FAMILY LAW CONSIDERATIONS FOR REAL ESTATE LAWYERS

Do you ever act for parties who are married or cohabiting? If so, there are some family law considerations that might impact them, whether they are the purchasers or the vendors. This article is intended as a family law refresher for real estate lawyers.

Acting for a Couple: Joint Retainers and Conflicts of Interest

If you are asked to act for a couple, you can only do so if the clients agree you may act for them on a joint retainer which means that you are retained by both of them.

You can only act jointly for clients when their interests are not in conflict. Because various family law situations, such as those discussed below, may create a conflict of which the clients may be unaware, this is a circumstance which requires caution and consideration.

Your role in a joint retainer is of limited scope. Your role, as the transactional lawyer, is to facilitate the purchase or sale, rather than to advise clients on their individual rights or obligations. It's important to be clear that you cannot protect either party's interests in a conflict. Reinforcing this helps set appropriate client expectations.

As always, a retainer agreement or letter should be sent to the clients at the earliest possible time.

A joint retainer agreement must be in writing. You must advise the clients that in acting for both of them, no information from one client can be treated as confidential from the other, and if a conflict develops that cannot be resolved, you cannot continue to act for both of them and may have to withdraw. (See Code Rules 3.4-5 and 3.4-8.)

Many clients will want you to act for them on a joint retainer even where there is a potential for conflicting interests to arise. Most couples who are purchasing a home see only happy times ahead. This means you must draw to their attention that they may be assuming risks. A fully informed client can consent and accept the risks.

If you have advised the clients of the potential for conflict and the clients still want you to represent them on a joint retainer, **and** you reasonably believe that you can provide loyal and effective representation without having a material adverse effect on the representation of, or loyalty to, the client or any other client, you may do so. (See Code Rule 3.4-2.)

Each client must consent in writing or you must confirm their consent separately in writing to each of them before acting. (See Code Rule 3.4-7.)

If one party is less sophisticated or more vulnerable than the other, you should refer them for independent legal advice. (See Code Rule 3.4-5.)

Your retainer letter should explain the options for taking title and inform the parties that you cannot and will not advise them about how they should do so, or steps they might take in order to protect their interests in the property in case of the death of either of them, separation or divorce, judgment creditors, and/or bankruptcy.

The retainer letter should confirm that if either or both parties want legal advice regarding their rights and obligations and about protecting their interests, they will each need to seek independent legal advice.

These concerns could include:

- how their individual financial contributions will be treated;
- how title to the property should be taken;
- what will happen in the event of separation or breakdown;
- whether a cohabitation or spousal agreement might be appropriate.

These issues are discussed in more detail below.

The Family Property Act

The main statute in Manitoba that governs family property rights is *The Family Property Act* (FPA), a provincial statute which provides for parties' rights to an accounting and equalization of the value of property owned by each of them upon **separation or death.**

The FPA applies to married parties or parties to a common law relationship, irrespective of gender. For the purposes of the FPA, common law partners are defined in section 1(1) as parties who are not married to each other, and who have cohabited in a conjugal relationship for at least three years, or those who have registered their common law relationship under section 13.1 of *The Vital Statistics Act*.

These defined parties also acquire rights under *The Homesteads Act*.

The FPA applies to assets acquired during the marriage or common law relationship, or those acquired prior to, but in specific contemplation thereof. Where the parties cohabited prior to marriage, the FPA also applies to assets acquired during that pre-marital cohabitation period, irrespective of its length.

You should be alert to the marital or common law status of your client, and aware of the relevant provisions of the Act that may affect the rights of parties who are married, cohabiting or contemplating either course of action, in the property that is being purchased or sold.

Sharing Under The Family Property Act

The FPA provides that the value of all assets and debts acquired during the period of the cohabitation/marriage relationship (as defined above) is shareable, with some important exceptions.

Assets that are acquired prior to the date of cohabitation or marriage (or while married but living separate and apart) are not shareable (unless in specific contemplation of marriage or cohabitation as noted above), although any appreciation in value of such assets and/or income from such assets during that relationship is shareable.

Assets that are acquired by way of damage award for personal injury, inheritance, gift or trust benefit that was not intended to benefit both parties, are not shareable. Any appreciation in value of such assets and/or income from such assets, is similarly not shareable.

It is quite easy for these exemptions from sharing to be lost, and it is this serious risk of which clients are almost universally unaware. Many believe that they will always receive a credit for funds that were either pre-acquired, inherited, gifted or personal injury compensation, if there are accounting proceedings upon a future separation. They also may believe that registering a property in their sole name will render it non-shareable. Neither is correct.

