An Encyclopedia of Real Estate Law:

Real Estate-Related Statutes, Court Cases, Articles, and Commentary for the Attorney and the Title Insurance Company

By

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Introduction

The following is an alphabetical compilation by topic of many of the statutes, court decisions, and articles that are of interest to the real estate attorney and the title insurance examiner and underwriter. *Real Property*, *Trusts & Estates*, and *Agricultural Law* are newsletters published by the Illinois State Bar Association (ISBA). *Real Property Law Communicator* is a newsletter published by the Chicago Bar Association. *Illinois Bar Journal* is a magazine published by the Illinois State Bar Association.

Note there are dozens of excellent articles in the ISBA newsletter, *Real Property*. I could not include them all, and so I chose to go through issues in the last few years and include a few articles from each issue in this compilation.

I started compiling this encyclopedia many years ago. At first it was primarily a collection of Illinois statutes, but then I gradually began adding court cases and articles. During the end of 2023 and throughout 2024, I spent many hours trying to bring this manuscript up to date by adding additional statutes and articles. Checking all my earlier citations to the *Illinois Compiled Statutes* listed below to make sure that they are still in effect would take many more hours, and so in the interest of time economy, I have not reviewed these earlier citations. Thus, this encyclopedia may include some "busted citations."

This is part encyclopedia and part Wikipedia. As I added statutes, judicial decisions, and articles, I also gradually began adding my own commentary to some of the entries. Thus, interspersed among the hundreds of statutes, court cases, and article titles, there is my commentary or "Editor's Notes."

Access

Editor's Notes:

Covered Risk 4 of the 2021 owner's policy insures the insured against loss in the event there is "[n]o right of access to and from the Land." Thus, access coverage under the title policy is "default access." That is, unless the title examiner raises a "no access" title exception on the title policy, the insured has access coverage by default.

However, this right of access is legal access. It is limited in scope. The title policy does not insure that this access is sufficient for the insured's intended use of the land. See *Gates v. Chicago Title Ins. Co*., 813 S.W.2d 10 (Mo.App. 1991).

The ALTA "Access and Entry" Endorsement 17-06 expands the access coverage of Covered Risk 4. If access to the land is via an easement, see the ALTA "Indirect Access and Entry" Endorsement 17.1-06.

Acknowledgments

See Notary Act

Adjacent Landowner Excavation Protection Act

765 ILCS 140/1 *et seq*.

Adjoining Landowners

765 ILCS 140/1 *et seq.;* Adjacent Landowner Excavation Protection Act
This Act provides that if an owner of land intends to excavate, he has to give notice to the adjoining landowners.

765 ILCS 125/1; Entry On Adjoining Land to Accomplish Repairs Act
This Act provides that if repair and maintenance of a single family residence cannot be reasonably accomplished without entering onto the adjoining land, and if the owner of that adjoining land refuses to allow the repairer onto his land, then the repairer can go to court to obtain entry to make the repairs and maintenance. The Act is limited to single family residences and condominium units used as single-family residences.

765 ILCS 130/1; *et seq.* The Fence Act
This Act provides that if two or more people have adjoining lands, each of them have to build and maintain their proportionate share of the division fence that separates their lands. If a person does not make or repair the fence, he is liable for damages. Disputes may be settled by "fence viewers." See also "When Fences Make Litigious Neighbors: The Illinois Fence Act," by Jeffrey A. Mollett, *Illinois Bar Journal*, August 2001; *Dwyer v. Love*, 805 N.E.2d 719, 282 Ill. Dec. 100 (2004).

765 ILCS 215/1 *et seq*., Permanent Survey Act; the Act provides that when the owner of land or the owners of adjacent tracts of land want to permanently establish the boundary lines and corners of the land, the parties can enter into a written agreement to hire a surveyor to survey the land. Once the plat is recorded (with the agreement of the landowners), the lines and corners become binding on all parties and their heirs, successor, and assigns. The appointment of a commission of three surveyors may also be required.

Burlew v. City of Lake Forest, 104 Ill. App. 3d 800, 433 N.E.2d 556, 60 Ill. Dec. 556 (2nd Dist., 1982). This case suggests that a fence encroachment of a small slice of a neighbor's property is not sufficient notice of possession to constitute adverse possession. See also *Dempsey v. Burns*, 281 Ill. 644, 118 N.E. 193 (1917), wherein the court said that the enclosure of a small lot by two smooth wires was not a sufficient act of possession.

Geller v. Brownstone Condominium Association, 82 Ill. App. 3d 334, 402 N.E.2d 807, 37 Ill. Dec. 805 (1st Dist. 1980), which involves a minor encroachment into a neighbor's air space. The court stated, "[A] property owner owns only as much air space above his property as he can practicably use. And to constitute an actionable trespass, an intrusion has to be such as to subtract from the owner's use of the property."

Brownstone Condominium Association v. Geller, 91 Ill. App. 3d 823, 415 N.E.2d 20, 47 Ill. Dec. 295 (1980). This case concerned the anchoring of nine bolts into the side of a multi-story building. In affirming the judgment of the trial court, which denied Brownstone's request for a preliminary mandatory injunction, the court stated: "The mere fact there is a trespass does not warrant any affirmative action by the Court. The close quarters of an urban society demand flexibility when we encounter an intrusion on our personal bubble."

Pradelt v. Lewis, 297 Ill. 374, 130 N.E. 785, An injunction will be denied where the encroachment is slight and the cost of removing it is great as compared with any corresponding benefit to the adjoining owner. But if the encroachment is intentional, then even the cost of removal will not defeat the right to an injunction.

Ariola v. Nigro, 16 Ill.2d 46, 156 N.E.2d 536 (1959), Injunctive relief will be granted if the encroachment results in damage to the property.

The general rule in Illinois is that courts will usually not require the encroaching party to remove an encroachment if the encroachment is unintentional, the cost for removing it is great, the corresponding benefit to the encroached-upon landowner is small, and damages can be had at law. See *Stroup v. Codo*, 65 Ill.App.2d 396, 212 N.E.2d 518 (3rd Dist. 1965); *Mari-Mann Herb Co. Inc. v. Borchers,* 216 Ill.App.3d 1014, 576 N.E.2d 496, 159 Ill.Dec. 827 (4th Dist. 1991); but see also *Whitlock v. Hilander Foods, Inc*., 308 Ill.App.3d 456, 720 N.E.2d

302, 241 Ill.Dec. 847 (2d Dist. 1999); *Borrowman v. Howland*, 119 Ill. App. 3d 493, 457 NE2d 103 (1983).

735 ILCS 5/13-122 provides for the posting of a notice that states, “Right of access by permission and subject to control of owner.” This posting would negate any claim of an easement by prescription.

Adopted Children

755 ILCS 5/2-4(a), “An adopted child is a descendant of the adopting parent for purposes of inheritance from the adopting parent and from the lineal and collateral kindred of the adopting parent and for the purpose of determining the property rights of any person under any instrument, unless. . . .”

755 ILCS 5/2-4(d), “For purposes of inheritance from or through a natural parent and for determining the property rights of any person under any instrument, an adopted child is not a child of a natural parent, nor is the child a descendant of a natural parent . . . unless one or more of the following conditions apply. . . .”

DeHart v. DeHart, 2013 IL 112137; even though there was no contract to adopt, a unanimous supreme court found that equity and fairness should allow the man’s “son” to pursue an inheritance from the father’s estate, even though he was written out of the will at a time when his father allegedly lacked testamentary capacity.

Adverse Possession

Adverse possession is the open and hostile possession of land under claim of title to the exclusion of the true owner, which, if continued for the period prescribed by statute (20 years), ripens into an actual title. See 735 ILCS 5/13-101, 5/13-107, 5/13-109, 5/13-110; see also *Joiner v. Janssen*, 85 Ill.2d 74, 421 N.E.2d 170, 51 Ill.Dec. 662 (1981).

What is sufficient occupation to warrant adverse possession? See what the Illinois Supreme Court said in *Joiner v. Janssen*:

> Plaintiffs mowed the grass on the 14-foot strip in question, raked leaves, planted and removed trees, bushes and flowers, gave away trees, bushes and flowers from the land as gifts, buried their pet dog on the strip when it died, shoveled snow from the walk in front of the strip, and generally maintained the property, thus indicating to neighbors and members of the community that they were in possession of and claiming ownership to the ground west of the line of trees and bushes.

McNeil v. Ketchens, 397 Ill. App. 3d 375 (2010); t the temporary vacancy of the

property does constitute a relinquishment or stopping of the 20 years of possession sufficient to establish adverse possession; that is, temporary vacancy of the land is not *abandonment* of the land; one can adversely possess land without physically occupying the land. Here, the owners had "the exclusive management and control of the land" beneath the driveway. The owners did not have to enclose Tract A with a fence or build a structure on Tract A in order to take possession of it.

To see at what lengths a plaintiff must go in order to obtain the adverse possession of land, see *McNeil v. Ketchens*, 397 Ill. App. 3d 375 (2010).

Adverse Possession, the Statutes

Editor's Notes: The Illinois statutes have a "sliding scale" as to the number of years of occupation and the nature of occupation that constitutes adverse possession.

735 ILCS 5/13-101
20 years occupation

735 ILCS 5/13-107
7 years occupation
connected title

735 ILCS 5/13-109
7 years occupation
color of title
7 years of payment of taxes

735 ILCS 5/13-110
7 years of payment of taxes
vacant land
color of title

735 ILCS 5/13-111; 735 ILCS 5/13-120(6); generally speaking, there is no adverse possession against the state; see *City of Chicago v. Middlebrooke*, 143 Ill. 265 (1892); but see *Wanless v. Wraight*, 202 Ill.App.3d 750, 559 N.E.2d 798, 147 Ill. Dec. 458 (3rd Dist. 1990); Paula R. Latovick, "Adverse Possession Against the States: The Hornbooks Have It Wrong," 29 *University of Michigan Journal of Law Reform* 939 (1996).

The "no adverse possession against the state" maxim is a rule that is riddled with exceptions. For example, the rule applies only to municipality-owned property that is held for a public use. Thus, in *City of Chicago v. Middlebrooke*, 143 Ill. 265 (1892), there was allowed the adverse possession of city-owned property

where the court found that “the property in question was not devoted to any public use or held for any public purpose."

The rationale seems to be: If the land serves no public purpose (compare a city park with benches and a playground to a vacant weed-filled and trash-filled lot), it has lost its “public property protection,” and so it can be adversely possessed.

“Case Note: Recent Appellate Court Analysis of Adverse Possession,” by Timothy Hammersmith, *Real Property*, July 2020, regarding *Valenziano v. Stewart*, 2020 IL App (2d) 190503-U.

Pradelt v. Lewis, 297 Ill. 374, 130 N.E. 785, An injunction will be denied where the encroachment is slight and the cost of removing it is great as compared with any corresponding benefit to the adjoining owner. But if the encroachment is intentional, then even the cost of removal will not defeat the right to an injunction.

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The general rule in Illinois is that courts will usually not require the encroaching party to remove an encroachment if the encroachment is unintentional, the cost for removing it is great, the corresponding benefit to the encroached-upon landowner is small, and damages can be had at law. See *Stroup v. Codo*, 65 Ill.App.2d 396, 212 N.E.2d 518 (3rd Dist. 1965); *Mari-Mann Herb Co. Inc. v. Borchers,* 216 Ill.App.3d 1014, 576 N.E.2d 496, 159 Ill.Dec. 827 (4th Dist. 1991); but see also *Whitlock v. Hilander Foods, Inc*., 308 Ill.App.3d 456, 720 N.E.2d 302, 241 Ill.Dec. 847 (2d Dist. 1999); *Borrowman v. Howland*, 119 Ill. App. 3d 493, 457 NE2d 103 (1983).

Adverse Possession, Defenses Against

Permission negates adverse possession, see *Peters v. Greenmount Cemetery Association*, 259 Ill.App.3d 566, 632 N.E.2d 187, 198 Ill. Dec. 128 (4th Dist. 1994); *Joiner v. Janssen*, 85 Ill.2d 74 (1981); *Cobb v. Nagele,* 242 Ill.App.3d 975, 611 N.E.2d 599 (1993); *527 S. Clinton, LLC v. Westloop Equities, LLC*, 403 Ill. App. 3d 42 (1st Dist. 2010). Thus, the delivery of a statement granting permission to maintain an encroachment over another’s land, with the delivery taking place before the expiration of the twenty-year adverse possession period, would negate a later claim of adverse possession by this party.

Burlew v. City of Lake Forest, 104 Ill. App. 3d 800, 433 N.E.2d 556, 60 Ill. Dec. 556 (2nd Dist., 1982). This case suggests that a fence encroachment of a small slice of a neighbor’s property is not sufficient notice of possession to constitute adverse possession.

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Geller v. Brownstone Condominium Association, 82 Ill. App. 3d 334, 402 N.E.2d 807, 37 Ill. Dec. 805 (1st Dist. 1980), which involves a minor encroachment into a neighbor's air space. The court stated, "[A] property owner owns only as much air space above his property as he can practicably use. And to constitute an actionable trespass, an intrusion has to be such as to subtract from the owner's use of the property."

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735 ILCS 5/13-122 provides for the posting of a notice that states, "Right of access by permission and subject to control of owner." This posting would negate any claim of an easement by prescription.

> Thus, if a farmer has a fence around his field, but his fence is five feet inside his boundary line, the farmer could post this notice at regular intervals on the other side (the side facing outside) of the fence. By doing so, the adjoining landowner would not be able to successfully claim ownership of a portion of the field by adverse possession. (Permission negates adverse possession.)

After-acquired Title

765 ILCS 5/7 et seq.; *Thompson v. Becker*, 194 Ill. 119 (1902); *Tompkins v. State Bank of Niles*, 160 Ill. App. 3d 226 (1987). By virtue of Illinois statutory law, when someone who does not have title to land, but purports to convey it, and then, later, subsequently acquires that land, the land passes, by operation of law (the doctrine of after-acquired title), to his first grantee. Note that while Illinois statutory law does not limit its application to warranty deeds, Illinois case law states that a quit-claim deed cannot operate to pass after-acquired title.

Air Parcels

"Practical Aspects Concerning the Creation of Air Parcels," by Richard F. Bales, *Real Property*, February 2000.

Annexation

65 ILCS 5/7-1-46; limitation on contesting annexation

65 ILCS 5/11-15.1-1; Annexation Agreements "shall be valid and binding for a period of not to exceed 20 years from the date of its execution."

Appeals

735 ILCS 5/2-1301(e): "The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable."

Supreme Court Rule 304 and 305; see especially 304(a) and 305(b) and 305(j). If there is no stay filed within the time for filing the notice of appeal--which time period may be extended by a motion made within the time for filing the notice of appeal, see Rule 305(c)—then a later reversal of the judgment order does not affect the right, title, and interest of someone who acquired the land who was not a party to the original action. See also 735 5/2-1401.

Supreme Court Rule 304(a): "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both."

735 ILCS 5/13-217; if one files a cause of action, but there is a time limit for bringing the cause of action (e.g., a mechanics lien foreclosure), if the case is dismissed for want of prosecution, then the plaintiff can still bring a new action. The plaintiff can bring the new action within one year or within one year of the limitation, whichever is greater.

Palmolive Tower Condominiums v. Simon, 409 Ill. App. 3d 539 (1st Dist. 2011), post-closing disposition of funds held back at closing, discussion of Supreme Court Rule 304(a);

Appearances

Illinois no longer distinguishes between special and general appearances. See 735 ILCS 5/2-301(a) and 735 ILCS 5/2-301(a-5); *KSAC Corporation v. Recycle Free, Inc*., 364 Ill. App. 3d 593 (2nd Dist 2006)

735 ILCS 5/2-207; a defendant has thirty days to file an appearance.

Associations

765 ILCS 115/1 *et seq*.; unincorporated associations. Unincorporated

associations are fraternal and social organizations, such as the Moose or Elk. An unincorporated association that is duly chartered by its grand lodge or body may convey or mortgage its property in the name of its organization.

Attachment

735 ILCS 5/4-101(9); A creditor may seek an attachment against land owned by the debtor when the debt sued for was fraudulently contracted on the part of the debtor.

Authority Issues

Editor's Notes:

Title to Illinois real estate can be held by any of a myriad of different entities. This means that there is also a myriad of different underwriting requirements relative to the execution of deeds or mortgages by these entities. These requirements are scattered throughout the *Illinois Compiled Statutes*.

The following article is a reference guide to these so-called "authority documents"—the various documentation that a title company examiner or closer needs to review in order to underwrite the conveyance or mortgage of Illinois land by entities as common as corporations and as unusual as unincorporated associations.

"A Guide to Illinois Authority Documents," by Richard F. Bales, *Real Property*, May 2014.

Bankruptcy Law

See below

Bankruptcy, Types of

11 U.S.C. § 701 *et seq.*, Chapter 7, liquidation

A Chapter 7 bankruptcy occurs when a debtor's non-exempt property is assembled by a trustee who is appointed by the court. This property is then sold and the proceeds are distributed equitably to the debtor's creditors. The proceedings will serve to discharge the debtor's personal obligation to pay many but not all debts. Chapter 7 may be either voluntary or involuntary.

11 U.S.C. § 1101 *et seq.*, Chapter 11, reorganization

The main goal of a Chapter 11 bankruptcy is to restructure the debtor so that it may continue to operate. It is to give the debtor "breathing room" so that the

debtor may reorganize his business and continue to operate. Compare this with a Chapter 7 bankruptcy, where the goal is simply to liquidate all debts. A Chapter 11 bankruptcy may be either voluntary or involuntary.

11 U.S.C. § 1301 *et seq.*, chapter 13, adjustment of debts; payment plan

Individuals with a regular income can seek relief by debt adjustment over a three-to-five-year period rather than by liquidation. This allows a debtor who makes payments under a Chapter 13 plan to keep non-exempt assets that would otherwise be lost in a Chapter 7 proceeding. A trustee is usually appointed.

