WHEN MARRIAGE MATTERS â?? Part 1: Various Ways Marital Status Can Affect Title

Description

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Introduction

Marriage matters for many reasons. Just ask anyone, and you are likely to get sundry reasons for why marriage matters: love, security, companionship, children, etc. But pose that same question to someone in the title industry, and you may hear about how marriage affects title to real estate. The purpose of this article is to have that conversationâ??with you.

So how does marriage affect title to real estate? Let me explain.

Marriage Defined and Created

Marriage is â??nearly a cultural universal, but the definition of marriage varies between cultures and religions, and over time.â?•[1] The Virginia Code is not much help. Nowhere in the Code is marriage defined, but looking to simple dictionary definitions, marriage certainly includes traditional male/female couples, which has in recent years been extended as a matter of law to same-sex couples.[2] And yet, despite the lack of guidance to tell us what marriage *includes*, the Virginia Code does tell us what it *excludes*, such as marriages between certain family members, minors, or more than two people.[3]

To create a marriage requires a license and some sort of solemnization, like an official ceremony.[4] Because of this requirement, Virginia does not recognize *common law marriages*, which for the most part depend on a couple simply â??behavingâ?• like a married couple for a requisite period, without any official ceremony.[5] However, if such a marriage is created in another jurisdiction which recognizes common law marriage, Virginia will recognize that common law marriage as long as it is not repugnant to Virginia public policy.[6]

Dower and Curtesy[7]

One need only review the long history of *dower* and *curtesy* in Virginia to appreciate the fundamental impact marriage has had on real estate in Virginia. Curtesy, the estate of a husband in the lands of his deceased wife, and dower, the estate of the wife in the lands of her deceased husband, are, at common law, two quite distinct estates. However, statutory enactments removed the most significant differences between the two and made dower and curtesy practically identical. The two were made synonymous by the General Assembly in 1977.

Tracing the evolution of these concepts through the various revisions to the Virginia Code yields many nuanced rules. But to put it simply, a surviving spouse was entitled to a dower or curtesy interest of one-third of all the real estate whereof the deceased spouse (or any other to his or her use) was at any

time seized during the marriage, unless such right was relinquished by agreement or lawfully barred due to divorce or desertion.

Effective January 1, 1991, the interests of dower and curtesy were abolished. This abolition was not intended to change or diminish the nature or right of any dower or curtesy interest of a surviving spouse whose interest vested prior to that date, or the right of a creditor or other interested party in any real estate subject to a right of dower or curtesy. Furthermore, at the time these concepts of dower and curtesy were abolished, they were replaced with another scheme to protect the economic rights of the surviving spouse: the augmented estate.

Augmented Estate[8]

At the time a spouse dies, the surviving spouse has a choice to make. He or she can take whatever is allotted to him or her under the decedentâ??s will or (if there is no will) under the laws of intestate succession. Alternatively, the surviving spouse can claim an elective share of the deceased spouseâ??s *augmented estate*. If a claim for an elective share is made, the surviving spouse is entitled to (i) one-third of the decedentâ??s augmented estate if the decedent left surviving children or their descendants or (ii) one-half of the decedentâ??s augmented estate if the decedent left no surviving children or their descendants.

The election by the surviving spouse must be made within six months from the later of the time of admission of the will to probate, or the qualification of an administrator on the intestate estate. A complaint to determine the elective share must be filed within six months from the filing of the election.

Remember that the claim is on not just the decedent spouseâ??s estate, but his or her *augmented* estate.[9] It is called an augmented estate because it is increased beyond whatever the decedent was seized of at the time of death. In particular, the value of the augmented estate consists of the sum of the value of all the property in the following categories:

1. The decedentâ??s net probate estate;[10]
2. The decedentâ??s non-probate transfers to others;[11]
3. The decedentâ??s non-probate transfers to the surviving spouse;[12] and
4. The surviving spouseâ??s property and non-probate transfers to others.[13]

Non-probate transfers include powers of appointment, survivorship estates held with a person other than the surviving spouse, payable on death accounts or transfer on death deeds.[14] Excluded from the augmented estate calculation is the value of property conveyed to the extent the decedent received adequate and full consideration in money or moneyâ??s worth or property conveyed with the written joinder of, or consent in writing of, the surviving spouse, or property conveyed to the decedent by gift, will or other transfer without consideration and maintained as separate property.[15]

The elective share is first satisfied with assets that were excluded from the augmented estate that pass or have passed to the surviving spouse; assets included within the augmented estate that pass or have passed to the surviving spouse, and the marital property portions of the surviving spouses assets included within the augmented estate.[16] If insufficient, the decedentâ??s net probate estate and non-probate transfers are applied.[17] The liability for the balance of the elective share is equitably apportioned among the recipients of the augmented estate property in proportion to the value of their interests.[18]

Only the original recipients of non-probate transfers, or those successors who have not paid valuable consideration (recipient of gift, heir, devisee) are subject to contribution, and then only to the extent such persons have the property or its proceeds. The contribution can be in the form of the property or its cash value, or, with the surviving spouseâ??s agreement, other property.[19]

Written consent or joinder of the spouse remains the means of exclusion most available to the title examiner.

Tenancy by the Entirety: Creation

When considering the benefits of marriage with respect to title, one can hardly find a better place to begin then *tenancy by the entirety*. When two or more persons hold title to real estate, Virginia recognizes various ways that such title may be held, each with its own requirements and characteristics.[20] One of those ways to hold title is tenancy by the entirety,[21] which can only be had by a married couple.[22]

To create a tenancy by the entirety, we begin by looking to the statutory foundation for this form of tenancyâ??Va. Code Â§ 55.1-136, which states in pertinent part as follows:

Â§ 55.1-136. Tenants by the entirety in real and personal property; certain trusts.

