact us.

NON-BANKRUPTCY REPAYMENT AGREEMENTS

by Michael J. McNamara,
Esq.

In this age of ever-increasing bankruptcy filings both consumers and businesses may want to consider non-bankruptcy resolutions to their payment difficulties. This article briefly discusses some of those non-bankruptcy resolutions.

A. COMPOSITION PLANS

An agreement between an insolvent debtor and two or more of his creditors in which the creditors agree among themselves and with the debtor to accept less than full payment of the amount due in full settlement of each of their claims. A composition is contractual in origin and is enforceable under the law of contracts when all of the elements of a contract are present. Not all creditors need to participate in the agreement, and participating creditors may be divided into classes.

B. EXTENSION PLAN

An agreement between a debtor and two or more creditors for full payment of the amounts due but over a time period beyond the original due dates.

C. ACCORD AND SATISFACTION

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An agreement between a debtor and a single creditor for the "satisfaction" (discharge) of a debt by full performance of the new agreement (an "accord"). Minnesota recognizes the validity of an accord and satisfaction even though no actual dispute may exist if the claim is liquidated (i.e., specifically determined), payment has been made and accepted, and the clear intention of the parties was that the substituted obligation would fully satisfy the original obligation.

D. DEBT SUBORDINATION BY A THIRD-PARTY

An agreement by which a creditor agrees "not to accept" and a debtor agrees "not to make" any payment on an account balance until the debtor's obligation to another creditor has been fully paid. In addition, the first creditor assigns to the second creditor (usually a lender) any collateral security (e.g., personal property, financial certificates, etc.) that have been pledged by the debtor to the first creditor. The net effect of this informal agreement is, essentially, to create an express subordination agreement.

E. CREDIT EXTENSION AGREEMENT

A temporary waiver by a creditor of its right to file and foreclose a lien (e.g. for work done to improve real property) or take other action to enforce its rights. Except for such a purely temporary waiver, the creditor preserves all of its statutory rights.

F. ASSIGNMENTS

1. Common Law (Non-Statutory) Assignments

A voluntary conveyance by a debtor of substantially all of his property to a party in trust. The "trustee" then collects amounts owed to the debtor by others, sells the property received, and distributes the proceeds to creditors of the debtor.

The trustee takes legal title to all of the debtor's property in a common law assignment. His only obligation is to creditors. He must be guided by the terms of the assignment and must administer the assignment quickly because failure to do so may be deemed a fraudulent conveyance, resulting in the assignment being vacated by a court.

A common law assignment must be absolute and complete, i. e., the debtor retains no control over the property surrendered to the trustee or the money owed to the debtor and collected by the trustee. Additionally, there can be no "side" agreements between the debtor and any creditor to reconvey property or funds to the debtor after the assignment has been completed.

This assignment is non-contractual in nature and non-consensual. It compels creditors to comply or to force the debtor into bankruptcy. The benefit of such an assignment is the relative quickness of the process. However, it may not be less costly than a bankruptcy filing.

2. Statutory Assignments

Minn. Stat. §577.01, et seq., provides for assignments for the benefit of creditors. Although the

statute seems to read as though it preempts common law assignments, Minnesota courts have held that common law assignments are valid.

Statutory assignments are rarely used because of the ease of handling common law assignments and, more recently, because of the relative inexpense and administra-

Henderson, Howard, Pawluk & McNamara is a full service law firm with offices in Brooklyn Center, MN. We are committed to providing quality legal representation in the following areas:

- **PERSONAL INJURY**

Automobile accidents, products liability, slip and fall, dog bite, and other accidents involving injury or death.

- **REAL ESTATE**

Residential and commercial, purchase agreements, property closings and title opinions.

- **FAMILY MATTERS**

Divorce, child custody, child support and post-decree actions, adoptions and paternity.

- **BUSINESS LAW**

Corporations, partnerships, business organization, purchases, sales and mergers.

- **WILLS AND ESTATES**

Wills and trusts, probate and estate administration, guardianships and elder law.

- **CRIMINAL LAW**

DWI, misdemeanor, traffic, felony, juvenile matters and license revocation.

- **BANKRUPTCY**

Individual and business.

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