Where non-shareable funds (for example funds pre-acquired or inherited by one party) are used to purchase property that is jointly held, the joint tenancy prevails, and the exemption is lost.

Where non-shareable funds are used to purchase a "family asset", that asset is shareable and the exemption is lost, even if it is registered in the name of one party alone. "Family asset" has a wide definition, and specifically includes a family home. A family home is defined as a "property in which a spouse or common-law partner has an interest and that is or has been occupied by the spouses or common-law partners as their family residence". It also includes a property owned by a corporation in which a spouse or common law partner owns shares that entitle them to reside in the property.

Where non-sharable funds are used to purchase a commercial asset, the exemption from sharing the funds continues.

Additional complexities can occur when one party owns a home with a previous partner. If that party purchases the interest of their previous partner in contemplation of their new relationship, the home may be fully shareable with the new partner, despite the first party's feeling that the home, or at least their original interest, was pre-acquired. (See FPA s. 4(1)(b) and s. 4(2.2)(b).)

In order for you to serve your client and be sure that they understand the implications of their real property purchase, you should discuss with your client the source of funds (also a requirement under the anti-money laundering rules), and ensure that they are aware that there can be implications of using pre-acquired or other non-shareable funds for a purchase that they may wish to consider. In such a case, it may be necessary for you to refer them to a family lawyer for further discussion and advice, including the possibility of a cohabitation, pre-nuptial or spousal agreement if required. Under section 5 of the FPA, that Act will not apply to any asset to which it is made inapplicable pursuant to such an agreement.

It is wise to document this information in writing for your clients, along with your strong recommendation that they consult a family lawyer with respect to these issues.

Title Matters

Many couples believe that married parties must hold title in joint tenancy. You should ensure they are aware of their various options.

Holding title in joint tenancy means that title will pass to the survivor, in the event of the passing of the first joint tenant. It also means that the property will be deemed to have "already been shared equally" under section 10 of the FPA, such that the FPA will not apply. Absent agreement, other proceedings will be needed to deal with a jointly held home in the event of separation. Since each party has an ownership interest, each party's interest will be valued whenever the property is dealt with.

A property held in the name of one party will be shareable, and valued as of the valuation date, usually the date of separation. If it was exempt from sharing (for example, it was pre-acquired not during cohabitation or marriage or contemplation of either) only the increase in its value will be shareable. In both cases, upon death, the survivor will have homestead rights, which will permit them to remain resident in the home for their lifetime, which may or may not accord with a client's wishes. A cohabitation, pre-nuptial or spousal agreement may allow the parties to deal with such matters in other ways that they prefer.

A property held as tenants in common will continue to be subject to the FPA, but upon separation, tenancy in common does not determine which party may retain it, or whether it will be sold and on what terms. Upon death, the surviving partner will have homestead rights, as noted above.

The clients should be aware that, irrespective of how title is held, the lender may require that the parties be jointly and severally liable for the loan or mortgage debt.

Parties Who Have a Spousal Agreement

Ask the parties whether they already have a prenuptial, cohabitation, separation or spousal agreement that may deal with the real property. If your present instructions do not accord

with its terms, this should be drawn to the parties' attention and referrals to their family lawyers will be in order.

Inter-Family Loans or Gifts

Where a purchase is being made with the assistance of a loan or gift from family members, your clients must beware. Often the provision of the funds is not documented, such that upon separation there may be a difficult dispute between partners as to whether the funds were a loan to be repaid, or a gift with no repayment required.

Sometimes the family member who provided the funds will only later assert they intended a loan, particularly if the relationship between the parties has broken down. If one client's family member is providing funds, they need to be aware of the risks. If a loan is intended, the best course of action is to document the loan properly, and register it on title.

Debts Registered on Title

Debts registered on title must be dealt with when the home is being transferred. If the parties want the proceeds to be divided and a debt paid from only one party's share of the proceeds, you will need instructions to that effect. If there is a prenuptial, cohabitation, separation or spousal agreement that governs the situation, and your instructions do not accord with the agreement, the parties should be referred to their family lawyers.

Separating or Divorcing Parties

Often when parties are separating or divorcing, they are selling their home or other real property. If they do not each have a family lawyer, you should recommend that they each seek family law advice so that they are aware of the implications of their actions.

If you are a member of a firm which is representing one of the parties in their separation or divorce proceedings, you are in a conflict if you are asked to handle the sale for both parties. You may act on a joint retainer with both clients' consents, if you can do so loyally and effectively for both as discussed above. (See Code Rules 3.4-2 and 3.4-5.) However, the safer practice is to refer the parties elsewhere, especially if there is any possibility that a contentious issue may arise, which could impact the domestic proceedings and possibly create a conflict necessitating withdrawal of you and/or your firm in the domestic matter.