A. Spouses may own real or personal property as tenants by the entirety for as long as they are married. Personal property may be owned as tenants by the entirety whether or not the personal property represents the proceeds of the sale of real property. An intent that the part of the one dying should belong to the other shall be manifest from a designation of the spouses as â??tenants by the entiretiesâ?• or â??tenants by the entirety.â?•

When read carefully, the statute does NOT say that ONLY the phrases *tenants by the entireties* or *tenants by the entirety* will create this estate. This leaves open the possibilities that other phrases may manifest the requisite intention. While there is no exhaustive list, relevant cases agree that a tenancy by the entirety results when the conveying instrument indicates that the parties are married and that each spouse has a right of *survivorship*â??a defining characteristic of tenancy by the entirety. A bankruptcy case would extend tenants by the entirety status on the mere recitation of the grantees being married, but this has not been authoritatively decided in Virginia.[23]

Survivorship

Understanding the elements necessary to create a tenancy by the entirety, we can now better appreciate all that this form of tenancy has to offer. There are several advantages worth noting.

The first notable advantage is the right of survivorship, mentioned earlier. In other words, when one spouse dies, his or her interest in the property does not â??passâ?• to anyone by will or by the laws of intestate succession. It is simply extinguished, leaving the surviving joint tenant as the sole owner. This right of survivorship is evident from the words in the statute quoted above, â??*An intent that the part of the one dying should belong to the other . . . .â?•*[24]

There are two exceptions to this â??right of survivorshipâ?• rule. The first exception to this rule is where one spouse murders the other. A murderer cannot profit by his own crime.[25] The second is grounded in Virginiaâ??s Uniform Simultaneous Death Act, which provides that if it cannot be established by clear

and convincing evidence that one spouse survived the other by 120 hours, each spouse will be allocated one-half of the property to be then distributed as if the other spouse had predeceased.[26] In addition to these two exceptions, there are two wrinkles to mention as well. First, when a deed purports to convey property to grantees as tenants by the entirety but they are in fact not married, they take title as joint tenants with the right of survivorship and not as tenants in common.[27] And second, when a deed purports to convey title to grantees as â??tenants in common with a common law right of survivorship,â?• the right of survivorship, being mentioned second and being repugnant to a tenancy in common, is negated.[28]

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[1] Wikipedia, â??Marriageâ?• (2023).

[2] *Obergefell v. Hodges*, 135 S.Ct. 2584 (S. Ct. 2015). Note further that in recent years the terms â??husbandâ?• and â??wifeâ?• have been replaced by â??spouseâ?• in relevant sections of the Virginia Code.

[3] Va. Code Â§ 2-43 (bigamous marriages); Va. Code Â§ 20-38.1 (marriage between certain family members); Va. Code Â§ 20-45.1 (marriages created during mental incapacity; marriage of minors).

[4] Va. Code Â§ 20-13.

[5] *Farah v. Farah*, 16 Va. App. 329 (1993) (citing *Offield v. Davis*, 100 Va. 250 (1902).

[6] *Kelderhaus v. Kelderhaus*, 21 Va. App. 721 (1996); *see also Porter v. Porter*, 69 Va.App. 167 (2018) (considering whether a common law marriage was established in D.C.).

[7] *See generally* Pogoda, *A Virginia Title Examinersâ?? Manual* (6th ed.), Chapter 29 (â??Marital Interestsâ?•) Â§Â§ 29-1 through 29-8.

[8] *See generally* Pogoda, *A Virginia Title Examinersâ?? Manual* (6th ed.), Chapter 29 (â??Marital Interestsâ?•) Â§Â§ 29-9 through 29-10. *See also* Va. Code Â§Â§ 64.2-300 through 64.2-308.

[9] Va. Code Â§ 64.2-308.4.

[10] Defined in Va. Code Â§ 64.2-308.5.

[11] Defined in Va. Code Â§ 64.2-308.6.

[12] Defined in Va. Code. Â§ 64.2-308.7.

[13] Defined in Va. Code Â§ 64.2-308.8.

[14] Va. Code Â§ 64.2-308.5.

[15] Va. Code Â§ 64.2-308.9.

[16] Va. Code Â§ 64.2-308.10(A).

[17] Va. Code Â§ 64.2-308.10(C) and (D).

[18] Va. Code Ann. Â§ 64.2-308.10(C) and (D).

[19] Va. Code Ann. Â§ 64.2-308.11.

[20] Other forms of tenancy include *tenancy in common* and *joint tenancy*.

[21] Virginia is one of about two-dozen states that continue to recognize tenancies by the entirety. *Bunker v. Peyton*, 312 F.3d 145, 151 (4th Cir.2002).

[22] Va. Code Â§ 55.1-136.

[23] *See In re Sampath*, 274 B.R. 224 (E.D. Va. 2002) (26-page opinion tracing history of tenancy by the entirety).

[24] *See also Vasilion v. Vasilion*, 192 Va. 735 (1951).

[25] *Sundin v. Klein*, 221 Va. 232 (1980).

[26] Va. Code Â§ 64.2-2203.

[27] *Gant v. Gant*, 237 Va. 588 (1989); Funches v. Funches, 243 Va. 26 (1992).

[28] *Camp v. Camp*, 220 Va. 595 (1979).

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Date Created
2024/06/20
Author
vltaexaminer