Bankruptcy, Types of Sales

11 U.S.C. § 363(c)(1), Sales in the Ordinary Course of Business

Such sales will rarely be encountered by the title examiner. These sales usually occur when, for example, the debtor is a developer who is selling off lots.

11 U.S.C. § 363(b), Sales not in the Ordinary Course of Business

This is the type of sale the examiner will usually encounter. The purpose of this sale is to bring in cash to pay off the debts of the creditor.

There are two types of sales not in the ordinary course of business: sales subject to liens and sales free and clear of liens.

Bankruptcy, Sale Subject to Liens

A sale subject to liens usually occurs when there are no liens affecting title (usually very seldom); the liens will be paid off at closing, pursuant to a bankruptcy court order; or; the terms of the sales contract (or auction sale conditions) provide that the buyer is to take title subject to all liens.

Real property can be sold subject to liens after notice has gone out to all interested parties and there are no objections or requests for a hearing. Generally, no order is necessary unless there are objections.

Bankruptcy, Sale Free and Clear of Liens

11 USC § 363(f), the trustee may sell property free and clear of any interest in such property of an entity other than the estate, only if: Applicable non-bankruptcy law permits sale of such property free and clear of such interest; such entity consents; such interest is a lien and the price at which such property is sold is greater than the aggregate value of all liens on such property; such interest is in bona fide dispute; or such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Although the section does not mandate it, most orders approving sales free and clear of liens provide that the liens attach to the proceeds of the sale. The lien holders can then argue later about who gets what.

Bankruptcy, Areas of Concern

There are three main areas of concern to a title examiner when asked to insure title through a bankruptcy: Has a proper notice of sale been delivered to the parties entitled to notice; does the order that authorizes the sale contain sufficient information to allow the title company to insure the transaction; and is the purchaser protected from a reversal of the order upon any appeal?

Bankruptcy, Appeal and Stay Periods

The right to appeal a bankruptcy order does not begin when the judge signs the order. The appeal period starts when the order is entered on the bankruptcy clerk's docket.

Bankruptcy Rule 8002(a) provides for an appeal period of fourteen days from the date of docketing—the date of the *entry* of the order. Therefore, if the closing takes place after such fourteen-day period, the title examiner can delete any exception for the right to appeal.

But what about closings that take place within this fourteen-day period?

See Section 363(m) of the Code, which provides in part:

> *The reversal or modification on appeal of an authorization . . . of a sale . . . does not affect the validity of a sale . . . to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such . . . sale . . . [was] stayed pending appeal.*

This section does appear to protect the purchaser. However, if there were an appeal filed after closing, the title company would have to defend against the appeal. Furthermore, the court can grant a stay of the order approving the sale pursuant to Bankruptcy Rule 8005.

Bankruptcy, Summary of Appeal Issues

Bankruptcy Rule 8002(a) provides for an appeal period of fourteen days from the order's entry on the docket to file an appeal from an order. When the final day of a deadline falls on a Saturday, Sunday or holiday for the federal court involved, the final day becomes the next day the court is open for business.

Bankruptcy Rule 6004(h) provides for a stay of an order authorizing the sale of property until the expiration of fourteen days from the order's entry on the docket.

Note that a court may lift the stay of Bankruptcy Rule 6004(h), but the court cannot lift the Bankruptcy Rule 8002(a) appeal period. The appeal period of BR 8002(a) runs concurrently with the stay period of BR 6004(h).

Bankruptcy, Problems with the Appeal

The court addressed the issue as to whether or not a purchaser is protected under 11 U.S.C. § 363(m) in *In re CGI Industries, Inc*., 27 F.3d 296 (1994). In this case the court held that, under the facts of the case, the purchaser was protected.

In this case, though, the closing took place four days after the order approving the sale became appealable. The court specifically said that it was not ruling on the situation where the closing took place immediately after the order became appealable.

Why would the court say this? Because if the purchaser were to successfully argue that he was protected when the closing takes place *immediately* after the order is entered, then the right to appeal becomes meaningless.

How much time must elapse between the date the order becomes appealable and the date of closing so that a purchaser is protected? The court in *In re CGI Industries, Inc*., does not answer this question.

Bankruptcy, Automatic Stay

11 U.S.C § 362, automatic stay

When a debtor files bankruptcy, the debtor receives the protection of an automatic stay pursuant to 11 U.S.C. § 362(a)1), which stays "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor." This is an automatic stay on the commencement or continuation of proceedings, such as mortgage foreclosures, against the debtor and his estate. The automatic stay remains in effect until the bankruptcy court disposes of the case or grants relief from the stay (i.e., "lifts" the stay). Actions taken in violation of the state are generally void.

Because of this automatic stay, the statute of limitations for the enforcement of liens are *tolled*, or temporarily halted, by the bankruptcy. This means that bankruptcies must be taken into account when a title examiner is asked to waive a lien because the lien is extinguished pursuant to the applicable statute of limitations.

11 U.S.C § 362(c), when does the automatic stay terminate?

- When the stay is lifted pursuant to court order.

- When the property ceases to be the property of the estate. This happens if the property is abandoned or is exempt.

- Upon the earliest of any of the following events: the closing of the bankruptcy case, the dismissal of the bankruptcy case, or at the time a discharge of bankruptcy is either granted or denied.

Bankruptcy Rule 4001(a)(3) provides as follows:

> *An order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.*

Entry of the order means "entry on the docket." Thus, if an examiner is given an order that lifts the automatic stay, the examiner should treat the stay as being lifted only after such order is entered on the docket, fourteen days or such lesser or greater time as the court has specifically directed has expired, and no appeal from the order has been filed.

Bankruptcy, Debts Not Discharged in Bankruptcy

11 U.S.C. § 523, some debts are not discharged in bankruptcy. For example, taxes, alimony, child support, educational loans, fines, and government liens, such as state or federal income tax liens.

Bankruptcy, Waiving Liens

Generally speaking, pre-bankruptcy judgments against an owner of land cannot be waived after the owner is discharged from bankruptcy unless:

- The land is sold free and clear of all liens;

- There is a specific court order, issued upon motion and notice to the creditor, removing the lien from the property. This order is usually called an *order avoiding the judicial lien*. See 11 U.S.C. 522(f). The examiner must remember that he cannot immediately waive a title exception pursuant to this "order avoiding the judicial lien." Bankruptcy Rule 8002(a)(1) provides for an appeal period of fourteen days from the date of docketing—the date of the *entry* of the order. Note that the date of the entry of the order is not the

> same as the date of the order. The examiner must first wait out this appeal period before waiving the lien.

See 11 U.S.C. § 522(f)(1), 11 U.S.C. § 522(f)(2)(a), 11 U.S.C. § 524(a); *Johnson v. Home State Bank*, 501 U.S. 78, 111 S. Ct. 2150, 115 L.Ed.2d 66 (1991); *First National Bank in Toledo v. Adkins*, 272 Ill.App.3d 111 (4th Dist. 1995)

Example:

2022—Adam buys Blackacre.
2023—A judgment against Adam is recorded.
2024—Adam files bankruptcy, creditor is scheduled, debt is discharged.
2025—Adam decides to sell Blackacre.

A title examiner performs a title search and finds the judgment. The examiner correctly shows the judgment on the commitment. All that the bankruptcy did was eliminate the judgment debtor's personal liability; it did not eliminate the lien on the land. Illinois law is clear that a lien on real estate survives the bankruptcy discharge unless a specific bankruptcy court order declares the lien void.

Bankruptcy, Selling the Property—Abandonment (11 U.S.C. § 554)

A seller can sell property if the bankruptcy trustee has *abandoned* the property.

See 11 U.S.C. § 554(a):

> *After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.*

See 11 U.S.C. § 554(b):

> *On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.*

Bankruptcy, Selling the Property—No Asset Finding

The term, "no asset finding" is not found in the Bankruptcy Code. However, the term simply means that the Chapter 7 bankruptcy trustee has determined that either the debtor has no non-exempt assets or the debtor's non-exempt assets are not enough to make for a reasonable distribution to creditors after the liquidation of said assets and the payment of case expenses.

With a no asset finding, there will be an order of a no asset finding by the bankruptcy trustee. As indicated above, there may be assets, but the assets are so tied up with secured creditors that the trustee is essentially stating, “I have no assets to work with; there is no equity in the property.”

Bankruptcy, Discharge of the Debt

In Chapter 7 cases, a debt is discharged when the individual is discharged from bankruptcy. See 11 U.S.C. § 727; 11 U.S.C. § 524.

In Chapter 11 cases, a debt is discharged occurs when the plan is confirmed, unless the plan or the order confirming the plan say otherwise. See 11 U.S.C. § 1141.

In Chapter 13 cases, a debt is not discharged until after the debtor pays all debts as required by the plan. See 13 U.S.C. § 1328.

Bankruptcy, Death of the Debtor

See Federal Rule 1016. (Death or Incompetency of Debtor)

Federal Rule 1016 is as follows:

> Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. If a reorganization, family farmer's debt adjustment, or individual's debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.

Note: One of the notes to Federal Rule 1016 reads as follows:

“In a chapter 11 reorganization case or chapter 13 individual's debt adjustment case, the likelihood is that the case will be dismissed.”

Bankruptcy, Cases

Peoples National Bank, N.A. v. Jones, 482 BR 257, U.S. Dist. Ct. S.D. Ill. (2012); The failure of a cross-collateralization clause in a mortgage to specifically describe the additional amounts of debt limits the lender’s recovery to the amount of the original note.

In re Crane, 742 F.3d 702 (2013), a bankruptcy trustee cannot avoid a mortgage because the mortgage failed to expressly state the maturity date and interest rate of the mortgage. See also "The Seventh Circuit and Illinois General Assembly Agree: Strict Compliance with the Illinois Conveyances Act not necessary for Enforcing Mortgages in Illinois," by Kelly M. Greco, *Real Property*, April 2014.

In re Heaver, 473 B.R. 734 (Bankr. N.D. Ill., 2012); The bankruptcy court determined that because the mortgage was recorded before the deed to the mortgagor was recorded, the mortgage was recorded outside the property's chain of title. Because the mortgage was recorded outside the property's chain of title, the bankruptcy trustee was allowed to avoid the mortgage.

Bankruptcy, Articles

"Second District Appellate Court Holds That Bankruptcy Does Not Extend the Redemption Period to Pay Delinquent Taxes Under the Revenue Code," by James V. Noonan, *Real Property*, March 2023, regarding *In re County Treasurer & ex officio County Collector of Lake County*, 2022 IL App (2d) 210689.

Boundary Issues

765 ILCS 140/1 *et seq.;* Adjacent Landowner Excavation Protection Act
This Act provides that if an owner of land intends to excavate, he has to give notice to the adjoining landowners.

765 ILCS 125/1; Entry On Adjoining Land to Accomplish Repairs Act
This Act provides that if repair and maintenance of a single-family residence cannot be reasonably accomplished without entering onto the adjoining land, and if the owner of that adjoining land refuses to allow the repairer onto his land, then the repairer can go to court to obtain entry to make the repairs and maintenance. The Act is limited to single family residences and condominium units used as single family residences.

765 ILCS 130/1; *et seq.* The Fence Act
This Act provides that if two or more people have adjoining lands, each of them must build and maintain their proportionate share of the division fence that separates their lands. If a person does not make or repair the fence, he is liable for damages. Disputes may be settled by "fence viewers." See also "When Fences Make Litigious Neighbors: The Illinois Fence Act," by Jeffrey A. Mollett, *Illinois Bar Journal*, August 2001; *Dwyer v. Love*, 805 N.E.2d 719, 282 Ill.Dec. 100 (2004).

765 ILCS 215/1 *et seq*. The Permanent Survey Act
This Act provides a means by which adjoining landowners can fix by agreement a boundary line when the corners and boundaries are lost destroyed, or are in dispute. This can involve, among other things, the appointment of a commission

of three surveyors.

Building Code Violations

65 ILCS 5/11-31-2(a)

Building Lines

55 ILCS 5/5-13001; A county can regulate building lines

65 ILCS 5/11-14-1; A municipality can regulate building lines; this states that "the corporate authorities in each municipality have power by ordinance to establish, regulate and limit the building or setback lines on or along any street. . . .[These powers] shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted." This statute seems to suggest that in order to abrogate a building line, the parties benefited as well as burdened must join in the agreement. See *Ruble v. Sturhahn*, 348 Ill.App.3d 667, 810 N.E.2d 278, 284 Ill. Dec. 625 (4th Dist. 2004).

Example: Adam buys two adjoining lots in a ten-lot subdivision. Every lot in the subdivision is burdened by a platted 25-foot building line. Adam cannot prepare and record a plat of consolidation, creating one lot with a 15-foot building line, unless he gets the consent of all the other lot owners in the subdivision.

A building line violation may render a home unmarketable, even if a title company agrees to endorse over it. See *Nelson v. Anderson*, 286 Ill.App.3d 706, 676 N.E.2d 735, 221 Ill. Dec. 932 (5th Dist. 1997).

A court may compel the removal of a building if the construction of the building over the building line was intentional and deliberate. See *Welton v. 40 East Oak Street Building Corp*., 70 F.2d 377 (1934); *Taubert v. Fluegel*, 122 Ill. Ap. 2d 298, 258 N.E.2d 586 (1970); *O'Gallagher v. Lockhart*, 263 Ill. 489, 105 N.E. 295 (1914).

See also *Hanna v. American National Bank and Trust Co. of Chicago*, 266 Ill. App. 3d 544, 639 N.E.2d 1326, 203 Ill. Dec. 507 (1st Dist. 1994).

Bulk Sales

35 ILCS 120/5j; 35 ILCS 5/902(d); 820 405/2600

"Bulk Transferee Liability under Illinois Income Tax and Sales Tax Laws," *Real Property*, June 1987

"Real Estate Transaction and Bulk Sale Requirements," *Real Property*,

September 2004

"Evaluating Bulk Sales Liability in Real Estate Transactions," *Real Property*, January 2009, by Larry N. Woodard, who writes: "When an entity owns real estate as its sole asset or as a majority of its assets, the sale of that real estate is often considered a bulk sale because that entity business is selling most or all of the assets it owns. The sale of the assets triggers potential tax liability whereby the state, and in some cases a local municipality, must ensure that any outstanding tax liability is paid while the sale of the assets takes place. If the tax liability is not paid, under many statutes that address bulk sales, the purchaser, and not the seller, is liable for the relevant unpaid taxes."

"Condominium Board and Bulk Sales," by Sherwin D. Abrams, *Real Property*, March 2022, regarding *Glazer v. Private Residences at Ontario Place Condominium Association*, 2022 IL App (1st) 210156.

"Overview of Bulk Sales Laws for Commercial Real Estate Transactions," by Nicky Sonntag, *Real Property*, May 2023.

Burnt Records Act

765 ILCS 45/1 *et seq.*; *Gormley v. Clark*, 134 U.S. 338

Cemeteries and Burial Rights

20 ILCS 3435/01 *et seq*. (Archaeological and Paleontological Resources Protection Act)
20 ILCS 3440/01 *et seq*. (Human Skeletal Remains Protection Act)
55 ILCS 65/01 *et seq*. (County Cemetery Care Act)
55 ILCS 70/01 *et seq*. (Grave and Cemetery Restoration Act)
760 ILCS 90/01 *et seq*. (Burial Lot Perpetual Trust Act)
760 ILCS 95/01 *et seq*. (Cemetery Perpetual Trust Authorization Act)
760 ILCS 100/1 et seq.(Cemetery Care Act)
765 ILCS 805/01 (Conveyance of Burial Places to County Act)
765 ILCS 810/01 (Cemetery Company Land Not Used for Burial Act)
765 ILCS 815/01 *et seq*. (Cemetery Association Land Not Used for Burial Act)
765 ILCS 820/01 *et seq*. (Cemetery Land Ownership and Transfer Act)
765 ILCS 825/01 *et seq*. (City Sale or Lease of Land for Cemeteries Act)
765 ILCS 830/01 (Cemetery Removal Act)
765 ILCS 835/0001 (Cemetery Protection Act)
765 ILCS 835/14.5; Cemetery encroachments
805 ILCS 320/01 *et seq*. (Cemetery Association Act)
805 ILCS 325/01 (National Cemetery Act)
765 ILCS 835/14.5; Cemetery encroachments

Certificates of Correction (Plats)

Section 1270.59, “Certificates of Correction,” of Title 68: “Professions and Occupations,” of the Illinois Administrative Code, which is found at https://www.ilga.gov/commission/jcar/admincode/068/06801270sections.html

Chain of Title

In re Bulgarea, 08 B 19992 (U.S. Bank. Court, N.D. Ill. 2010); mortgage is recorded outside the chain of title; it was recorded in the wrong county.

Citizens Savings Bank v. Covey (In Re Pak Builders), 284 B.R. 650 (Bankr. C.D. Ill. 2002) is a chapter 7 bankruptcy case, Central Division of Illinois, dealing with deed analysis and deed chain of title.

“The Chain of Title—A Real Property Law Basic Revisited,” by Ronald L. Otto, *Real Property*, February 1989

Skidmore, Owings & Merrill v. Pathway Financial, 173 Ill. App. 3d 512 (1988)

In re Heaver, 473 B.R. 734 (Bankr. N.D. Ill., 2012).

Churches

- Church (Standard Religious Corporation)

805 ILCS 110/0.01 *et seq*.; Religious Corporation Act

> 805 ILCS 110/41; The real property of a standard religious corporation is vested in the corporation. The property may be sold or mortgaged.
>
> 805 ILCS 110/43; The trustees of the church have the care, custody, and control of the church’s real property, but this power is subject to the direction of the congregation.