Problems may arise in knowing how to disburse the sale proceeds if the parties haven't yet finalized the division of their family property. All debts, liens or judgments registered on title must be paid out in order to convey clear title. The parties may agree to factor such a payment into the family property accounting, or could argue about the shareability of such debts. One spouse might also seek to divide and pay out the net proceeds unequally, in furtherance of that spouse's family property claim.

You must be on guard against being drawn into a conflict over who is entitled to what share of the net proceeds or the temptation to give any advice in the context of such a clear conflict of interest.

If the parties each have family law counsel, you should ensure that your instructions for the Direction to Pay come from them jointly. The instructions should be specific as to the division of the sale proceeds. If you are to pay certain debts from the sale proceeds, your Direction to Pay should be clear and detailed, and should also include directions as to the payment of your fees and disbursements.

If the parties have not yet agreed as to the division of the net sale proceeds, the parties may agree that the funds should be paid to one of the family lawyers, to hold in trust pending the parties' agreement or court order.

If the parties do not have counsel, and have not yet agreed as to how the proceeds of sale should be shared, the Direction to Pay could provide that the balance of the net sale proceeds, after the pay-out of all registered encumbrances, taxes, and sale-related expenses (commissions, legal fees, etc.), be held in trust by you, to be paid out as the parties agree or pursuant to an order of the court. This might require you to hold the net sale proceeds for quite a while, and it may be necessary to bring an interpleader application if the parties are not able to reach agreement.

If it appears that the funds might be held for more than a month or so, you should also seek instructions regarding investing the funds and in whose names it should be. Absent other agreement, the investment should be in the names of the parties as their interests appear on title. Later their family lawyers will need to deal with the T5 when it issues.

Homestead Consents and Homestead Releases

A homestead consent from the registered owner's spouse or common law partner is necessary when there is to be a disposition of the property. If the property is jointly held, and both owners are making a disposition of their interests, separate homestead consents are not required.

However, where one joint owner is transferring their interest to the other, you must determine if the transferring spouse is consenting to the transfer and *retaining* their homestead rights. This is usually the case if the parties are remaining in their relationship and the transfer is for estate planning, financial or other reasons. On the other hand, where the parties are ending their relationship and one party is retaining the home, the transferring spouse is *releasing* their homestead rights in favor of the other, and a separate homestead *release* is required in addition to the transfer of land. The transfer of land alone does not operate as a release of homestead. Both forms need to be registered at Land Titles.

Homestead rights are terminated by divorce or by the filing of a dissolution under *The Vital Statistics Act* by a party to a registered common law relationship, but not by a separation. This is important where parties are not immediately divorced, have not filed a dissolution of their registered relationship, or where their common law relationship was not registered. Where homestead rights have not been terminated or released, proceedings may be necessary to seek a court order dispensing with consent or terminating homestead rights (See *The Homesteads Act* s. 10.)

Separating Parties and the Principal Residence Designation

Most separating parties are not aware that there can be only one principal residence at a time per family unit. Separated parties often believe that they can each designate a separate principal residence commencing on the date of their separation. This is not accurate. Married or common law parties can only designate separate principal residences once they are living apart from, and are separated under a judicial separation or a written separation agreement. (See Canada Revenue Agency *Income Tax Folio S1-F3-C2 Principal Residence*.)

Accordingly, if one party purchases a new property while the original property is still owned, absent a signed agreement or judicial separation, the new property does not become its owner's principal residence at the time of purchase.

If parties own two properties, such as a house and a cottage, only one is their principal residence. If each party retains one property, the party who sells first might claim that property as their principal residence, leaving the other party unable to designate their property as principal residence for that same period of time.

Parties may need to be referred to tax and/or family law counsel to discuss these issues and potentially include relevant provisions as to the principal residence designation in an agreement.

What Clients Need to Know But Don't Know to Ask

You need to ensure that your clients understand that title may be taken jointly, or as tenants in common in any proportions, and the implications.

The Homesteads Act may impact how they can deal with their property in the future, in light of a non-titled survivor's life interest and the titled party's inability to sell or mortgage the property without the consent of the other.

The Family Property Act may impact the sharing of the value of the property upon separation or death in ways that may or may not accord with their wishes.

You might provide examples, including that sometimes the parties are contributing funds disproportionately, or using funds that they may not wish to share in future, or that the parents of one of the parties is providing a monetary gift or loan toward the purchase.

In many circumstances, the two parties may have different interests and may require information about what steps, if any, they might take to protect those interests.

