

THE DAILY RECORD

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TitleTRACK

Adverse possession and other updates

Gov. David A. Paterson signed S.7915-C/A.11574-A into law in July 2008.

The law purports to clarify the statutory standards required to establish a claim of adverse possession. According to its sponsor, state Sen. Elizabeth Little, the new law “reflects a policy aimed at settling adverse possession claims based upon a good faith standard which should not be used offensively to deprive a landowner of their real property.”

The most significant provision, RPAPL Section 543, appears to require a more stringent burden to establish adverse possession: “The above statute thus permits acquisition of another’s real property by constructing a structure — other than a shed — which encroaches on another’s land, provided such encroachment is not deemed ‘*de minimus*’ nor ‘permissive and non-adverse.’”

Unfortunately, the intended effect of the new law has yet to manifest itself in the day-to-day real estate practice. According to some, that is due mainly to the uncertainty in applying such amorphous terms as “*de minimus*” or “permissive and non-adverse.”

Until such time as that verbiage is subjected to judicial scrutiny, the legislation will bear little fruit.

Fortunately for local practitioners, the standard Monroe County Bar Association Purchase and Sale Agreement set the bar for *de minimus* fence encroachments as being less than one foot. Only time will tell how the legislation truly will affect this interesting and troublesome area of real estate practice.

Further foreclosure protections

The New York State Assembly is aiming to protect homeowners with the passage of a bill that adds to the state’s Responsible Lending Act of 2008.

The bill, which Gov. Paterson is expected to sign, tops off at almost 20 pieces of legislation. One measure requires lenders to give borrowers a 90-day warning before beginning the foreclosure process. Once the process is started, the state is required to notify counseling agencies, which then will be responsible for explaining alternatives to homeowners to avoid foreclosure, such as loan and payment modifications.

The lengthy bill also includes mandatory mediation provided free to homeowners by the lender, as well as “shared appreciation” agreements between the two parties.

The new legislation also guarantees owners of co-ops would receive at least 90 days before losing their shares in the build-

ing. Lawmakers hope that will allow more time to seek help. Most foreclosures regarding co-ops occur because tenants cannot pay monthly maintenance fees that cover the mortgage and any other building-related expenses.

As the housing market begins to bounce back from the foreclosure crisis, it seems state officials now realize it’s time to make permanent changes to avoid the same fate in the future. The bill most likely will take effect within the next two months.

Tenancy

Fee ownership to real property in New York typically is held individually, as tenants in common, as tenants by the entirety and as joint tenants (also known as joint tenants with rights of survivorship). It is with the latter two modes that my column will briefly visit.

Four elements or unities are required to form a joint tenancy:

- Time — Property must be acquired at the same time.
- Title — Co-owners must take title to property by the same instrument, and the type of tenancy must be specifically identified therein.
- Interest — Each owner must have an equal interest with other co-owners.
- Possession — All owners must have an equal right to possess the whole property.

Those four unities, along with a fifth unity — that the owners must be married to each other — also are required to form a tenancy by the entirety.

A married couple holding real property as tenants by the entirety is treated as if the couple is one individual, with each spouse having a 100 percent interest in the whole subject to right of survivorship of the other. There is a great benefit to a surviving spouse, in that they would have a whole interest in the property free of probate and estate tax issues. Other benefits include partial protection in cases where the other spouse files a bankruptcy petition.

When a judgment is perfected against only one spouse and that spouse predeceases the other, the judgment no longer would be enforceable against the property. It is important to note also that a tenancy by the entirety dissolves upon the owners’ divorce, creating a tenancy in common in which each party holds a separate interest in the whole.



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Continued ...

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Continued ...

Joint tenancy shares many attributes with tenancy by the entirety — such as the passage of title outside of probate — but there are differences. Two or more individuals, married or not, can hold property as joint tenants. A judgment against only one deceased joint tenant is enforceable against the whole premises.

One of the most common errors observed in the formation of title held as joint tenants is when one party holds a 99 percent interest jointly with another party who holds a 1 percent interest.

Since the unity of equal interest has not been met, joint tenancy would fail. It is crucial not only to determine the proper type of tenancy for each situation, but also just as important to ensure it is set up correctly.

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