Examples of this type of church would include the smaller incorporated “storefront” churches.

- Church (Religious Corporation Subject to Higher Ecclesiastical Body)

> 805 ILCS 110/46a through 805 ILCS 110/46h, inclusive
>
> 805 ILCS 110/46a; 805 ILCS 110/46e; 805 ILCS 110/46f; A church subject to the control of a higher ecclesiastical body can incorporate. Title to real estate would be vested in this religious corporation, but the power to convey or mortgage the real estate would be subject to the “patronage, control, direction, or supervision” of the governing ecclesiastical body.

See 805 ILCS 110/46a; The power to convey or mortgage church property would be vested in the church trustees, but because the trustees' right to convey or mortgage property is subject to the authority of a higher ecclesiastical body, the examiner should obtain a certified copy of the governing "rules, regulations, articles of association, constitution, bylaws, or canons" of this superior body. The document(s) should be examined to make sure that all requirements for the conveyancing or mortgaging of local church property are met.

Examples of this type of church appear to be the Lutheran Church—Missouri Synod, the United Methodist Church, and the Presbyterian Church (U.S.A.).

- Church (Corporation Sole)

A corporation sole is a legal entity consisting of a single ("sole") incorporated office that is occupied by a single ("sole") man or woman. See "Associational Structures of Religious Organizations", by Patty Gerstenblith, *Brigham Young Law Review*, May 1995, pp. 439-480 at pp. 454-55.

he Roman Catholic Church is an example of a corporation sole. Title to property conveyed to this church is taken in the name of the bishop. For example, in the Archdiocese of Chicago, the corporation sole is "The Catholic Bishop of Chicago." According to the bylaws of this corporation sole, "by that name said bishop, and his successors in office . . . may acquire, hold and convey property, real, personal and mixed. . . ."

Thus, title conveyed or devised to the Roman Catholic Church is taken in the name of the bishop or archbishop of the ecclesiastical district in which the property is located.

A corporation sole may buy, sell, lease, and mortgage property in the same manner as a natural person. Thus, the title examiner needs no special documentation to insure a mortgage or deed executed by a corporation sole.

- Church (Unincorporated Association)

765 ILCS 115/0.01 *et seq.*

A church can be an unincorporated association. See "Associational Structures of Religious Organizations", by Patty Gerstenblith, *Brigham Young Law Review*, May 1995, pp. 439-480 at p. 444.

In order to acquire, mortgage, and convey property in its own name, the church must be chartered by its "parent" entity. The examiner must obtain and review a copy of this charter. The examiner should make sure that the

charter contains no limitations on the church's power to convey and mortgage property. See 765 ILCS 115/1; 765 ILCS 115/2.

The proposed deed or mortgage must be authorized by a vote of the members present at a regular meeting held by the organization, after at least ten days' notice has been given to all members of the organization. Notice is by mail to the last known address of all the members. See 765 ILCS 115/2.

- Church (Not-for-Profit Corporation)

805 ILCS 105/101.01 *et seq.*; 805 ILCS 105/103.05(a)(8)

A not-for-profit corporation has the power to sell and mortgage its property. See 805 ILCS 105/103.10(e).

- Church (Presbyterian)

See the *Book of Order 2019—2023*. See in particular these sections of the Book of Order. See www.pcusa.org

G-1.0503(d): With adequate notice, congregations can have meetings to discuss the "buying, mortgaging, or selling real property."

G-3.0303: The "presbytery" and the "session" are two higher groups in the church.

G-4.0101: The congregation can form a corporation. The corporation has the power to "receive, hold, encumber, manage, and transfer property, real or personal, for the congregation, provided that . . . the trustees shall act only after the approval of the congregation . . . subject to the authority of the session."

G-4.0206(a): "A congregation shall not sell, mortgage, or otherwise encumber any of its real property and it shall not acquire real property subject to an encumbrance or condition without the written permission of the presbytery transmitted through the session of the congregation."

- Church (United Methodist Church)

See the Book of Discipline Go to either www.ctcumc.org or www.cokesbury.com. Section 2539 concerns the purchase of property for the United Methodist Church. Section 2541 concerns the mortgaging or selling of United Methodist Church property. The *Book of Discipline* is readily available for review online.

Civil Procedure, Code of; 735 ILCS 5/1-101, *et seq.*

Civil Union Act

750 ILCS 75/1 *et seq.*

"A Guide to the New Illinois Civil Union Law," by Richard A. Wilson, *Illinois Bar Journal*, May 2011

"The Civil Union Act and the Execution and Preparation of Real Estate Documents," by Richard F. Bales, *Real Property*, September 2011.

Closings

215 ILCS 155/16.1, Closing Protection Letters

In re The Kirk Corp., 09B 17236, U.S. Bankruptcy Court, N.D. Illinois, Eastern Division (2010); when an escrowee interpleads escrowed funds when there is a dispute, the escrowee is entitled to be reimbursed its attorney's fees from the escrowed money.

Obi v. Chase Home Finance, 10 C 5747, U.S. Bankruptcy Court, N.D. Illinois, Eastern Division; (2011); A borrower may assert his right to rescind either through a letter to a creditor within three years of the transaction or through a lawsuit filed within three years of the transaction.

"Sellers *Can* Sue Over Excessive Fees for Section 22.1 Condo Disclosures," by Joseph R. Fortunato, *Real Property*, January 2022.

"*Crawford v. Hayen*: The Infamous Count VI," by Michael J. Rooney, *Real Property*, September 2021, regarding *Crawford v. Hayen*, 2020 IL App. (1st) 200076.

"Pouring Over Water Certs and Utility Prorations," by Adam B. Whiteman, *Real Property*, September 2016.

"E-mail Scams and Lawyer Trust Accounts," *Real Property*, December 2016.

"New Fannie Mae Condominium Requirements," by Paul Peterson, *Real Property*, November 2021.

"New Fannie Mae Condominium Underwriting Addendum: Speculations on Issues for Owners, Buyers, Lenders, Associations, and Developers," by Paul Peterson, *Real Property*, February 2022.

"6 Strategies to Better Represent Sellers of Real Estate," by Colleen L. Sahlas, *Real Property*, June 2014.

"What NOT to Include in Your Attorney Modification Letters," by Colleen L. Sahlas, *Real Property*, August 2016.

"A Better Strategy: Reduce the Contract Purchase Price in Lieu of Credits to Buyers," by Colleen L. Sahlas, *Real Property*, August 2018.

"Post-Closing Issue? Don't Count on the Merger Doctrine to Save You," by Daniel A. Huntley, *Real Property*, November 2018

"Completing Commercial Due Diligence: Do Not Forget Governmental Requirements and Zoning!" by David B. Sosin, *Real Property*, January 2019

"Considerations for Non-Married Parties Purchasing Residential Real Estate Together," by Erica Minchella, *Real Property*, March 2019

"Can a Wire Transfer Be Recalled After It is Accepted?," by Michael Weissman, *Real Property*, July 2022.

"The Escrow Dilemma: Handling Earnest Money and Escrow Holdbacks," by Bob Floss, II, *Real Property*, February 2023."

Commercial Real Estate Broker Lien Act

770 ILCS 15/1 *et seq*.

"Understanding the Illinois Commercial Real Estate Broker Lien Act," by Julia Jensen Smolka, *Real Property*, September 2015.

Note that there is no similar broker lien act for residential real estate.

Common Interest Communities

765 ILCS 160/1-1 *et seq*., the Common Interest Community Association Act

Condemnation

735 ILCS 30/1-1-1 *et seq*.; Condemnation

65 ILCS 5/11-61-1 provides that "the corporate authorities of each municipality may exercise the right of eminent domain by condemnation proceedings . . . for the acquirement of property useful, advantageous or desirable for municipal purposes or public welfare . . . ."

735 ILCS 5/7-102 notes some of the conditions that must be met before condemning public property.

735 ILCS 5/7-102); An entity cannot condemn the property belonging to a public utility or railroad without the approval of the Illinois Commerce Commission (ICC).

735 ILCS 5/7-102 provides that "where the property to be taken or damaged is a common element of property subject to a declaration of condominium ownership pursuant to the Condominium Property Act or of a common interest community, the complaint shall name the unit owners' association in lieu of naming the individual unit owners and lienholders on individual units."

765 ILCS 605/9.3, which is part of the Condominium Property Act, provides that "the unit owners' association shall be named as defendant on behalf of all unit owners in any eminent domain proceeding to take or damage property which is a common element and which includes no portions of any units or limited common elements. The association shall act therein on behalf of all unit owners."

765 ILCS 605/9.4 provides that "after receipt of summons in an action to take or damage a common element, the unit owners' association shall provide to the plaintiff a list of the unit owners, mortgagees and lienholders, and the plaintiff shall provide notice by certified mail to the unit owners, mortgagees and lienholders."

735 ILCS 5/7-103; Quick Take Condemnation; This is a statutory procedure by which the state and certain other specified governmental units acquire title to land before the amount of just compensation is finally determined.

"From Where Do State and Local Government Entities Get Authority to Take Private Property for Public Use and What Rights Belong to the Property Owners?," by Sharon L. Eiseman, *Real Property*, June 2023.

SouthWestern Illinois Development Authority v. National City Environmental, L.L.C., 199 Ill. 2d 225, 768 N.E. 2d 1 (2002)

Kelo v. City of New London, 545 U.S. 469 (2005)

Condemnation, Inverse

"You've Never Heard of an Avigation Easement? Consider Construction and Expansion of Airports and the Impact on Landowners Nearby—and Read On!," by Sharon L. Eiseman, *Real Property*, July 2020, regarding *Jackiewicz v. the Village of Bolingbrook*, 2020 IL App (3d) 180346, 148 N.E.3d 152, 439 Ill. Dec. 412. (2020)

Condominiums, in General

765 ILCS 605/1 *et seq*.; The Condominium Act

765 ILCS 605/2 defines a condominium unit as “a part of the property designed and intended for any type of independent use.”

765 ILCS 605/18 Condominium Bylaws; The bylaws contain a multitude of things, which include: The election of a board of managers; the powers and duties of the board; compensation of the board, removal from office of board members; maintenance of the common elements; and provisions concerning notice to board meetings.

765 ILCS 605/26; Limited common elements can be conveyed to other unit owners, but the transfer must be done in accordance with Section 26, which requires an amendment to the declaration and not a deed.

765 ILCS 605/27; An amendment to the declaration must be passed by either 2/3 vote approval or the majority specified in the declaration.

765 ILCS 605/18.5. This is part of the Condominium Act that deals with “Master Associations.” These associations can control townhomes as well as condominiums.

35 ILCS 200/10-35; This section of the Revenue Act governs the assessment of common areas. It provides that “the common area or areas which are used for recreational or similar residential purposes and which are assessed to a separate owner and are located on separately identified parcels, shall be listed for assessment purposes at $1 per year.”

765 ILCS 605/9(g); creates an assessment lien in favor of the condominium association.

765 ILCS 605(9)(h); A lien for condominium assessments may, upon the recording of the lien, be foreclosed like a mortgage. The action is brought in the name of the board of managers.

765 ILCS 605/25 of the Act governs add-on condominiums. It allows the developer to add additional property to the condominium and reallocate the percentage interest of common elements without the prior approval of the unit owners, merely by recording an amended plat and declaration.

765 ILCS 605/27; amendment of condominium instruments

765 ILCS 605/30; In order to combat the many abuses that occurred in converting apartment buildings into condominiums, Section 605/30 of the Act was added, effective January 1, 1978. It essentially provides for the giving of notices to the current tenants and the granting of the first right to purchase the

unit to the tenant.

765 ILCS 605/31; In *Picerno v. 1400 Museum Park Condominium Association*, 2011 IL App (1st) 103505. The plaintiff and his mother-in-law owned two units at the opposite ends of a hallway. The plaintiff wanted to take the hallway adjacent to these two end units and enclose it, making it a kind of foyer for private use. He felt that he could do this pursuant to Section 31 of the Condo Act. The court said no.

But Section 31 of the Condominium Act has now been revised to permit this.

765 ILCS 605/16 provides that all of the unit owners may remove the property from the provisions of the Condominium Act. This is done by executing and recording an instrument to that effect. All "holders of all liens affecting any of the units" must consent.

765 ILCS 605/15 allows for the sale of the entire condominium property based on the affirmative vote of the unit owners. The vote does not have to be unanimous.

765 ILCS 605/17 of the Act states that the bylaws and the declaration can be modified only by an amendment, which is recorded. Unless otherwise provided, amendments shall be executed and recorded by the president of the association or such other officer authorized by the board of managers.

765 ILCS 605/27 states that if there is any unit owner other than the developer, the condominium instruments shall be amended only upon the affirmative vote of 2/3 of those voting or upon the majority specified by the condominium instruments, together with mortgagee approval, except in cases where the Act provides for different methods of amendment.

765 ILCS 605/14.2 of the Act provides that unless the condominium instruments expressly provide for a greater percentage or different procedures, a 2/3 majority of the unit owners at a meeting of unit owners called for such purpose may elect to dedicate a portion of the common elements to a public body for use as a street or utility.

765 ILCS 605/14.3 provides that unless the condominium instruments expressly provide for a greater percentage or different procedures, a majority of more than 50% of the unit owners at a meeting of unit owners called for such purpose may authorize the granting of an easement for the laying of cable television cable.

765 ILCS 605/14.4 provides that unless the condominium instruments expressly provide for a greater percentage or different procedures, a majority of more than 50% of the unit owners at a meeting of unit owners called for such purpose may authorize the granting of an easement to a governmental body for construction, maintenance, or repair of a project for protection against water damage or

erosion.

735 ILCS 5/7-102 of the Code of Civil Procedure provides that "where the property to be taken or damaged is a common element of property subject to a declaration of condominium ownership pursuant to the Condominium Property Act or of a common interest community, the complaint shall name the unit owners' association in lieu of naming the individual unit owners and lienholders on individual units."

765 ILCS 605/14.5; distressed condominium property

765 ILCS 605/9.3 of the Condominium Act provides that "the unit owners' association shall be named as defendant on behalf of all unit owners in any eminent domain proceeding to take or damage property which is a common element and which includes no portions of any units or limited common elements. The association shall act therein on behalf of all unit owners."

765 ILCS 605/9.4 of the Condominium Act provides that "after receipt of summons in an action to take or damage a common element, the unit owners' association shall provide to the plaintiff a list of the unit owners, mortgagees and lienholders, and the plaintiff shall provide notice by certified mail to the unit owners, mortgagees and lienholders."

Apple II Condominium Association v. Worth Bank and Trust Company, 277 Ill. App. 3d 345, 659 N.E.2d 93, 213 Ill. Dec. 463 (1st Dist. 1995); condominium association may prohibit leasing of units either by board action or by a vote of the entire association pursuant to the terms of the condominium declaration. If by board action, the court will uphold it only if reasonable. If by vote and then made part of the declaration, the court will presume it to be valid unless the restriction is arbitrary, against public policy, or violates some fundamental constitutional right of the unit owners.

"Condominium Assessments and Mortgage Foreclosure: A Study of 765 ILCS 605/9(g)," by Richard F. Bales, *Real Property*, July 2011.

"Deconstructing Condominiums and Reinventing Communities," by Nancy Hyzer, *Real Property*, May 2012.

"A Guide to Repairing Broken Condominiums," by Richard F. Bales, *Real Property*, July 2012.

"Practical Solutions for Handling Association Issues When a Condominium Unit Owner is in Distress," by Erica Crohn Minchella, *Real Property*, February 2013.

"The Illinois Supreme Court's Decision in *Spanish Court Two Condominium Association v. Carlson*—What Is the Next Step?," by Ellis B. Levine, *Real*

Property, April 2015. This article concerns *Spanish Court Two Condominium Association v. Carlson*, 2014 IL 115342.

"Condominium Property Subject to Easements? Yes! A Review of *Madden v. Scott*, 2017 IL App (1st) 162149 (1st Dist. 2017)," by Ellis B. Levin, *Real Property*, October 2017, regarding *Madden v. Scott*, 2017 IL App (1st) 162149, 83 N.E.3d 1101, 416 Ill. Dec. 264 (2017).

"Here We Go Again: Timeliness of Post-Foreclosure Sale Assessment Payments Left Unresolved in *Andersonville South Condominium Association v. Federal National Mortgage Association*," by Barbara Starke Tishuk, *Real Property*, December 2017, regarding *Andersonville South Condominium Association v. Federal National Mortgage Association*, 2017 IL App. (1st) 161875.

"1010 Lake Shore Association v. Deutsche Bank National Trust Company: The Reexamination of an Extinguished Lien," by Philip J. Vacco, *Real Property,* September 2014, regarding *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co*., 2015 IL 118372.

Wing Street of Arlington Heights Condominium Association v. Kiss the Chef Holdings, LLC, 2016 IL App(1st) 142563.

1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co., 2015 IL 118372.

"When Worlds Collide—Condominium Law v. Foreclosure Law and *1010 Lake Shore Association v. Deutsche Bank National Trust Company*," by Joseph R. Fortunato, *Real Property*, February 2016, regarding *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co*., 2015 IL 118372.

"Appellate Court Rules Condominium Association Need Not Have Filed a Lawsuit to Collect Unpaid Assessments from a Foreclosure," by Barbara Starke Tishuk, *Real Property*, October 2018, regarding *Sylva, LLC v. Baldwin Court Condominium Association*, 2018 IL App (1st) 170520, 106 N.E.3d 431, 423 Ill. Dec. 725 (2018).

"Illinois Condominium Deconversion: An Overview," by R. Kymn Harp, *Real Property*, November 2019.

"*V&T Investment Corp. v. West Columbia Place Condominium Association*: A Decision Offering Major Answers to Questions from Purchasers of Units in Mortgage Foreclosures," by Ellis B. Levin, *Real Property*, January 2019, regarding *V&T Investment Corp. v. West Columbia Place Condominium Association*, 2018 IL App (1st) 170436.

