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How Community Property Law Affects Real Estate

from the desk of David M. Touchstone

Louisiana is one of nine community property states. The legal implications of community property play a significant role in the ownership, transfer, and mortgage of real estate.

For married persons, ownership of property falls into two and only two categories: separate and community. When property is the separate property of a spouse, that spouse is free to do whatever he likes; the non-owning spouse has absolutely no rights as to the owning spouse's separate property. A spouse may acquire property as his separate property in the following ways, to wit:

1.) By inheritance;
2.) Any acquisition prior to marriage;
3.) By donation;
4.) By exchange if the property transferred was separate property;
5.) By purchase with funds if the funds are the separate property of the spouse;
6.) By purchase, if the acquiring spouse entered into a prenuptial agreement with the non-acquiring spouse.

Category 6 requires some additional explaining. Louisiana law allows a prospective husband and wife to enter into a contract prior to marriage. While the prospective spouses may draft their prenuptial agreement to design the marital regime pretty much as they wish, most people who enter into prenuptial agreements simply provide that property acquired during marriage (which would otherwise have become community property) will be the separate property of the acquiring spouse. However, the fact that spouses enter into a prenuptial agreement does not prevent them from acquiring property together; this can be accomplished by titling the property in both of their names.

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Real estate that is acquired during marriage and not subject to any of the exceptions described above is presumed to be community property. Moreover, titling of the property in one spouse's name is not definitive of ownership. Obviously, property titled in both names belongs to both spouses. An example of this would be the following language on the spouses' deed of acquisition: SAM SPEED and SALLY SPEED, husband and wife. If, on the other hand, the deed of

acquisition reads, "SAM SPEED, husband of SALLY SPEED", the property is community even though it is titled in Sam's name alone. Occasionally, title attorneys will encounter a deed of acquisition in which the property is titled in the name of only one of the spouses, and the deed is silent as to that spouse's marital status. When this occurs, an affidavit must be obtained and filed on record to establish what the marital status of the purchaser was at the time of his acquisition.

By now you may be wondering why title lawyers make such a big deal about the marital status of a purchaser at the time of acquisition. Answer: Louisiana law provides that a sale, lease, donation, exchange, or mortgage of community real estate that does not have both spouses' signatures is null. That is to say, such a disposition on one spouse's signature is as if nothing ever happened. The grantee doesn't even get a half interest; he gets zero. It is marriage alone that determines the right. Consider the following scenario: Sam Speed and Sally Speed were married and then separated twenty years ago. Sam hasn't seen Sally or had any contact with her in twenty years, but Sam never got around to getting a divorce. Three years ago, Sam acquired real estate in his name; Sam's deed of acquisition is silent as to his marital status. Under these facts, the property Sam acquired <u>is</u> community, and Sally's signature <u>is</u> required to effect the sale or mortgage.

This writer most often encounters challenges arising from community property law in the context of a newly separated (but not divorced) spouse who wishes to purchase real estate with the assistance of a mortgage secured loan. Louisiana law allows an acquiring spouse to make a declaration on his or her deed of acquisition that the property is being acquired with separate funds as separate property. When such a declaration is made on the deed, third persons can safely deal with the acquiring spouse in the legally protected belief that the property is in fact the separate property of the acquiring spouse. Accordingly, if such a purchaser wishes to later sell the property, it can be sold free of a title problem. More to the point, however, the double declaration (separate funds as separate property) can be relied upon by a lender who finances the purchase on behalf of the declaring spouse. But while such a lender is protected, the unfortunate reality of our business is that the lender may not know this and sometimes is difficult to convince. Often times, lenders will require title agents to obtain the signature of the non-acquiring spouse. Title agents who have been entrusted with a lender's funds must follow that lender's closing instructions to the last jot and tittle. Accordingly, real estate brokers and agents who are assisting a lone purchaser would be well advised to ascertain the following facts:

1.) Is the client married?
2.) If the client is married, does he intend to acquire the property as his/her separate property?
3.) Does the client have a prenuptial agreement? If so, make sure that you get to see it, and that you tell the lender and the title agent.
4.) Will the client's non-acquiring spouse come to the closing to sign the necessary papers? If so, be at pains to <u>make sure</u> the other spouse will come.
5.) If the other spouse will not come to the closing, will this lender agree to lend its money to finance the sale if the acquiring spouse makes the double declaration? If not, there are

lenders who will, and it is better to find this out early and get your client in contact with a lender who will co-operate.

Finally, if a spouse makes the separate property double declaration on the deed, the non-acquiring spouse is not barred from claiming an interest in the property. However, third parties are nonetheless protected. For example: Sally Speed is estranged from Sam Speed. Sally purchases a home, makes the double declaration on her deed of acquisition; Sam does not appear at the closing. The sale is financed with a mortgage secured loan. Six months later, Sam finds out about the sale, files a divorce proceeding against Sally and claims that he owns a half interest in the property. If the court finds that Sally made the purchase with community funds (and not separate funds as she claimed on the deed), then Sam will be recognized as the owner of a half interest. Nevertheless, the mortgage holder will be protected, because the mortgage holder was entitled to rely on the double declaration. Nonetheless, the above-described scenario should stimulate you to strongly encourage your client to arrange for the non-acquiring spouse to sign the deed to acknowledge that it is the separate property of the acquiring spouse. A non-acquiring spouse who signs such an acknowledgement is conclusively barred from ever setting up any claim to the property.

Another interesting permutation involving community property occurs when husband and wife wish to acquire property with a mortgage secured loan, but one of the spouses has poor credit. In such cases, the lender often requires that the property be acquired as the separate property of the good credit spouse. Often times, this is disappointing to the buyers who wanted to purchase the property together. Not to worry: the solution here is to complete the purchase as a separate property purchase, but have the acquiring spouse later donate a half interest to the non-acquiring spouse. Caveat: before making the donation, contact with the lender should be made to determine that the lender will not "call the note" (demand full payment) for unauthorized transfer in violation of the mortgage. Also, the public records should be consulted to obtain assurance that no judgments or tax liens are filed against the bad credit spouse.

Community property law also has significant consequences in the descent and distribution of property when a spouse dies, but more about that in the future.