

TITLE ISSUES

DOES DIVORCE AUTOMATICALLY STAY REAL PROPERTY SALES?

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AN AUTOMATIC STAY.

A new provision of the Illinois Marriage and Dissolution of Marriage Act became effective on January 1, 1993. It provides that:

...upon service of a summons and petition or praecipe filed under the Illinois Marriage and Dissolution of Marriage Act or upon the filing of the respondent's appearance in the proceeding, whichever first occurs, a dissolution action stay shall be in effect against both parties and their agents and employees, without bond or further notice, until a final judgment is entered, the proceeding is dismissed, or until further order of the court:

- (1) restraining both parties from transferring, encumbering, concealing, destroying, spending, damaging, or in any way disposing of any property, without the consent of the other party or an order of the court, except in the usual course of business, for the necessities of life, or for reasonable costs, expenses, and attorney's fees arising from the proceeding, as well as requiring each party to provide written notice to the other party and his or her attorney of any proposed extraordinary expenditure or transaction...

A restraint of the parties' actions under this Section does not, however, affect the rights of a bona fide purchaser or mortgagee whose interest in real property or whose beneficial interest in real property under an Illinois land trust was acquired before the filing of a lis pendens notice under Section 2-1901 of the Code of Civil Procedure.

SALES STOPPED? THE IMPORTANCE OF LIS PENDENS.

Does this amendment to the Illinois Marriage and Dissolution

of Marriage Act mean that each and every time a lis pendens notice of a dissolution of marriage is filed, that any and all sales of real property are enjoined? Can no sales be made without court approval?

The expressed intention of the Act is to restrain either spouse from wasting his or her individual assets and dissipating them so the other spouse will not be able to gain benefit from such assets in the dissolution of marriage action. But it surely was not intended, nor will it, prevent both spouses from jointly selling and conveying real estate. To make the restraint provided in this Act effective against third parties it is essential that a lis pendens notice of the dissolution proceeding be placed of record in the county where the real property is located. This restraint might be termed an automatic stay similar to the stay in a bankruptcy action. Any bona fide purchaser will take the real estate free and clear of any possible restraint intended to be placed on the spouses if the purchase is completed prior to the filing of a lis pendens notice in the county where the real property is located.

WHAT WILL TITLE INSURERS REQUIRE TO INSURE SALES?

Even after lis pendens is perfected, if both spouses join in a conveyance, be it a deed or mortgage, the grantee or mortgagee will take free and clear of any restraint. If title is in one spouse alone, title insurers will accept a conveyance by that party alone together with a written consent to the conveyance by the other spouse. The insurer may well insist that the signature of the other spouse on the consent be attested by a Notary. Although the statute plainly intends that any sale of real estate which takes place in the normal course of business is not to be restrained, in fact will be difficult to convince title insurers that a sale is in the ordinary course of business. Only if a court approves a sale as being in the ordinary course of business or adequate indemnification is given to a title insurer, is it likely exceptions raised invoking the restraint will be waived.

If both spouses are not going to sign or authorize the conveyance title insurers will demand court orders authorizing the sale, lifting the stay. Unless the orders are entered by consent of the parties, this means that thirty days will have had to pass without any appeal being taken from date of entry of the order

lifting the stay, authorizing the sale, before title insurers will insure any conveyance.

As the stay operates on the parties, a spouse who has sole power of direction in a land trust cannot execute a power of direction to convey (or mortgage) unless the consent of the other spouse is given or the direction is given pursuant to a court order or after a lifting of the stay has been entered. Appeal periods (unless the orders are by consent) will have to have passed before the order can be relied upon by the trustee.

POSSIBLE UNCONSTITUTIONALITY.

It should be noted that a judge in a Cook County case has declared this automatic stay provision of the statutory amendment unconstitutional. The case is now on appeal. The author

makes no comment on this decision, but will note that title insurers will surely not recognize it until and unless a reported appeal court decision holds the amendment unenforceable for whatever reason.

1. P. A. 87-881, S.B. 934, Ill. Rev. Stat., ch. 40 par. 501.1, 750 ILCS 5/501.1 (1992 ISBA Edition).
2. 735 ILCS 5/2-1902 (1992 ISBA Edition).
3. *Carrie Messenger v. Edgar et. al.*, 93 CH 4, as reported in *The Chicago Daily Law Bulletin* of Wednesday, February 17, 1993.

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