"Luxury Condominium Mechanics Lien Issues in Illinois," by Paul Peterson, *Real Property*, March 2021

“New Fannie Mae Condominium Requirements,” by Paul Peterson, *Real Property*, November 2021.

”New Fannie Mae Condominium Underwriting Addendum: Speculations on Issues for Owners, Buyers, Lenders, Associations, and Developers,” by Paul Peterson, *Real Property*, February 2022.

“The Condo Act and Mortgage Foreclosure: Section 9(g)(4) and the Sylva Case,” by Mark R. Rosenbaum, *Real Property*, September 2022, regarding *Sylva, LLC v. Baldwin Court Condominium Association*, 2018 IL App (1st) 170520.

“Condominium Board and Bulk Sales,” by Sherwin D. Abrams, *Real Property*, March 2022, regarding *Glazer v. Private Residences at Ontario Place Condominium Association*, 2022 IL App (1st) 210156.

“Sellers *Can* Sue Over Excessive Fees for Section 22.1 Condo Disclosures,” by Joseph R. Fortunato, *Real Property*, January 2022, regarding *Channon v. Westward Management*, 2021 IL App 1st 210176, but see *Channon v. Westward Management*, 2022 IL 128040.

“Case Summary: *Channon v. Westward Management, Inc*.,” by Erica Crohn Minchella, *Real Property*, January 2023, regarding *Channon v. Westward Management*, 2022 IL 128040.

Condominiums, Plat of

765 ILCS 605/5 requires certain information to be shown on the plat of condominium: All angular and linear data along the exterior boundaries of the parcel (that is, a complete “picture” of the legal description of the land, similar to a plat of survey);

The location of all improvements on the parcel in relation to the exterior boundaries of the parcel (in other words, the distance from the exterior lot lines of the parcel to the corners of the condominium building);

The elevations of the unfinished ceilings and floors, the location and dimensions of the interior walls of each unit in relation to the exterior boundaries of the parcel of land;

The elevation and location (by linear measurement) of part of any unit located outside of any building. (For example, a parking space or garage may be part of a unit);

The unit number or symbol of each unit.

If the condominium is an “add on” condominium, or in the event the boundaries or location of a unit as platted is not substantially the same as the boundaries or location as built, then an amended plat or certificate must be recorded.

Condominiums, Declaration of

765 ILCS 605/4 Section 4 of the Condominium Property Act sets forth the requirements for the textual part of the declaration:

The legal description of the parcel;

The legal description of each unit, which may be the unit number or symbol;

The name of the condominium, which must include the word “condominium” or be followed by the words, “a condominium.”

The name of the city and county or counties in which the condominium is located;

Each unit’s percentage interest in the common elements;

A description of both the common and limited common elements, if any, and the manner in which they are assigned to the units;

Condominium conversion provisions, if any.

765 ILCS 605/22; 22.1; seller must obtain copies of condominium documents for buyer

Condominiums, Deconversion of

Editor’s Notes: The first step in the deconversion process is usually a developer buying up all of the condominium units pursuant to Section 15 of the Condominium Property Act, which is codified as 765 ILCS 605/15. The second step is usually pursuant to Section 16 of the Act. Section 16 of the Act (765 ILCS 605/16) permits all of the unit owners (or one owner who owns all of the units) to remove the units (and the appurtenant common elements) from the terms of the Act. This is accomplished by the execution and recording of an instrument to that effect, often called a “Declaration of Withdrawal.”

Section 15 of the Condominium Property Act permits unit owners to sell the condominium property—that is, the unit owners may sell all of the units and the appurtenant common elements. But note that under Section 15, less than all of the unit owners can sell all the condominium units. That is, unless the condominium declaration or by-laws provide otherwise, Section 15 allows for less than 100% affirmative votes to sell the property.

Condominiums and Mechanics Liens

765 ILCS 605/9.1: Subsequent to the recording of the declaration, no liens of any nature shall be created or arise against any portion of the property except against an individual unit or units. . . . If the performance of the labor or furnishing of the materials is expressly authorized by the board of managers, each unit owner shall be deemed to have expressly authorized it and consented thereto, and shall be liable for the payment of his unit's proportionate share of any due and payable indebtedness as set forth in this Section.

Consumer Rights

Consumer Fraud and Deceptive Business Practices Act; 815 ILCS 505/1 *et seq.*

Home Repair and Remodeling Act; 815 ILCS 513/1 *et seq.*

Contracts

765 ILCS 70/2; all contracts for the sale of a dwelling structure may be recorded; any provision in a contract that prohibits the contract buyer from recording the contract is void. See also 765 ILCS 5/28 for a similar statute:

765 ILCS 5/28; “Deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this state, shall be recorded in the county in which such real estate is situated; but if such county is not organized, then in the county to which such unorganized county is attached for judicial purposes. No deed, mortgage, assignment of mortgage, or other instrument relating to or affecting the title to real estate in this State may include a provision prohibiting the recording of that instrument, and any such provision in an instrument signed after the effective date of this amendatory Act shall be void and of no force and effect.”

Contracts, oral; see 735 ILCS 5/13-205

Contracts, written, see 735 ILCS 5/13-206

“Case Law Update: Real Estate Contracts,” by Steven B. Bashaw and Joseph R. Fortunato, Jr., *Real Property*, January 2011

Contracts, Installment

765 ILCS 75/2; any installment contract for the sale of a dwelling structure shall be voidable at the election of the buyer unless a certificate of compliance regarding notice of code violations is attached.

765 ILCS 70/2; all contracts for the sale of a dwelling structure may be recorded;

any provision in a contract that prohibits the contract buyer from recording the contract is void. See also 765 ILCS 5/28 for a similar statute.

735 ILCS 5/15-1214: "Any agreement or contract for a deed under which the purchase price is to be paid in installments with title to the real estate to be conveyed to the buyer upon payment of the purchase price or a specified portion thereof. For the purpose of this definition, an earnest money deposit shall not be considered an installment."

765 ILCS 75/1*et seq*.; Dwelling Unit Installment Contract Act

See also 765 ILCS 605/18(b)(11).

"The Need to Review Illinois Residential Installment Contracts," by Jack H. Tibbetts, *Real Property*, May 2010.

"A Better Approach to Installment Contracts," by Gary Gehlbach, *Illinois Bar Journal*, June 2019.

Contracts, Acceptance, Modification, and Termination of

See 715 ILCS 5/6; 5 ILCS 70/1.11; *Anand v. Marple*, 522 N.E.2d 281 (1988); *Olympic Restaurant Corp. v. Bank of Wheaton*, 251 Ill.App.3d 594 (Second Dist. 1993); *Grossinger Motorcorp, Inc. v. National Bank and Trust Company*, 670 N.E.2d 1337 (1992); *Groshek v. Frailey*, 274 Ill.Ap.3d 566, 654 N.E.2d 467, 211 Ill.Dec. 5 (First Dist. 1995); *Hubble v. O'Connor*, 291 Ill.App.3d 974, 684 N.E.2d 816, 225 Ill.Dec. 825 (First Dist. 1997); *McKenna v. Smith*, 302 Ill.App.3d 28, 704 N.E.2d 826, 235 Ill.Dec. 253 (First Dist. 1998); *Catholic Charities of Archdiocese of Chicago v. Thorpe*, 318 Ill. App. 3d 304 (First Dist. 2000); *Voyles v. Sandia Mortgage Corp*., 311 Ill.App.3d 649 (2nd Dist 2000); *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461(First Dist. 2004); *Terry v. Cafferata*, 349 Ill. App. 3d 1042 (2nd Dist. 2004, Rule 23 Opinion); *Barts v. Domanskis* (1st Dist., March, 2006); *Patel v. McGrath*, 374 Ill. App. 3d 378 (2nd Dist. 2007); *Jennings v. Baron*, 378 Ill. App. 3d 1127 (2nd Dist. 2007, Rule 23); *Warnock v. Karm, Winand & Patterson*, 376 Ill. App. 3d 364 (1st Dist. 2007); *Berggren v. Hill*, 401 Ill. App. 3d 475 (2010); *Barts v. Van Domanskis*, 2011 Ill. App. 1st 91198-U (2011); "Attorney's Approval Rider—A View from other Jurisdictions," by Richard W. Kuhn, *Real Property*, April 1989; "Attorney's Approval Provisions Revisited," by Richard W. Kuhn, *Real Property*, May 1994; "Attorney's Approval Revisited. . . Again!," by Richard W. Kuhn, *Real Property*, January 1996; "Attorney Approval Provisions—the Good Faith Requirement, by Richard W. Kuhn," *Real Property*, October 2000; "Liquidated Damages: You Can't Have Your Cake and Eat It Too," by Mark G. Hanley and Mark C. Zimmerman, *Real Property*, May 2001; "Recent Cases on Contract Formation. . . .," by Steven B. Bashaw, *Real Property*, May 2001; "There *is* a Difference! Attorney *Modification* versus Attorney *Approval* Clauses," by Richard W. Kuhn, *Real Property*, December 2001; "Attorney-

Approval Clauses and Residential Real Estate Contracts: Mere Modification or More?" by Helen W. Gunnarsson, *Illinois Bar Journal*, February 2005; "Another Look at Attorney Approval Clauses," *Illinois Bar Journal*, October 2006; "New Law on Attorney Modification Clauses in Real Estate Contracts," by Helen W. Gunnarsson, *ISBA Bar Journal*, September 2007; "Navigating Residential Attorney Approvals: Finding a Better Judicial North Star," by Debra Pogrund Stark, *The John Marshall Law Review* (30 Winter 2006); "A Little Bit of This, A Little Bit of That," by Gary R. Gehlbach, *Real Property*, October 2006; "Overview of Attorney Review Cases," by Joseph R. Fortunato, *Real Property*, October 2007; "Case Law Update: Real Estate Contracts," by Steven B. Bashaw and Joseph R. Fortunato, *Real Property*, January 2001.

Contracts, Time

5 ILCS 70/1.11; The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Saturday or Sunday or is a holiday as defined or fixed in any statute now or hereafter in force in this state, and then it shall also be excluded. If the day succeeding such Saturday, Sunday or holiday is also a holiday or a Saturday or a Sunday, then such succeeding day shall also be excluded.

715 ILCS 5/6; In computing the time for which any notice is to be given, whether required by law, order of court or contract, the first day shall be excluded and the last included, unless the last is Sunday, and then it also shall be excluded.

Cooperatives

805 ILCS 105/112.12; dissolution of residential cooperative housing corporation

Because of the interdependent nature of the cooperative, the cooperative board of directors must consent to any assignment of leasehold interest to a new purchaser of a cooperative apartment. Such perceived autocratic authority has been upheld by the courts because of the interdependent nature of the cooperative. See, e.g., *Weisner v. 791 Park Ave. Corp*., 160 N.E.2d 720 (N.Y., 1959).

"An Overview of Housing Cooperatives in Illinois," by Karen G. Courtney, *Real Property,* April 2018.

Corporations

805 ILCS 5/1.05 *et seq*.; the Corporation Act

805 ILCS 5/1.10; corporate execution of documents; by the president or a vice-president, and attested to by the secretary or an assistant secretary (or by such officers as may be authorized to exercise these duties), or, If there are no such

officers, then by a majority of the directors or by such directors as may be designated by the board, or, if there are no such officers or directors, then by the holders of record of a majority of all outstanding shares, or by such holders as may be designated by the holders.

805 ILCS 5/1.15; statements of correction.

805 ILCS 5/3.20, 805 ILCS 5/ 8.05(a), 805 ILCS 5/ 8.50, 805 ILCS 5/11.55; When a corporation sells or mortgages its assets, the title company will usually require that a corporate resolution be passed by the Board of Directors that authorizes the sale or mortgage. The title company will want to make sure that the corporate representatives who sign the deed or mortgage have the authority to do so and that these corporate representatives are doing so pursuant to the wishes of the corporation.

805 ILCS 5/11.60; If the conveyance or mortgage is of all or substantially all of the corporate assets of the corporation, then approval of the shareholders of the corporation is also required.

805 ILCS 5/8.05(a) of the Act indicates that the affairs of the corporation are managed by the Board of Directors. Therefore, a resolution assures the title company that the proposed transaction is authorized by the Board of Directors.

805 ILCS 5/12.30 of the Act states that “after dissolution, a corporation may transfer good and merchantable title to its assets as authorized by its board of directors or in accordance with its by-laws.” This is called *winding up* the business of the corporation. (See also 805 ILCS 105/112.30)

805 ILCS 5/12.45; Once a corporation pays its delinquent fees and charges, the Secretary of State can *reinstate* the corporation. This can be done within five years following the date of issuance of the certificate of dissolution. Once reinstated, the corporate existence shall be deemed to have continued without interruption from the date of the issuance of the certificate of dissolution. That is, the corporate existence “relates back” to the time the certificate of dissolution was issued. Once reinstated, it is as if the certificate was never issued.

805 ILCS 5/3.10(c); there is no longer a need for a corporate seal

805 ILCS 5/4.05, *et seq*.; corporate name issues, including change of name

805 ILCS 5/11.05, *et seq*.; 805 ILCS 5/14.35; corporate merger and consolidation

805 ILCS 5/12.05, *et seq*.; corporate dissolution

805 ILCS 5/13.05, *et seq*.; foreign corporations

805 ILCS 5/15.05, *et seq*.; corporate fees

805 ILCS 105/101.01 *et seq*.; not-for-profit corporations

805 ILCS 105/106.05; 805 ILCS 105/103.05; 805 ILCS 105/103.10(e); 805 ILCS 105/111.55; A not-for-profit corporation is a corporation whose income is not distributable to its members. A not-for-profit corporation may be organized for charitable or educational purposes, or for any one or more of the other purposes outlined in Section 103.05 of the Act. A not-for-profit corporation has the power to sell or mortgage any or all of its property or assets.

805 ILCS 110/0.01 *et seq*.; religious corporations

805 ILCS 40/1 *et seq*., Benefit Corporation Act

For municipal corporations see Municipalities.

Pielet v. Pielet, 2012 IL 112064; in order to sue a dissolved corporation, the cause of action must exist prior to the time of dissolution.

Court Decisions, Rules of Law

One appellate court district is not bound to follow the decisions of the other appellate districts; see *In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 604 N.E.2d 929 (1992)

Appellate court cases prior to 1935 are not binding precedent; see *Bryson v. News America Publications, Inc*., 174 Ill. 2d 77, 672 N.E.2d 1207 (1996)

“The decisions of an appellate court are binding precedent on all circuit courts regardless of locale.” *People v. Harris*, 123 Ill. 2d 113 (1988); “Trial courts are obligated to follow applicable appellate court decisions until the Illinois Supreme Court decides differently. *People v. Carpenter*, 228 Ill. 2d 250 (2008).

“Decisions by federal courts interpreting Illinois law are not binding and are merely persuasive.” *People v. Criss*, 307 Ill. App. 3d 888 (1999).

State courts are not bound to follow decisions of the federal district courts or circuit courts of appeal. Except for the U.S. Supreme Court, federal courts exercise no appellate jurisdiction over state courts and their opinions are not binding on state courts. Federal decisions may, however, be considered persuasive authority. *Hinterlong v. Baldwin*, 308 Ill. App. 3d 441 (1999); *Wilson v. County of Cook*, 2012 IL 112026.

Covenants, Conditions, and Restrictions

Example: A deeds the land to B *for so long as* the land is used for residential purposes. On the day of closing B tears down the house and starts to build a high-rise office building. This condition is called a *possibility of reverter* or a *fee simple determinable*. As soon as the land is no longer used for residential purposes, the estate in B automatically terminates and title reverts back to A.

Example: A sells the land to B *on the condition that* (or, *upon condition*) the property be used only for residential purposes. B starts to build a factory. This condition is called *a right of re-entry* or a *fee simple subject to condition subsequent.* Title to the land doesn't automatically revert to the grantor. Instead, A or his heirs must physically take possession of the property, either peaceably or by a forcible entry and detainer action. The key here is that title does not revert until the right is exercised.

Covenants, Conditions, and Restrictions, Statutory Limitations

765 ILCS 330/1 states that a right of re-entry and possibility of reverter can neither be devised in a will nor sold.

765 ILCS 330/3 provides that if a corporation creates a right of re-entry or possibility of reverter and the corporation dissolves or ceases to exist, the condition is also extinguished.

765 ILCS 330/4 mandates that when a condition has not been broken, neither a right of re-entry nor a possibility of reverter shall be valid for a longer period than forty years from the date of the creation of the condition.

735 ILCS 5/13-102 provides that no person shall commence an action for the recovery of lands by reason of a breach of a condition subsequent unless it is within seven years after the time the condition is first broken.

735 ILCS 5/13-103 provides that no person shall commence an action for the recovery of lands, nor make an entry thereon, by reason of the termination of a fee simple determinable estate unless within seven years after the termination.

775 ILCS 5/3-105(A) states that every provision in an oral agreement or a written agreement relating to real property that purports to forbid or restrict the conveyance, encumbrance, occupancy, or lease thereof on the basis of race, color, religion, or national origin is void.

Covenants, Conditions, and Restrictions, Miscellaneous

415 ILCS 5/1 *et seq.* The Illinois Environmental Protection Act provides for a site remediation program. This program contemplates the recordation of a document at the time of completion of remediation activity. This document is called a "No Further Remediation (NFR) Letter. This document *may* contain items in the

nature of restrictions.

SB1560; the Industrialized Residential Structure Deed Restriction Act; A deed restriction recorded after January 1, 2010 cannot prohibit or restrict the erection of an industrialized residential structure on real estate.