The clients must be aware that you cannot provide any advice to them in these regards, and that you strongly recommend that if they have any concerns, they should each seek independent legal advice from a family lawyer.

A Client Who is Not in a Relationship

You may have a single, unmarried and not cohabiting client, to whom none of the above is currently relevant. This is a perfect opportunity to caution your client about the future. Making your client aware of the risks to their property in the event they contemplate cohabitation or marriage in the future will give them an opportunity to consult at that time with family law counsel, before they lose exemptions or other rights through lack of knowledge, mistaken beliefs or inadvertence. A little preventative lawyering can be a good thing!

Summary

Many clients are unaware of the family law provisions that may impact them in relation to their real estate holdings. It is your obligation to ensure they are aware that they may be undertaking risks and that they should seek independent legal advice, which you cannot provide, about these risks and ways they might protect their interests.

The key points to discuss are these:

- the different ways to take title and the implications of each option;
- sufficient general information about potential family law scenarios such that clients are aware that they may be undertaking risks;
- the parties may have different interests, there may be implications that affect them, and they may have concerns in these regards;
- they may require information about what steps, if any, they might to take to protect their interests;
- you cannot provide advice on any of those issues as you are jointly retained;
- your strong recommendation that they each obtain independent legal advice.

Drawing these matters to your clients' attention is an important way to help ensure that they understand the risks that they may be assuming before it's "too late".

Appendix

Sample terms to incorporate in a standard retainer letter (to be sent to each joint client)

Re: Joint Retainer for Purchase of [Property Address]

Thank you for asking our firm to assist you with the purchase of your new home at [Property Address]. This letter outlines the terms of our joint retainer and provides important information about our role in acting for both you and your [spouse/partner or insert name] in this transaction. Please review this carefully, as it sets out both the scope and limitations of our services.

1. Joint Retainer and Limited Scope of Our Role

As you have requested that we act for both of you in this transaction, we are acting under a **joint retainer**. This means that we represent both of you equally. Our role is to **facilitate the transaction.** We will:

- review and prepare documents necessary for the purchase;
- assist with the registration of title;
- ensure the transaction is completed according to the terms of the purchase agreement.

However, please note that **we cannot provide advice that is tailored to your individual legal rights and obligations** as against each other. This includes, but is not limited to:

- advice on how your respective financial contributions (e.g., pre-acquired funds, inheritances, or gifts) might affect your individual rights;
- estate planning matters or what happens to the property in the event of separation, divorce, or death;
- any other issue where your personal interests may conflict.

If you have concerns about these matters, we strongly recommend that you each obtain **independent legal advice** from separate lawyers to ensure your individual interests are considered.

2. Conflict of Interest and Confidentiality

Since we are acting for both of you, we must disclose that there is a possibility of a **conflict of interest** arising during the transaction. If a conflict occurs that cannot be resolved, we may be required to withdraw from acting for both of you.

In this joint retainer, there is **no confidentiality** between you. This means that any information you share with us must be disclosed to the other party. We cannot withhold information from either of you.

3. Title to the Property

There are two main ways to hold title to the property:

- **Joint Tenancy**: In joint tenancy, if one of you passes away, the other becomes the owner of the full interest in the property by the right of survivorship.
- **Tenancy in Common**: In tenancy in common, each of you would own a defined share of the property, which could be passed on to your heirs.

Our role is to identify these options, but we **cannot advise** on which option may be better for your individual situation. We are also unable to advise you as to the proportionate share that you should each have, if you decide to take the title of the property as tenants in common.

If you have concerns about how to hold title, we recommend seeking independent legal advice.

4. Fees and Disbursements

Our fees for acting on this transaction will be [insert fee structure], plus applicable taxes and any disbursements, such as registration fees and other expenses. We will provide you with an estimate of these costs and keep you informed of any significant changes.

5. Your Acknowledgment and Consent

By signing this letter, you confirm that:

- you understand the nature of our joint retainer and the **limited scope** of our role in representing both of you equally;
- you are aware that we cannot provide advice on your individual legal rights as against each other;
- you understand the potential for conflict and the lack of confidentiality between you;

- you have been advised to seek **independent legal advice** if you have concerns about your individual interests or how this transaction may affect you in the future;

- you consent to us acting for both of you in this transaction.

If you have any questions about this letter or the terms of our representation, please do not hesitate to contact us.

Please sign and return this letter to confirm your understanding and agreement with these terms.

Acknowledgment and Consent

I have read and understood the terms of this retainer letter, including the limitations of the lawyer's role and the advice to seek independent legal advice. I consent to [Lawyer's Name] acting for both me and [my spouse/partner or insert name] in this joint retainer.

[Client Name] _____

Date: _____