Ruble v. Sturhahn, 348 Ill.App.3d 667, 810 N.E.2d 278, 284 Ill. Dec. 625 (4th Dist. 2004)

Save the Prairie Society v. Green Development Group, Inc., 323 Ill.App.3d 862, 752 N.E.2d 523, 256 Ill. Dec. 643 (1st Dist. 2001)

Vandelogt v. Brach, 325 Ill.App.3d 847, 759 N.E.2d 921, 259 Ill. Dec. 860 (1st Dist. 2001)

“Do Good Fences Make Good Neighbors,” by Joel L. Chupack, *Real Property*, February 2017, regarding the construction of a fence that is in violation of a platted covenant.

“Covenants, Conditions and Restrictions: A Trend of Enforcement Denial,” by Ron Otto, *Real Property* (October 1989)

“Covenants, Conditions, and Restrictions: A Trend of Enforcement,” by Richard F. Bales, *Real Property*, (December 2004)

“Lessons in Interpretation of Covenants and Restrictions,” by Kim Casey, *Real Property*, August 2019, regarding *Standlee v. Bostedt*, 2019 IL App 2d 180325.

Covenants, Racial Restrictive

55 ILCS 5/3-5048; An owner of land that is subject to what this legislation calls an “unlawful restrictive covenant” can execute and file with the recorder a restrictive covenant modification.

Covenants, Transfer Fee Covenants

765 ILCS 155/1 *et seq*., Transfer Fee Covenant Act. Section 5 of the Act states that these covenants violate Illinois public policy because they impair the marketability and transferability of real property and constitute an unreasonable restraint on alienation.

Dead Man’s Act

735 ILCS 5/8-201

Dedications

765 ILCS 205/3: “The acknowledgment and recording of a [plat created under the Plat Act] shall be held in all courts to be a conveyance in fee simple of such portions of the premises platted as are marked or noted on such plat as donated or granted to the public. . . and the premises intended for any street, alley, way, common or other public use in any city, village or town, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended.”

765 ILCS 205/1 *et seq.*; see especially 765 ILCS 205/3; A statutory dedication is a dedication that is in strict conformity to the Plat Act. With a statutory plat, the fee simple ownership of the street vests in the public. A common law plat is any plat that is *not* created in accordance with the Plat Act. With a common law plat, the public gets only an easement interest. The fee simple ownership of the street vests in the owner of the adjoining lot.

765 205/6; a vacation of a plat eliminates any dedications created on said plat.

605 ILCS 5/4-501; 65 ILCS 5/11-61-1; Roads can be created by condemnation or eminent domain.

605 ILCS 5/9-113 A public utility has the right to install underground utilities in a statutory dedicated road. Such underground installations are regarded as being within the easement for highway purposes, in favor of the public. But this statute provides limitations on this right. This statute indicates that the consent of the underlying fee owner of the land is a necessary prerequisite to the installation of any utilities. Note that Public Act 93-357, effective January 1, 2004, adds new subsection (h-1) to 605 ILCS 5/9-113 and drastically amends subsection (I).

65 ILCS 5/11-135-7 allows for the construction of water mains under and across highways and street.

5 ILCS 70/1.16; a highway, road, or street may include any road laid out by authority of the United States, or the state of Illinois, or any town or county of Illinois, and all bridges upon any highway, road, or street.

65 ILCS 5/11-61-1; municipalities have the right to acquire property by condemnation, “including property in unincorporated areas outside of but adjacent and contiguous to the municipality where required for street or highway purposes by the municipality.”

65 ILCS 5/11-61-2: “The corporate authorities of each municipality may vacate, lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds. . . .”

65 ILCS 5/11-90-2: “The corporate authorities shall not grant the use of or the right to lay tracks in any street of the municipality to any railroad or street railway corporation except upon the petition of the owners of record of the land representing more than one-half of the frontage of the street. . . .”

70 ILCS 805/6; a forest preserve may dedicate a road.

605 ILCS 5/2-202; any road that has been used by the public for fifteen years as a highway becomes a public highway. (But such a public highway would be a common law dedication and hence an easement interest.) See *Village of Cypress v. Green*, 154 Ill.App.3d 119; 506 N.E.2d 762 (5th Dist. 1987); *City of Des Plaines v. Redella*, 365 Ill. App. 3d 68, 847 N.E.2d 732, 301 Ill. Dec. 722 (1st Dist. 2006).

605 ILCS 5/6-301 *et. seq*.; the “laying out, widening, altering or vacating township and district roads.” Generally speaking, all township and district roads shall be not less than forty feet in width.

605 ILCS 5/6-315; this statute was amended in 2003 by Public Act 93-183 to counteract the holding in *Klose v. Mende*, 329 Ill. App. 3d 543, 771 N.E.2d 960, 265 Ill. Dec. 1 (3rd Dist. 2001). The statute now reads as follows: “An entry in the records, ledger, or official minute book of the district clerk, stating that there has been a dedication of a public highway according to statutory requirements shall be prima facie evidence in all cases that there was a dedication of a public highway and that the dedication complied with all statutory requirements, regardless of whether supporting records or documentation of the dedication is available.”

765 ILCS 205/9; when a road or highway is “laid out, located, opened, widened, or extended, or its location altered,” a plat must be prepared and recorded.

Dedications, Court Cases

Township of Jubilee v. State of Illinois, 2011 IL 111447, 960 N.E.2d 550, 355 Ill. Dec. 668 (2011); statutory dedication of public square; quiet title suit; no adverse possession.

Carter Oil v. Meyers, 105 Fed2d 259 (7th Circuit, 1939)

Village of Riverside v. MacLain, 210 Ill. 308 (1904)

Village of Joppa v. Chicago and Eastern Illinois Railroad, 51 Ill.App.3d 674 (1977)

Grimming v. Ferris, 79 Ill.App.3d 546, 399 N.E.2d 141 (1979)

Road King Petroleum Products, Inc. v. Village of Wood Dale, 23 Ill.App.3d 181, 318 N.E. 2d 710 (1974)

City of Chicago v. Rumsey, 87 Ill. 348 (1877)

Owen v. Village of Brookport, 208 Ill. 35, 69 N.E.952 (1904)

Village of Auburn v. Goodwin, 128 Ill. 57 (1889)

Ingraham v. Brown, 231 Ill. 256, 83 N.E. 156 (1907)

Klose v. Mende, 329 Ill. App. 3d 543, 771 N.E.2d 960, 265 Ill. Dec. 1 (3rd Dist. 2001), but then see Public Act 93-183, which amends 605 ILCS 5/6-315, which counteracts the holding in *Klose v. Mende*, thereby creating a super dedication.

Urbaitis v. Commonwealth Edison, 143 Ill.2d 458 (1991); this Illinois Supreme Court case offers an excellent discussion of dedications and easement interests v. fee simple interests.

Deeds

735 ILCS 5/2-1304(b) Judge's deeds

765 ILCS 5/8 "Grant, Bargain, and Sell" deeds; This is a deed that gives more protection to the grantee than a quit claim deed but not as much protection as a warranty deed. The operative words in this deed are "grant, bargain, and sell." They mean that the grantor has done no act, nor created any encumbrance, whereby the estate granted can be defeated. This deed is no longer commonly used in Illinois. However, perhaps this deed might be construed as a special warranty deed. (See below.)

765 ILCS 5/9 Warranty deeds; A warranty deed, when it uses the words "convey and warrant," carries with it certain implied covenants. These warranties are: That the grantor was the lawful owner of the land and had full power to convey the land; that the land was free from all encumbrances; that the grantor warrants, or promises, to the grantee, his heirs and assigns, the quiet and peaceable possession of the land, and will defend the title to the land against all persons who claim an interest in it. See *Midfirst v. Abney*, 850 N.E.2d 373 (2nd Dist. 2006)

765 ILCS 5/10 Quit claim deeds; The operative words of a quit claim deed are "convey and quit claim . . . all interest in." These deeds contain no warranties but are effective transfers of all of the grantor's interest, if any, in the property at the time he executed the deed.

(For special warranty deeds, see Deeds, Special Warranty.)

740 ILCS 80/1 *et seq.;* 765 ILCS 5/1; this is the Statute of Frauds; the deed must be in writing.

765 ILCS 5/8 *et seq.;* consideration (the giving of value) is necessary for a deed. The full amount paid does not have to be on the deed; a nominal consideration is acceptable.

765 ILCS 5/28; deeds shall be recorded in the county in which the land is located; a provision in a deed or other document relating to the title of real estate that contains a provision that prohibits its recording is void.

765 ILCS 5/28; "Deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this state, shall be recorded in the county in which such real estate is situated; but if such county is not organized, then in the county to which such unorganized county is attached for judicial purposes. No deed, mortgage, assignment of mortgage, or other instrument relating to or affecting the title to real estate in this State may include a provision prohibiting the recording of that instrument, and any such provision in an instrument signed after the effective date of this amendatory Act shall be void and of no force and effect."

765 ILCS 5/29; if a deed affects two or more counties, one can record a certified copy of said originally recorded deed in the other county or counties.

Do documents have to be notarized in order to be recorded? See 765 ILCS 5/31:

> "Deeds, mortgages and other instruments of writing relating to real estate shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, *though not acknowledged or proven according to law*; but the same shall not be read as evidence, unless their execution be proved in manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof."
>
> However, see 765 ILCS 5/35c: "Whenever any deed or instrument of conveyance or other instrument to be made a matter of record is executed, the signatures of the parties making the conveyance shall be acknowledged by a notary public. . . . Failure to comply with this provision shall not invalidate the instrument." This seems to nullify 765 ILCS 5/31. See also 765 ILCS 5/19 *et seq.*, 765 ILCS 5/35; 765 ILCS 5/35c. In this regard, see *King v. The DeKalb County Planning Department*, 394 Ill. App. 3d 699 (2nd Dist. 2009), a plat was held to be such a document. See also *Federal National Mortgage Ass'n v. Kuipers*, 314 Ill. App. 3d 631 (2000).

765 ILCS 5/35c; lists some items to placed on a deed: Printing or typing the

names of the grantor(s) below the signature(s) as well as the names of all witnesses and acknowledgers; the names and addresses of the grantee or grantees to whom subsequent tax bills are to be sent; see also 765 ILCS 5/35d.

55 ILCS 5/3-5022; the name and address of the person who prepared the deed must be printed, typewritten or stamped on the deed before the Recorder will record it.

55 5/3-5026; A deed may not be recorded unless the name and address of the grantee or grantees are on it.

765 ILCS 5/28; A deed must be recorded in the county in which the land is located.

765 ILCS 5/30; Deeds do not take effect as to creditors and subsequent purchasers without notice until the deed is recorded. Recording a deed places subsequent purchasers on constructive notice of the buyer's interest in the property. The deed is void as to all creditors and subsequent purchasers, without notice, until it is recorded.

765 ILCS 5/7; The doctrine of after-acquired title. By virtue of Illinois statutory law, when someone who does not have title to land, but purports to convey it, and then, later, subsequently acquires that land, the land passes, by operation of law (the doctrine of after-acquired title), to his first grantee. Note that while Illinois statutory law does not limit its application to warranty deeds, Illinois case law states that a quit-claim deed cannot operate to pass after-acquired title. See *Thompson v. Becker*, 194 Ill. 119 (1902).

765 ILCS 45/1 *et seq*.; Destroyed Public Records Act

765 ILCS 5/35c; the intent of this legislation was to eliminate legal descriptions that incorporate, by reference only, legal descriptions contained in other documents. For example: "...thence westerly to the northwest corner of that property conveyed in deed recorded as document R94-2468 . . . ."

765 ILCS 905/5; deed as security for a mortgage: "Every deed conveying real estate, which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage."

735 ILCS 5/2-1304(b); orders for conveyances.

Resulting trusts; when a party purchases property with his own funds and then places the title to the property in the name of another, but actually intends to retain the legal ownership for himself, a resulting trust is created. That is, it is as if the grantee in the deed holds the property "in trust" for the person who paid for

it. See *In re Marriage of Karen and David Kendra*, 351 Ill. App. 3d 826 (2004); *In re Szabo*, No. 99B 39097, United States District Court, N.D. Illinois, Eastern Division (2002)

765 ILCS 20/1; Covenants of Warranty Act; No covenant of warranty shall be considered as broken by the existence of a highway on the land conveyed, unless otherwise particularly specified in the deed.

5 ILCS 70/1.15; A person can sign a deed by mark. Although the statute does not require that there be two witnesses to such a signature, title companies have traditionally required it. Perhaps this custom arose out of the Probate Act; see 755 ILCS 5/4-3, which provides that wills should be witnessed by two or more witnesses.

765 ILCS 20/1, the Covenants of Warranty Act; No covenant of warranty shall be considered as broken by the existence of a highway on the land conveyed, unless otherwise particularly specified in the deed.

"Attorneys Must Carefully Consider Their Deeds," by Adam B. Whiteman, *Real Property,* January 2011.

"Doing the Deed: Some Property-Related Tips for Divorcing Couples," by Adam B. Whiteman, *Real Property*, November 2017.

Deeds, Dresser Drawer

Editor's Notes:

Assume that Jane Jones told her daughter, Carol, "You have always been my favorite daughter. Here is a deed of my property from me to you. I will keep it here in my dresser drawer. When I die, you can take the deed out of my dresser drawer and record it, and you will own the property."

There are two things wrong with this scenario. First of all, Jane, the grantor, is essentially attempting to create a will out of a deed. This deed, however, was not executed with all the formalities of a will, and thus this transfer of title appears to be invalid. (Such formalities include the requirement of two witnesses and attesting to the competency of the party executing the will.) See 755 ILCS 5/4-3.

Secondly, one of the prerequisites of a deed is a valid *delivery* of the deed. That is, the grantor must intend that the grantee receive the land described in the deed, and so the grantee (or his agent) must receive the deed. See *Redmond v. Gillis*, 346 Ill. 223, 178 N.E. 504 (1931).

In this example, when Jane, the grantor, puts the deed in her dresser drawer and tells her daughter that the deed will not become operative until her death, she is

retaining control over the deed. The grantor is essentially reserving the right to recall the deed, and thus the deed is void for lack of delivery. See *Shelby v. Smith*, 301 Ill. 554 (1922); *In re Estate of Wittmond,* 314 Ill. App. 3d 720, 732 N.E.2d 659 (2000); *Seibert v. Seibert*, 379 Ill. 470, 41 N.E.2d 544 (1942).

Shelby v. Smith, 301 Ill. 554 (1922); *In re Estate of Wittmond,* 314 Ill. App. 3d 720, 732 N.E.2d 659 (2000); *Seibert v. Seibert*, 379 Ill. 470, 41 N.E.2d 544 (1942).

Deeds, Sheriff's, Administrator's, Executor's, Guardian's

765 ILCS 5/12; one does not have to copy a judgment, order, or proceeding in the deed; it is sufficient to refer to the same by the title of the cause, the name of the court, the date at which said proceedings were had, or the judgment or order obtained.

Deeds, Special Warranty

765 ILCS 5/8(a) states that a deed that uses the verbs, "grant, bargain, and sell" is a special warranty deed that automatically contains the following covenants, or warranties: a covenant that the grantor was the owner of the land; a covenant that the land is free from the grantor's encumbrances; and a covenant of quiet enjoyment.

765 ILCS 5/8(b); The words of conveyance of this second statutory special warranty deed are four verbs, not three. These words are "grants, bargains, sells, and conveys."

See *Midfirst v. Abney*, 850 NE2d 373 (2nd Dist. 2006), where a grantor was successfully sued on the warranties he made in a special warranty deed.

Chicago Title Insurance Company v. Aurora Loan Services, 2013 IL App (1st) 123510; this case concerned a special warranty deed. The deed was a special warranty deed, but not because of any special words of conveyance as set forth in 765 ILCS 5/8(a) and 765 ILCS 5/8(b). Rather, it was a special warranty deed because of the additional language that was added to the deed. See Cook County document 1007055039 recorded March 11, 2010. Thus, this is a non-statutory third type of special warranty deed.

"Special Warranty Deeds," by John C. Murray," *Real Property*, August 2014.

"Special Warranty Deeds—For the Rest of Us," by Joseph R. Fortunato, Jr., *Real Property*, February 2015.

"Special Warranty Deeds," by Craig R. Hedin, *Real Property*, October 2022.

"Danger, Will Robinson: Another Caveat Lawyer," *Real Property*, January 2023

"A New Statutory Special Warranty Deed—and More," by Richard F. Bales, *Real Property*, February 2023.

Developer Rights

765 ILCS 160/1-47 (Successor Developers; Common Interest Community Association Act); Any assignment of a developer's interest in the property is not effective until the successor: (i) obtains the assignment in writing; and (ii) records the assignment.

Disclaimer

755 ILCS 5/2-7; a person who inherits property either by testate or intestate means can disclaim his or her interest in the property.

755 ILCS 27/80; the disclaimer of a Transfer on Death Instrument

760 ILCS 25/1, right to disclaim transfers under nontestamentary instruments (This statute seems to suggest that one could disclaim property acquired by deed.)

In re Estate of Heater, 266 Ill. App. 3d 452, 640 N.E.2d 654, 203 Ill. Dec. 734 (4th Dist., 1994); *People v. Flanagin*, 331 Ill. 203, 162 N.E. 848 (1928) but see *Drye v. United States*, 528 U.S. 49, 120 S. Ct. 474 (1999)

Dissolution of Marriage

735 ILCS 5/2-1304(b); orders for conveyances.

750 ILCS 5/503; Section 503 of the Illinois Marriage and Dissolution of Marriage Act, allows the court to arrive at a "just" division of property upon the dissolution of marriage. The court is allowed to "assign" property based on a calculation; see also "New Rules on Property Classification and Division upon Dissolution of Marriage," 72 Ill. Bar J. 336 (1984); *In re Marriage of Patrick*, 233 Ill.App.3d 561 (4th Dist. 1992)

See also *In Re Marriage of Dowty*, 146 Ill. App. 3d (1986); *In Re Marriage of Dudek*, 201 Ill. App. 3d 995 (1990); *Sondin v. Bernstein*, 126 Ill. App. 3d 703 (1984) for cases concerning tenancies after dissolution of marriage.

"Doing the Deed: Some Property-Related Tips for Divorcing Couples," by Adam B. Whiteman, *Real Property*, November 2017.

"Liens, Tenancies, and Death," by Richard F. Bales, *Real Property*, September

2018.

Documents

720 ILCS 5/32-13; penalties for unlawful clouding of title

Documents; Execution of

in general; see 5 ILCS 70/1.15, which provides for, *inter alia*, signature by mark and electronic signature; regarding signature by mark, see *In Re Estate of Deskovic*, 21 Ill. App.2d 209, 157 N.E.2d 769 (1st Dist. 1959); corporations, see 805 ILCS 5/1.10; UCC, see 810 ILCS 5/3-401 *et seq*.; wills, see 755 ILCS 5/4-3. See also 810 ILCS 5/1-201.

Witt v. Panek, 408 Ill. 328, 97 N.E.2d 283 (1951) suggests three methods by which a physically incapacitated person might be able to "sign" a deed or mortgage: by signing his mark; by having his hand guided when signing; by directing a third party to affix his signature in his presence.

O'Donnel v. Kellcher, 62 Ill.App.641 (1895); When a person signs a deed for another, the signature can become that of the grantor by adoption.

See *In Re Estate of Deskovic*, 21 Ill. App.2d 209, 157 N.E.2d 769 (1st Dist. 1959); When one signs a document by mark, this "mark" can even be one's fingerprints.

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart G, "Notarial Acts," Section 176.610, "Persons Physically Unable to Sign Documents."

Deutsche Bank v. Dolci, 2012 IL App (2nd) 111275-U; All owners of the land must execute the mortgage of the land. It is not sufficient for one spouse to execute the mortgage and the other spouse waive homestead.

In Re Wirth, 355 BR 60 (N.D. Ill., 2005) The signature of a person as "borrower" on a mortgage is not sufficient to create a security interest if that person is not defined as a borrower in the mortgage.

In Re Jeannine Victoria Heaver, Bankruptcy No. 09B 73096 (N.D. of Illinois, Western Division, 2012). A mortgage recorded before the deed to the mortgagor is recorded outside the property's chain of title, and therefore, the mortgage is avoidable by the bankruptcy trustee.

Drainage

70 ILCS 605/1-1 *et seq*.; (Illinois Drainage Code)

Illinois follows the civil law rule of surface water drainage. That is, when tracts of land are situated so that surface water from one tract flows naturally onto another tract, the owner of the higher (dominant) land has a natural easement in the lower (servient) land to allow the surface water to flow naturally off of the dominant land over and upon the servient land.

Under the civil rule, the owner of a servient estate is not obligated to receive surface water in different quantities or at different times than would naturally come onto his land. See *Dovin v. Winfield Township*, 164 Ill. App. 3d 326, 517 N.E.2d 1119, 115 Ill. Dec. 433 (1987).

This concept is set forth in the Illinois Drainage Code at 70 ILCS 605/2-12.

70 ILCS 605/1-2; definitions of such terms as “ditch” and “drain.”

70 ILCS 605/2-9; it is unlawful to connect to a ditch or drain without the consent of all interested parties.

70 ILCS 605/2-10; drains and levees that benefit land shall constitute perpetual easements and shall not be impaired in any way without the consent of all the owners of the lands.

70 ILCS 605/2-12; states that a landowner cannot willfully and intentionally interfere with any ditches or natural drains that cross his land so that the flow of water is impeded, unless the ditch or drain is entirely on the landowner’s land.

70 ILCS 605/12-9; whoever willfully impedes the construction or repair of any drain through the land of another is guilty of a Class A misdemeanor.

See generally Patrick Kinnally, “Drainage Law and Development,” *Bar Briefs*, Kane County Bar Association, November 2005, 8-10.

Templeton v. Huss, 57 Ill. 2nd 134, 311 N.E. 2d 141 (1974) held that a dominant estate that increased the natural lateral flow of surface waters was inconsistent with a policy of reasonableness of use. There are two exceptions to the rule. The first exception deals with railroads; see *Coomer v. Chicago & North Western Transportation Co*., 91 Ill. App. 3d 17, 414 N.E.2d 865 (1980). The second exception is the “good husbandry” exception. This exception allows owners of dominant agricultural land to increase or alter the flow of water upon a servient estate if this is required for the proper husbandry of the dominant land. See *Peck v. Herrington*, 109 Ill. 611 (1884).

Although this second exception may allow a reasonable increase in the amount of water drained from the dominant estate to the servient estate, the exception does not allow the natural flow of the surface water or the rate at which the water

is drained to be altered by the drainage development of the dominant estate.

Hicks v. Silliman, 93 Ill. 255 (1879), “While the owner of land may use it as he pleases for habitation and other lawful purposes, yet his right in this respect is subject to the qualification that he must so use it as to not inflict an injury upon his neighbor. By the term injury here we have no reference to those slight inconveniences that often occur by the ordinary and legitimate use of land, but we have reference to those palpable and substantial injuries which are not sanctioned by usage and do not result from the ordinary use and enjoyment of one's own property.”

Bollweg v. Richard Marker Associates, Inc., 353 Ill. App. 3d 560, 818 N.E.2d 873, 288 Ill. Dec. 938 (2nd Dist. 2004) notes that although the good husbandry exception was developed to promote agriculture, the Illinois Supreme Court has stated that the exception applies to urban and suburban settings.

Dresser Drawer Deeds

See Deeds, Dresser Drawer

Easements

Editor’s Notes:

An easement is an interest in land that entitles the easement owner to a limited use or enjoyment of the land burdened by the easement. See *Kuecken v. Voltz*, 110 Ill. 264 (1884); 16 Ill. L. Rev. 122 (1931).

There are two types of easements:

An easement appurtenant is created to benefit, and does benefit, the owner of a tract of land in the use and enjoyment of his land. With this type of easement, there will be two tracts of land-- a dominant tract (or estate), and a servient tract (or estate).

The dominant estate is the land *benefited* by the easement.

The servient estate is the land *burdened* by the easement.

Easements appurtenant "run with the land.” When the land benefited by the easement is conveyed; the easement is conveyed, too. See *Beloit Foundry Co. v. Ryan*, 28 Ill.2d 379 (1963); see also 765 ILCS 5/7a.

Easements appurtenant can be created by grant, deed, reservation, agreement, mortgage, plat of subdivision, or declaration.

An easement in gross is an easement that is a personal right of one party to the use and enjoyment of another party's land.

There are no separate tracts of land in an easement in gross, because an easement in gross does not benefit the easement owner in the use and enjoyment of his land.

The most common example of an easement in gross is the easement that a utility company has over a portion of many residential lots.

Easements; The Creation of Easements by Operation of Law

Implied easement:

If an owner of a tract of land uses one part of his land to benefit another part, and this use is such that if the parts were owned by different people, the use would constitute an easement, then, upon a conveyance of one of the parts, an *implied easement*, or *easement by implication* is created over this land that is already being used. See *Limestone Development Corp. v. The Village of Lemont and K.A. Steel Chemicals, Inc*., 284 Ill.App.3d 848 (1996); 23 Ill. L. Rev. 399 (1928); 5 Ill.Bar.J. 689 (1957); G*ranite Properties Ltd. Partnership v. Manns*, 117 Ill.2d 425 (1987); *Legendre v. Harris*, 125 Ill.App.2d 76 (1979); *Dudley v. Neteler*, 392 Ill.App.3d 140, 924 N.E.2d 1023 (4th Dist. 2009).

Easement by Necessity

When the owner of land divides and conveys a portion of said land, so that one of those parcels of land has no legal access to a dedicated road, an *easement by necessity* is created. The easement by necessity is not created over land owned by a stranger. The easement by necessity is created only over the land that was divided—over either the grantor's land or the grantee's land. See *Granite Properties Ltd. v. Manns*, 117 Ill.2d 425 (1987); *Luthy v. Keehner*, 90 Ill.App.3d 127 (1980); 45 Ill.Bar J. 689 (1957); 12 Ill.L.Rev. 294 (1917); *Canali v. Satre*, 293 Ill. App. 3d 407, 688 N.E.2d 351, 227 Ill. Dec. 870 (1997).

The property must become landlocked at the time the land is divided. That is, if, at the time of severance, neither parcel is landlocked, but instead, a change of circumstance later creates the need for an easement, no easement is created at the time of severance. See *Katsoyannis v. Findlay*, 2016 IL App (1st) 150036.

Illinois courts have found an easement by necessity to exist under circumstances short of "absolute necessity" where there was no reasonable alternative access to the conveyed land. *See Rextroat v. Thorell*, 89 Ill.2d 221, cert. denied, 459 U.S. 837 (1982); see also 10 ALR4th 447.

Easement by Prescription

This is sometimes called a *prescriptive easement*. This easement is created when someone uses someone else's land in an adverse manner for a prescriptive period of at least twenty years. The use of the land must not be permissive; it must be adverse to the rights of the true owner. See *Page v. Bloom,* 223 Ill.App.3d 18 (1991); *McRaven v. Charles*, 7 Ill.App.3d 55 (1972); *Independent Tube Corp.v. Radke*, 301 Ill.App.3d 713, 704 N.E.2d 72, 234 Ill. Dec. 914 (3rd Dist. 1998); *City of Des Plaines v. Redella*, 365 Ill.App.3d 68, 847 N.E.2d 732, 301 Ill. Dec. 722 (1st Dist. 2006); *Chicago Title Land Trust Co. v. JS II, LLC*, 2012 IL App. (1st) 063420; *Rainbow Council Boy Scouts of America v. Loretta Holm*, 2018 IL App (3d) 160715.

The use of the land must be with the knowledge of the landowner, but without his permission. That is, the use of the land must be open and visible. It must be adverse to the rights of the true owner. See *Ruck v. Midwest Hunting and Fishing Club*, 104 Ill.App.2d 185 (1968).

The use of the land must be “open and notorious.” Thus, one cannot obtain a prescriptive easement when the use is invisible to the owner of the servient estate, such as a subsurface sewer or drain line. See *Murtha v. O’Heron*, 178 Ill.App. 347 (1913).

An easement by prescription can be negated by the posting of a notice. See 735 ILCS 5/13-122.

An easement by prescription is the easement equivalent of adverse possession. The use must be adverse, uninterrupted, exclusive, continuous, and under a claim of right. See *Petersen v. Corrubia*, 21 Ill.2d 525 (1961).

The use of the land must be continuous. An occasional act of trespass is not sufficient. *See Leonard v. Pearce*, 348 Ill. 518 (1932).

35 ILCS 200/22-70; A tax buyer at a tax sale cannot extinguish a previously created easement.

765 ILCS 5/7a; Once an easement is properly created and granted to the easement holder, any subsequent conveyance of the land does *not* have to include a description of the easement. See also *Beloit Foundry Co. v. Ryan*, 28 Ill.2d 379, 192 N.E.2d 384 (1963);

McGoey v. Brace, 395 Ill. App. 3d 847, 918 N.E.2d 559 (1st Dist. 2009); depending on the substantiality of the proposed change, it is possible to relocate an easement appurtenant without the joint consent of both the owner of the servient estate and the owner of the dominant estate.

Matanky Realty Group, Inc. v. Katris, 367 Ill. App. 3d 839, 856 N.E.2d 579, 305

Ill. Dec. 774 (1st Dist., 2006); the court held that a mechanics lien arising from work done on the servient estate (including the easement area) couild not be enforced against the dominant estate. The court held this, notwithstanding that the claimant's work provided beneficial improvements to the dominant estate or increased the value of the dominant estate.

527 S. Clinton, LLC v. Westloop Equities, LLC, 932 403 Ill. App. 3d 42, 932 N.E.2d 1127(1st Dist. 2010); 2014 IL (1st) 131401, 7 N.E.3d 756, Ill. Dec. 918 (Ill. App. 2014); When unspecified, the dimensions of an easement will be construed as those reasonably necessary and convenient for the purposes for which the easement was created. However, this is a question of fact that should not be determined by summary judgment.

Perbix v. Verizon North, 396 Ill. App. 3d 654, 919 N.E.2d 1096 (2009); concerns a "floating" easement; "where an easement granted by deed is undefined as to its location and width, the dimensions depend upon the intent of the parties, which can be shown by the extent of the actual use."

Chicago Title Land Trust Co. v. JS II, LLC, 2012 IL App. (1st) 063420; concerns an easement by prescription, three driveways that cross a strip of land that used to be a railroad right of way. The significance of this case is that one can have an easement by prescription without the claimant proving the exact loction and dimensions of the easements. Precise proof is not necessary because the extent of prescriptive use defines the easement. An easement's actual use determines its width.

735 ILCS 5/13-122 provides for the posting of a notice that states, "Right of access by permission and subject to control of owner." This posting would negate any claim of an easement by prescription.

DeRaedt v. Rabiola, 2011 IL App (2d) 100719; easements created by operation of law; sanctions.

"Floating Easements Don't Always Float: The Dilemma, by Ted M. Niemann, *Real Property*, March 2023.

"When the Owner of the Servient Estate Just Doesn't Want to 'Get It,'" by Michael J. Rooney, *Real Property*, July 2023.

Easements, Conservation

505 ILCS 35/1-3(b); definition of conservation easement

765 ILCS 120/1, the Real Property Conservation Rights Act

525 ILCS 30/3.06: "'Dedicate' means to set aside land in perpetuity as a nature

preserve or as a buffer area as provided in this Act for the benefit of the public, thereby subjecting the land to a negative easement in favor of the public and precluding the owner from asserting any right of ownership inconsistent with this Act or the dedication."

Bjork v. Draper, 404 Ill. App 3d 493, 936 N.E.2d 763 (2nd Dist. 2010)

"Conservation Easements: A Win/Win for Preservationists and Real Estate Owners," by George M. Covington, *Illinois Bar Journal*, December 1996

"Post-Death Conservation Easements—Another Way to Save the Farm?," by Andrew White, *Real Property,* March 2018.

Easements (Utilities), in Rights of Way

605 ILCS 5/9-113; A public utility has the right to install underground utilities in a statutory dedicated road. Such underground installations are regarded as being within the easement for highway purposes, in favor of the public. But this statute provides limitations on this right. This statute indicates that the consent of the underlying fee owner of the land is a necessary prerequisite to the installation of any utilities. Note that Public Act 93-357, effective January 1, 2004, adds new subsection (h-1) to 605 ILCS 5/9-113 and drastically amends subsection (l).

605 ILCS 5/9-113(a); The "written consent of the appropriate highway authority" is needed for the installation of any utilities in or along a highway or township or district road.

65 ILCS 5/11-135-7 allows for the construction of water mains under and across highways and street.

Richard F. Bales, "New Legislation Concerning Utilities and Rights-of-Way," Illinois State Bar Association's *Real Property* newsletter, May 2004.

Howard Samson, "Road Conveyancing after *Benno*," Illinois State Bar Association's *Real Property* newsletter, May 2004.

Benno v. Central Lake County Joint Action Water Agency, 242 Ill. App. 3d 306, 609 N.E.2d 1056 (2nd Dist. 1993)

Easements for Light and Air

Editor's Notes:

Easements for light and air are valid in Illinois. Basically, building lines are easements for light and air. See *O'Gallagher v. Lockhart*, 263 Ill. 489, 105 N.E. 295 (1914), "The establishment of a building line also creates an easement of

unobstructed light, air, and vision for the benefit of the public and for the benefit of the owners upon whose property the restricted area is laid out."

Under the English common law, the Ancient Lights Doctrine held that the owner of a building with windows that had received sunlight for a prescriptive period, usually twenty years, is entitled to receive a reasonable amount of sunlight forever.

Illinois, however, does not recognize the Ancient Rights Doctrine. An easement for light and air cannot be acquired by prescription. See *O'Neill v. Brown*, 242 Ill. App. 3d 334, 609 N.E.2d 835, 182 Ill. Dec. 301 (1993); *Guest v. Reynolds*, 68 Ill. 478 (1873); *Eckhart v. Irons*, 18 Ill. App. 173 (1885); see also *People ex rel. Hoogasian v. Sears, Roebuck & Co*., 52 Ill. 2d 301, 287 N.E.2d 677, (1972), citing the Florida case, *Fontainbleau Hotel Corp. v. Forty-Five Twenty-Five, Inc*. 114 So. 2d 357 (1959).

An easement for light and air can be created by a grant, covenant, or agreement. See *Keating v. Springer*, 146 Ill. 481, 34 N.E. 805 (1893).

There is no easement by implication for light and air. See *Baird v. Hanna*, 328 Ill. 436, 159 N.E. 793 (1928); *Keating v. Springer*, 146 Ill. 481, 34 N.E. 805 (1893).(If an owner of a tract of land uses one part of his land to benefit another part, and this use is such that if the parts were owned by different people, the use would constitute an easement, then, upon a conveyance of one of the parts, an *implied easement*, or *easement by implication* is created over this land that is already being used. See *Limestone Development Corp. v. The Village of Lemont and K.A. Steel Chemicals, Inc*., 284 Ill.App.3d 848 (1996); 23 Ill. L. Rev. 399 (1928)).

Easements, Avigation

"You've Never Heard of an Avigation Easement? Consider Construction and Expansion of Airports and the Impact on Landowners Nearby—and Read On!," by Sharon L. Eiseman, *Real Property*, July 2020, regarding *Jackiewicz v. the Village of Bolingbrook*, 2020 IL App (3d) 180346, 148 N.E.3d 152, 439 Ill. Dec. 412. (2020)

Easements, Negative

There are two basic types of easements: easements appurtenant and easements in gross. But there are two other types of easements: affirmative easements and negative easements.

An affirmative easement gives the easement holder the right to do something. Most easements are affirmative easements. An example of an affirmative easement is an access easement, where the owner of lot 1 grants the owner of lot 2 an easement for ingress and egress over the east ten feet of lot 1.

A negative easement *precludes* the owner of the land subject to the easement from doing an act which, but for the easement, the owner would be entitled to do. See *Friedman v. Gingiss*, 182 Ill. App. 3d 293, 537 N.E. 2d 1067, 130 Ill. Dec. 738 (1989). A platted building line is a negative easement—the owner of the subdivided lot is precluded from building his house over the platted building line. Thus, the easement is for the benefit of the other owners in the subdivision. See *Eckhart v. Irons*, 18 Ill. App. 173 (1885); *Ewertsen v. Gerstenberg*, 186 Ill. 344, 57 N.E. 1051 (1900); *Eckhart v. Irons*, 18 Ill. App. 173 (1885); *Piper v. Reder*, 44 Ill. App. 2d 431, 195 N.E. 2d 224 (1963).

A conservation easement is another example of a negative easement. See Section 3.06 of the Illinois Natural Areas Preservation Act, or 525 ILCS 30/3.06.

Ejectment

735 ILCS 5/6-101

Encroachments

Illinois case law indicates that courts will usually not require the encroaching party to remove an encroachment if the encroachment is unintentional, the cost for removing it is great, the corresponding benefit to the encroached-upon landowner is small, and damages can be had at law. See *Pradelt v. Lewis*, 297 Ill. 374, 130 N.E. 785 (1921); *Stroup v. Codo*, 65 Ill.App.2d 396, 212 N.E.2d 518 (3rd Dist. 1965); *Hill v. Meister*, 133 Ill.App.2d 678, 273 N.E.2d 643 (1st Dist. 1971); *Terwelp v. Sass*, 111 Ill.App.3d 133, 443 N.E.2d 804, 66 Ill.Dec. 878 (4th Dist. 1982); *Mari-Mann Herb Co. Inc. v. Borchers*, 216 Ill.App.3d 1014, 576 N.E.2d 496, 159 Ill.Dec. 827 (4th Dist. 1991); *Cammers v. Marion Cablevision*, 26 Ill. App. 3d 176 (5th Dist 1975); 1 I.L.P., Adjoining Landowners sec. 9; but see also *Whitlock v. Hilander Foods, Inc*., 308 Ill.App.3d 456, 720 N.E.2d 302, 241 Ill.Dec. 847 (2d Dist. 1999); *Borrowman v. Howland*, 119 Ill. App. 3d 493, 457 NE2d 103 (1983); *Burlew v. City of Lake Forest*, 104 Ill.App.3d 800, 433 N.E.2d 353, 60 Ill.Dec. 556 (2nd Dist. 1982).

For other encroachment cases, see *Geller v. Brownstone Condominium Ass'n*, 82 Ill.App.3d 334, 402 N.E.2d 807, 37 Ill.Dec. 805 (1st Dist. 1980); *Brownstone Condominium Ass'n v. Geller*, 91 Ill.App.3d 823, 415 N.E.2d 20, 47 Ill.Dec. 295 (1st Dist. 1980); *Ridge v. Blaha*, 166 Ill.App.3d 662, 520 N.E.2d 980, 117 Ill.Dec. 629 (2nd Dist. 1988); *Rackouski v. Dobson*, 261 Ill.App.3d 315, 634 N.E.2d 1229, 199 Ill.Dec. 875 (3d Dist. 1994); *Winters v. Polin*, 309 Ill.App. 458, 33 N.E.2d 497 (1941); *Nelson v. Anderson*, 286 Ill.App.3d 706, 676 N.E.2d 735, 221 Ill.Dec. 932 (5th Dist. 1997); *Will v. Will Products*, 109 Ill. App. 3d 778, 441 N.E.2d 343 (1982); *Encroachment of Structure on or over Adjoining Property or Way as Rendering title Unmarketable*, 47 A.L.R.2d 331 (1956); *Defect in, or Condition of, Adjacent land or Way as Within Coverage of Title Insurance Policy*, 8 A.L.R.4th

1246 (1981), supp. Sec. 5; "County Sends Trail Warning," *Chicago Tribune*, 11 April 2000, page 1, section 2; "Viewing an Encroachment Problem through the Dual Lens of the Real Estate Contract and the 2006 ALTA Owner's Title Insurance Policy," by Richard F. Bales, *Real Property*, June 2011.

765 ILCS 835/14.5; Cemetery encroachments

Burlew v. City of Lake Forest, 104 Ill. App. 3d 800, 433 N.E.2d 556, 60 Ill. Dec. 556 (2nd Dist., 1982). This case suggests that a fence encroachment of a small slice of a neighbor's property is not sufficient notice of possession to constitute adverse possession. See also *Dempsey v. Burns*, 281 Ill. 644, 118 N.E. 193 (1917), wherein the court said that the enclosure of a small lot by two smooth wires was not a sufficient act of possession.

Geller v. Brownstone Condominium Association, 82 Ill. App. 3d 334, 402 N.E.2d 807, 37 Ill. Dec. 805 (1st Dist. 1980), which involves a minor encroachment into a neighbor's air space. The court stated, "[A] property owner owns only as much air space above his property as he can practicably use. And to constitute an actionable trespass, an intrusion has to be such as to subtract from the owner's use of the property."

Brownstone Condominium Association v. Geller, 91 Ill. App. 3d 823, 415 N.E.2d 20, 47 Ill. Dec. 295 (1980). This case concerned the anchoring of nine bolts into the side of a multi-story building. In affirming the judgment of the trial court, which denied Brownstone's request for a preliminary mandatory injunction, the court stated: "The mere fact there is a trespass does not warrant any affirmative action by the Court. The close quarters of an urban society demand flexibility when we encounter an intrusion on our personal bubble."

Ariola v. Nigro, 16 Ill.2d 46, 156 N.E.2d 536 (1959), Injunctive relief will be granted if the encroachment results in damage to the property.

735 ILCS 5/13-122 provides for the posting of a notice that states, "Right of access by permission and subject to control of owner." This posting would negate any claim of an easement by prescription.

Encroachments, Tree

See Tree Encroachments

Endorsements, Title Insurance

See Title Insurance; Endorsements

Environmental

415 ILCS 5/58.8; 415 5/58.10; No Further Remediation Letter

"ASTM E1527-21: The New 2021 Standard for Phase I Environmental Site Assessments," by William J. Anaya, *Real Property*, January 2022.

Escrows

765 ILCS 910/1 *et seq*.; Mortgage Escrow Account Act

Estates

755 ILCS 5/1-1 *et seq.*; The Probate Act

755 ILCS 5/4a-5 (Presumptively Void Transfers); In any civil action in which a transfer instrument is being challenged, there is a rebuttable presumption, except as provided in Section 4a-15, that the transfer instrument is void if the transferee is a caregiver and the fair market value of the transferred property exceeds $20,000.

755 ILCS 5/2-6; person who intentionally causes the death of another cannot receive any property as a result of this person's death. (This is the so-called "slayer statute."

755 ILCS 5/5-3; the court's power to ascertain and declare heirship

755 ILCS 5/9-6; Petition to issue letters on presumption of death of decedent.

755 ILCS 5/28-8; 755 ILCS 5/28-9; an independent administrator has very broad powers. He can sell the property, even though there is no power of sale in any will, or, even if the decedent died intestate. Furthermore, note that a purchaser for value from an independent administrator takes the property, free and clear of the rights and claims of all persons who have an interest in the estate.

755 ILCS 5/12-9(a); The "additional bond" requirements of the Probate Act are applicable to estates administered under Independent Administration.

755 ILCS 5/20-15; The title received by a purchaser from the exercise of a power of sale in a will or in an independent executor or administrator relates back to the date of death of the decedent. This retroactively eliminates the interest of any heir or legatee.

> *Example*: Adam, a widower, dies testate on January 1, leaving one son, Ben. Adam's estate is probated pursuant to independent administration, with the will being admitted to probate on February 1. Adam's family decides to sell Adam's home to Charles, a purchaser for value. In this example, Ben, as the sole heir of Adam,

> could deliver a deed from him to Charles. But a title search shows that a $100,000 judgment was recorded against Ben a year earlier. The closing takes place on March 1. Because of the judgment, during the closing the executor of Adam's estate instead delivers an executor's deed to Charles. The delivery of that deed relates back to January 1, the date that Adam died. The legal effect of this "fiction" is that it is as if Ben never owned the property, and thus, it is as if the judgment against Ben never became a lien against the property.

755 ILCS 5/6-8; 755 ILCS 5/6-9, 755 ILCS 5/6-14; a representative of an estate derives his powers from the letters of office that are issued to him. Until the letters of office, the representative has very little power.

755 ILCS 5/28-8(i); states that "real estate specifically bequeathed shall not be leased, sold, or mortgaged without the written consent of the legatee." Because of this statute, some title companies feel that if the land is specifically devised by the decedent to someone other than the proposed insured, the consent of this legatee should be obtained before the property is conveyed to the insured.

755 ILCS 5/28-9 of the Probate Act provides that a good faith purchaser for value from an independent representative takes title free of the rights of all persons having an interest in the estate. Such a sale, however, will not affect any lien for federal estate taxes.

755 ILCS 5/4-13 states that "every will when admitted to probate as provided by this Act is effective to transfer the real and personal estate of the testator bequeathed in that will."

> Example: Adam owns his home. Adam is a widower with one son, Ben. Adam dies testate. When Adam dies, Ben becomes the owner of Adam's home pursuant to the rules of descent and distribution set forth in 755 ILCS 5/2-1. Adam's will is then admitted to probate (independent administration). (Because Ben is very wealthy, and because Ben already has a home, Adam leaves his home to Betty, his niece.) Ownership of the home now shifts. Betty, the legatee named in Adam's will, now owns the home pursuant to 755 ILCS 5/4-13, subject to the power of sale of the independent executor.

755 ILCS 5/2-8; If the surviving spouse of a testator renounces the will of the decedent, then, regardless of whether the will provides for the benefit of the spouse, said spouse is entitled to, after payment of claims, 1/3 of the estate if the testator leaves a descendant or ½ of the estate if the testator leaves no descendant.

755 ILCS 5/4-10 states, as to a child born after the execution of a will, that unless

the will makes provisions for a child born after the execution of the will, or, unless the will specifically disinherits said child, said child is entitled to receive that portion of the estate as if the decedent died intestate.

755 ILCS 5/4-11 deals with legacies to a deceased legatee.

755 ILCS 5/18-12(b); when an estate is not probated, the claims period is two years from the date of death of the decedent.

755 ILCS 5/3-1 of the Probate Act deals with simultaneous deaths. For example, if two persons hold title to property as joint tenants, the property shall be distributed ½ as if one had survived and ½ as if the other had survived.

755 ILCS 5/4-6 of the Probate Act notes that it is possible that a legatee of a will who is also a witness to a will may only be entitled to an intestate share. Also, a legatee of a will who is also the spouse of a witness to said will may only be entitled to an intestate share.

755 ILCS 5/4-7 of the Probate Act notes that after a dissolution of marriage, a will of one spouse, if executed before the dissolution of marriage, takes effect as if the surviving former spouse had died before the testator former spouse.

755 ILCS 5/2-3 of the Probate Act states that a posthumous child of a decedent shall receive the same share of an estate as if the child had been born in the decedent's lifetime.

755 ILCS 5/20-24; 755 ILCS 5/28-10; deal with a notice of probate and an instrument of distribution and release. These are the two types of instruments that should be recorded when real estate is distributed directly to a legatee. Note that 755 ILCS 5/20-24[c] states that these two instruments can be combined into one instrument. (See also 755 ILCS 5/28-8[i]).

755 ILCS 5/18-3; Claims against the estate; the claims period for probated estates is six months from the date of the first publication of a notice stating information regarding the death of the decedent or three months from the date of mailing or delivery of said notice to creditors, whichever is later.

755 ILCS 5/18-10; 755 ILCS 5/28-11; Expenses of administration of the estate

755 ILCS 5/15-1; 755 ILCS 5/15-2; 755 ILCS 5/28-7; relate to a surviving spouse and child's award, if any. These awards are for the support of any spouse or children of the decedent, for a period of nine months after the death of the decedent. This can be waived if there is no such surviving spouse or dependent child.

735 ILCS 5/12-902; the surviving spouse and/or children have a limited estate of

homestead. (Note, though, that Illinois does not have a dower-like or curtesy-like "residual life estate" for a surviving spouse.)

755 ILCS 5/8-1; an interested party can contest a will.

755 ILCS 5/6-21; an interested party can demand formal proof of a will.

735 ILCS 5/2-1401; An interested party can appeal the order admitting the will to probate.

755 ILCS 5/28-8(a); the executor under independent administration the right to sell the property.

755 ILCS 5/20-5; 5/20-15, 5/20-8; An executor has the power to mortgage the decedent's estate.

755 ILCS 5/12-9; the additional bond for the sale of real estate; in this regard, see also 755 ILCS 5/12-1; 755 ILCS 5/12-2; 755 ILCS 5/12-9(d).

755 ILCS 5/20-4 provides that if the land was specifically devised by the will of the decedent to someone other than the proposed insured, then, evidence that this legatee consents to the sale is necessary.

755 ILCS 5/20-15; a representative, under a power of sale in a will, may sell the land, free and clear of all liens, except for federal estate tax liens, as long as the bonding requirements of 755 ILCS 5/2-9 of the Probate Act are met; see also 755 ILCS 5/20-6.

755 ILCS 5/20-6; details the power of the court to direct the sale or mortgage of property, paying off liens, determining the priority of liens, or even sell or mortgage property free of all liens: "In any proceeding to sell or mortgage real estate the court may: Investigate and determine all questions of conflicting and controverted titles arising between any of the parties, remove clouds from any title or interest involved therein, and invest the mortgagee or purchaser with a good and indefeasible title to the property sold or mortgaged."

755 ILCS 5/20-4; under supervised administration, the executor, by leave of court, has the power to sell or mortgage real estate.

755 ILCS 5/9-6, presumption of death, intestate, see also 755 ILCS 5/20-6(a)

755 ILCS 5/6-20, presumption of death, testate, see also 755 ILCS 5/20-6(a)

755 ILCS 5/2-1; rules of descent and distribution; heirship

755 ILCS 5/2-4; an adopted child is a descendant of the adopting parent for

purposes of inheritance from the adopting parent. (But see the rest of the statute for the exceptions for this general rule.)

755 ILCS 5/5-1; place of probate of will or of administration of will

755 ILCS 5/2-8; the surviving spouse of a testator can renounce the will of a decedent.

755 ILCS 5/6-1; unproven will box; someone in possession of a decedent's will has to file it with the clerk of the court.

755 ILCS 5/4-11; anti-lapse statute; see also *In re Estate of Albert Lello Deceased v. Lello*, 2016 IL App (1st) 142500.

755 ILCS 5/4-13; "every will when admitted to probate as provided by this Act is effective to transfer the real and personal estate of the testator bequeathed in that will."

755 ILCS 5/28-9; this statute provides that "if property or a security interest therein is acquired in good faith by a purchaser or lender for value from an independent representative, the purchaser or lender takes title free of the rights of all persons having an interest in the estate . . . ."

755 ILCS 5/7-1 *et seq.*; ancillary proceedings; see also 755 ILLCS 5/22-4

755 ILCS 5/22-4, allows an out-of-state administrator to sell the Illinois land owned by an out-of-state decedent.

755 5/11-1 *et seq*., 755 ILCS 5/11a-1 *et seq.*; If a minor or disabled person is a mortgagor, the mortgage must be executed by the guardian of the estate for such party pursuant to court order.

755 ILCS 5/20-3; 5/20-4; sale or mortgage of ward's real estate.

765 ILCS 5/12; one does not have to copy a judgment, order, or proceeding in the executor's, administrator's, or guardian's deed; it is sufficient to refer to the same by the title of the cause, the name of the court, the date at which said proceedings were had, or the judgment or order obtained.

755 ILCS 5/2-4(d), (Adopted children and heirship): "For purposes of inheritance from or through a natural parent and for determining the property rights of any person under any instrument, an adopted child is not a child of a natural parent, nor is the child a descendant of a natural parent . . . unless one or more of the following conditions apply. . . ."

755 ILCS 5/2-6; "Slayer Statute," "A person who intentionally and unjustifiably

causes the death of another shall not receive any property, benefit, or other interest by reason of the death." See *In re Estate of Irene Opalinska*, 2015 IL App (1st) 143407. In this case, Darota Chaban, the daughter of Irene Opalinska and the wife of William Chaban was convicted of perjury and obstruction of justice in connection with statements she made during the investigation of her mother's murder. Her husband was eventually convicted of the murder. The administrator of Irene Opalinska's estate argued that the "Slayer Statute," or 755 ILCS 5/2-6, prevented Darota from inheriting her mother's estate due to the

755 ILCS 5/20-6: "In any proceeding to sell or mortgage real estate the court may: Investigate and determine all questions of conflicting and controverted titles arising between any of the parties, remove clouds from any title or interest involved therein, and invest the mortgagee or purchaser with a good and indefeasible title to the property sold or mortgaged."

755 ILCS 5/4-1(b); legal capacity of testator

ABN AMRO Mortgage Group, Inc. v. Nona L. McGahan, 237 Ill. 2d 526, 931 N.E.2d 1190 (2010); the Illinois Supreme Court states that a mortgagee must name a personal representative for a deceased mortgagor in a mortgage foreclosure proceeding in order for the circuit court to acquire subject matter jurisdiction. See also Supreme Court Rule 112(i).

In re Estate of LaPlume, 2014 IL App (2d) 130945, 24 N.E.3d 792; a probate court can authorize the sale of land free and clear of all liens. In this regard, see 755 ILCS 5/20-6(b) and 755 ILCS 5/20-4(a).

Crooker v. McArdle, 332 Ill. 27, 163 N.E. 384 (1928). When a will is probated, the legatee's title is deemed to relate back to the date of the testator's death and is legally effective at that time.

"ABN AMRO Mortgage Group, Inc. v. Nona L. McGahan, 2010 Ill. LEXIS 959, 2010 WL 2222126," *Real Property*, December 2010.

"Liens, Tenancies, and Death," by Richard F. Bales, *Real Property*, September 2018.

"Who Owns the Decedent's Estate?" by Sherwin D. Abrams, *Real Property*, June 2019.

Electronic Wills and Remote Witnesses Act, 755 ILCS 6/5-5 *et seq*.

"Ethics and the Illinois Electronic Wills and Remote Witnesses Act," by Daniel Ebner, *Real Property*, November 2021, regarding the Electronic Wills and Remote Witnesses Act, 755 ILCS 6/5-5 *et seq.*

"Insuring Title Free and Clear of All Liens: *In re Estate of LaPlume*, 2014 IL App (2d) 130945, 24 N.E.3d 792," by Richard F. Bales, *Trusts and Estates*, October 2019.

"Liens against Decedent's Real Estate," by Leonard Berg, *Real Property*, December 2021.

"Selling Land Owned with No Survivorship: Bond in Lieu of Probate or Probate?", by Ellen Beth Gill, *Real Property*, July 2021.

"Illinois Estate Tax and Real Property: Best Practices for Residents and Non-Residents," by Luke E. Harriman and Angelica F. Russell-Johnson, *Real Property*, January 2023.

Estates, Ancillary Proceedings

755 ILCS 5/7-1

755 ILLCS 5/22-4

Editor's Notes: An ancillary proceeding is an additional proceeding executed in Illinois when probate of a decedent's Illinois estate is had outside Illinois. See 755 ILCS 5/7-1 *et seq.* The proceeding allows Illinois to obtain jurisdiction over the land. A court in a state other than Illinois has no jurisdiction over Illinois land. Any court order entered in a court in a state other than Illinois in not enforceable in Illinois and is invalid as to the disposition of Illinois land.

To initiate ancillary proceedings, the attorney must file the foreign will in an Illinois court and have the Illinois court issue letters of office. See 755 ILCS 5/7-5.

But see also 755 ILCS 5/22-4. This statute allows for an out-of-state administrator to sell the Illinois land owned by an out-of-state decedent.

Attorneys for deceased non-resident owners of Illinois land may object to what they feel is the added burden of both ancillary jurisdiction pursuant to 755 ILCS 5/7-1 *et seq*. and probate pursuant to 755 ILCS 5/22-4. If this is the case, the attorney should not forget the traditional alternative to probate.

That is, the attorney for the deceased non-resident owner of Illinois land could simply consider obtaining deeds from all the heirs and legatees (if any) of the decedent. In other words, the attorney and the examiner could treat what is normally an ancillary proceeding situation as a "bond in lieu of probate" situation.

Estates, Bond in Lieu of Probate

Editor's Notes:

Example: Adam owns his home. Adam is a widower, and he has two adult sons, Bob and Charlie. Adam dies. Bob and Charlie hire Attorney to sell the family home. They have already found a third party purchaser, David.

What happens now? What are Attorney's options?

An unprobated estate arises when the title holder dies and his estate will not be *probated*—that is, the court will not administer the disposition of his personal property and real property.

Attorney could probate Adam's estate. Instead, Attorney chooses not to do so. In this situation, the title examiner will collect *deeds* from all of Adam's *heirs* (Bob and Charlie), and, if Adam had a will, *deeds* from all of Adam's *legatees* under the will. In this regard, see 755 ILCS 5/2-1 and 755 ILCS 5/4-13.

This is what title companies call somewhat cavalierly a *bond in lieu of probate*. This process, however, is more accurately described as a *premium in lieu of probate*. Title companies do not really take in a bond. Title companies will, though, take in an additional risk premium. The additional premium is to cover the risk of possible claims against the estate.

In addition to the premium, title companies require a *personal undertaking* as to possible claims against the estate of the decedent. A personal undertaking is an unsecured agreement wherein the person who signs the agreement affirms that if there are any claims against the estate, that person will take care of them.

Title companies will also want a *death certificate* to confirm the death of the homeowner.

Title companies will also want an *affidavit of heirship* to confirm the identity of all of the heirs of the deceased homeowner. (If there is only one heir, and that heir is preparing the affidavit of heirship, the title company may want some kind of corroborative or supporting affidavit from someone like another relative, confirming that there is only one heir. An obituary of the decedent is often useful as such a corroborative affidavit.

In order to insure the sale of Adam's home to David, the title company will need deeds from Adam's heirs, Bob and Charlie. If Adam had a will, the title company will need deeds from any and all legatees under the will. This is the case, even though Adam's will is not being probated.

Why is this the case? If Adam's will were to be admitted to probate, even post-policy, Adam would be an owner of the land. See 755 ILCS 5/4-13, which states the following:

> *Every will when admitted to probate as provided by this Act is effective to transfer the real and personal estate of the testator bequeathed in that will.*

Summary of Title Company Requirements for "Bond in Lieu of Probate":

The title company will need these items to insure title pursuant to a "bond in lieu of probate":

- Death certificate of the decedent
- Additional risk premium
- Personal undertaking
- Affidavit of heirship (and corroborative affidavit, if appropriate)
- Deeds from all the heirs
- Copy of the decedent's will, if the decedent had a will
- Deeds from all the legatees, if the decedent had a will

Estates, Disclaimer

755 ILCS 5/2-7; a person who acquires property either by testate or intestate means can *disclaim* his interest in the property. The disclaimer has the effect as if the disclaiming person had predeceased the decedent.

760 ILCS 25/1, right to disclaim transfers under nontestamentary instruments

Drye v. United States, 528 U.S. 49, 120 S. Ct. 474 (1999); Drye inherited some property from his mother. There was a recorded federal revenue lien against Drye. Seeking to avoid the lien, Drye disclaimed his interest in the land. The U.S. Supreme Court held that the lien attached to the property, notwithstanding the fiction that a disclaiming heir is treated as if he died prior to the decedent—in this case, state law creates the fiction that Drye died before his mother did, and that thus, the lien would not attach.

In re Estate of Heater, 266 Ill. App. 3d 452, 640 N.E.2d 654, 203 Ill. Dec. 734 (4th Dist., 1994); state liens may be disclaimed.

People v. Flanagin, 331 Ill. 203, 162 N.E. 848 (1928).

In re Atchison, 101 B.R. 556 (Bankr. S.D. Ill. 1989), *aff'd*, 925 F.2d 209 (7th Cir. 1991). The bankruptcy court allowed a pre-petition disclaimer of an inheritance that was created before the bankruptcy filing.

In re Chenoweth, 132 B.R. 161 (Bankr. S.D. Ill. 1991), *aff'd*, 143 B.R. 527 (S.D. Ill. 1992), *aff'd*, 3 F.3d 1111 (7th Cir. 1993); the bankruptcy court allowed the

bankruptcy trustee to set aside a post-petition disclaimer pursuant to Section 549 of the Bankruptcy Code.

William P. LaPiana, “Some Property Law Issues in the Law of Disclaimers”, *ABA Real Property, Probate and Trust Journal*, vol. 38, no. 2 (Summer 2003).

Estates, Guardians for Disabled Adults

755 ILCS 5/11a-18(a-5); 755 ILCS 5/11a-14(d)

Editor’s Notes:

When asked to insure a conveyance executed by a guardian of a disabled adult, the title examiner must make sure that the guardian has the authority to execute the deed. That is, the examiner will need either a court order that authorizes the guardian to convey or mortgage (as appropriate) the real estate, or a court order that allows the guardian to exercise any and all power over the disabled adult’s estate that the disabled adult could exercise if he or she were present and had no disability.

There are several types of guardians of persons with a disability.

A *guardian of the person* is appointed by the court when a person with a disability cannot make responsible decisions concerning his personal care. A guardian of the person will make decisions about medical treatment, social services, and other needs. A guardian of the person does not have the power to sell the real estate of the person with a disability.

A *guardian of the estate* is appointed by the court when a person with a disability is unable to make or communicate responsible decisions regarding the management of his estate or finances. A guardian of the estate can undertake to sell the real estate of the person with a disability, *but only pursuant to court order*.

Why is this the case? See 755 ILCS 5/11a-18(a): “To the extent specified in the order establishing the guardianship, the guardian of the estate shall have the. . . .” This makes it clear that the powers of the guardian of the estate are defined and limited by the court.

A *limited guardian* is a guardian who is granted only limited powers by the court. Theoretically, anyway, a court could authorize a limited guardian to handle the sale of the real estate owned by a person with a disability. See 755 ILCS 5/11a-12.

A *temporary guardian* may be appointed by the court to act as a guardian for the period between the filing of a petition for guardianship and the conclusion of the court hearing where the need for guardianship is decided. A temporary guardian

does not normally have the power to sell the real estate of a person with a disability. See 755 ILCS 5/11a-4.

A *standby guardian* is a person appointed by the court as the person who will act as guardian of the person with a disability when that person's guardian dies or is no longer willing or able to make and carry out day-to-day care decisions concerning the person with a disability. A standby guardian does not have the power to sell the real estate of a person with a disability unless the power is granted by the court. See 755 ILCS 5/1-2.23; 755 5/11a-3.1.

A *plenary guardian* is a guardian who has the power to make all decisions concerning the personal care and finances for the person with a disability. However, these powers exist only pursuant to court order. Thus, even a plenary guardian does not have the power to sell the real estate of a person with a disability unless that power is granted by the court. See 755 ILCS 5/11a-12(c) and 755 ILCS 5/11a-18.

Estoppel Against Municipalities

See Municipalities, Estoppel Against

Ethics

"Real Estate Ethics Corner," by Michael J. Rooney, *Real Property*, December 2011, regarding *In re: Shaveda Monique Scott.*

"Real Estate Ethics Corner," by Michael J. Rooney, *Real Property*, December 2012, regarding *In re: David Andre Bertha* and *In re Howard Reich.*

"Real Estate Ethics Corner," by Michael J. Rooney, *Real Property*, October 2012, regarding *In re: Marc Robert Engelmann.*

Real Estate Ethics Corner," by Michael J. Rooney, *Real Property*, September 2012, regarding *In re: Jay Fernand Fortier and In re: Laurel Sue Hickman*

Real Estate Ethics Corner," by Michael J. Rooney, *Real Property*, August 2012, regarding *In re: John Walsh*.

Real Estate Ethics Corner," by Michael J. Rooney, *Real Property*, June 2012, regarding real estate scams.

Real Estate Ethics Corner," by Michael J. Rooney, *Real Property*, May 2012, regarding *In re: Bernard James Conway*.

Real Estate Ethics Corner," by Michael J. Rooney, *Real Property*, April 2012, regarding *In re: Joseph Michael Pisula.*

Real Estate Ethics Corner," by Michael J. Rooney, *Real Property*, March 2012, regarding *In re: David Milton Svec*.

Real Estate Ethics Corner," by Michael J. Rooney, *Real Property*, February 2012, regarding *In re: Andrew Warren Peters* and *In re: Leonard Mason.*

Real Estate Ethics Corner," by Michael J. Rooney, *Real Property*, January 2012, regarding *In re: Rukavina.*

"Pick Your Title: Just Don't Do It! Ethical Common Sense. . . . Everyone is Tempted," by Michael J. Maslanka, *Real Property*, December 2015. What does one do when a signature or notarization is missing from a document for a transaction that is otherwise ready to close?

"Ethics and the Illinois Electronic Wills and Remote Witnesses Act," by Daniel Ebner, *Real Property*, November 2021, regarding the Electronic Wills and Remote Witnesses Act, 755 ILCS 6/5-5 *et seq.*

False Liens

See Liens, False

Farms and Farmland

505 ILCS 60/1 et seq., Farm Names Act; provides for the registration of farms.

Section 2001 and Section 2032A(c) of the Internal Revenue Code (Title 26 of the U.S. Code); the IRS allows for substantial reductions in estate taxes for family farms that are used for farming. However, under certain circumstances, the IRS may recapture these taxes if the property is conveyed to a non-farmer.

735 ILCS 5/9-206.1; life estate on farms; in this regard, see also *Olmstead v. Nodland*, 356 Ill. App. 3d 1092 (2005).

"Get A Survey," by Jeffrey A. Mollet, *Real Property*, June 2018, regarding obtaining a survey when buying agricultural land.

"Post-Death Conservation Easements—Another Way to Save the Farm?," by Andrew White, *Real Property,* March 2018.

Fence Act

The Fence Act (765 ILCS 130/1; *et seq*.) provides that if two or more people have adjoining lands, each of them has to build and maintain his or her proportionate share of the division fence that separates their lands. If a person

does not make or repair the fence, that party is liable for damages. Disputes may be settled by “fence viewers

Section 3 of the Fence Act: “When 2 or more persons have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them.”

Section 4 of the Fence Act: “When any person wishes to inclose his land, located in any county having less than 1,000,000 population according to the last preceding federal census and not within the corporate limits of any municipality in such county, each owner of land adjoining his land shall build, or pay for the building of, a just proportion of the division fence between his land and that of the adjoining owner and each owner shall bear the same proportion of the costs of keeping that fence maintained and in good repair.”

Section 5 of the Fence Act: “The value of such fence, and the proportion thereof to be paid by such person, and the proportion of the division fence to be made and maintained by him, in case of his inclosing his land, may be determined by 2 fence viewers. . . .”

Section 6 of the Fence Act: “If any person neglect to repair or rebuild a division fence, or portion thereof, which he ought to maintain, any two fence viewers of the town or precinct, as the case may be, shall, on complaint by the party aggrieved, after giving due notice to each party, examine such fence, and if they deem the same to be insufficient, they shall so notify the delinquent party, and direct him to repair or rebuild the same within such time as they may deem reasonable.”

Section 11 of the Fence Act: “If any person who is liable to contribute to the erection or reparation of a division fence shall neglect or refuse to make or repair his proportion of such fence, the party injured, after giving 60 days’ notice, in writing, that a fence should be erected, or 10 days’ notice, in writing, that the reparation of a fence is necessary, may make or repair the same at the expense of the party so neglecting or refusing, to be recovered from him, with costs of suit, in the circuit court; and the party so neglecting or refusing, after notice in writing, shall be liable to the party injured for all damages which shall thereby accrue.”

Section 13 of the Fence Act: “If such person shall neglect or refuse to make or repair his proportion of such fence or flood gate within the periods specified in section 12 of this Act, the party injured may make or repair the same at the expense of the party so refusing or neglecting, to be recovered with costs of suit.”

Section 14 of the Fence Act: “If any person is disposed to remove a division fence, or part thereof, owned by him or her, and allow his or her lands to be uncultivated and not used for pasture purposes, after having first given the

adjoining owner one year's notice, in writing, of his or her intention so to do and having received such adjoining owner's permission, he or she may, at any time thereafter, remove the same. . . .”

Section 15 of the Fence Act: “If any such fence shall be removed without such notice, the party removing the same shall pay to the party injured all such damages as he may thereby sustain, to be recovered with costs of suit.”

In the Matter of the Estate of Wallis, 276 Ill. App. 3d 1053, 659 N.E.2d 423, 213 Ill. Dec. 507 (4th Dist. 1995); *Deimel v. Obert*, 20 Ill. App. 557 (4th Dist., 1886); *Judith Mottl Kerr Trust v. Holm*, 2018 Ill. App. (3d) 160329-U; *Raab v. Frank*, 2019 IL App (2d) 171040, 124 N.E.3d 544, 429 Ill. Dec. 348 (2d Dist. 2019); *Raab v. Frank*, 2019 IL 124641 (2019).

“When Fences Make Litigious Neighbors: The Illinois Fence Act,” by Jeffrey A. Mollett, 89 *Illinois Bar Journal* 429 (August 2001)

“Good Fences Make Good Neighbors—Or Do They?” by Dennis Riley, *Real Property*, December 2020

FIRPTA (Foreign Investment in Real Property Tax Act of 1980)

The Foreign Investment in Real Property Tax Act, or FIRPTA, is a federal act that is enforced by the Internal Revenue Service, or IRS. This federal act imposes a “withholding obligation” on the buyer of an interest in U.S. real estate. This “withholding obligation” is the obligation to withhold 10% of the gross sales price of the land. This “withholding obligation” is imposed on the buyer when a U.S. real property interest is acquired from a foreign person.

(This “interest in real estate” includes such “less than fee simple” interests as easements, leasehold interests and life estates.) See IRS Publication 515.

See also 26 US Code Section 1445.

“Attack on Olympus: The Rise of FIRPTA,” by Donald Hyun Kiolbassa and Neil Noden, *Real Property*, September 2022.

Fixtures

In *Chappel v. Burwell*, 273 Ill. App. 348 (2d Dist. 1934), the following items were held to be fixtures--that is, they were held to be part of the realty: screens, storm windows and doors, gas furnace, electric light fixtures, water softener, built-in refrigerator, and the incinerator.

In *Guardian Life Ins. Co. v. Swanson*, 286 Ill. App. 278 (1st Dist 1936), the court held: “While it is true that parties may not by contract make personal property

real or personal at will, it has been generally held that such property as refrigerators may, upon installation, be classified as chattels personal or as chattels real, according to the intention."

Foreclosure, Mortgage

See also Mortgages, Foreclosure of

735 ILCS 5/15-1101 *et seq.*, Illinois Mortgage Foreclosure Law (IMFL)

ABN AMRO Mortgage Group, Inc. v. Nona L. McGahan, 237 Ill. 2d 526, 931 N.E.2d 1190 (2010); the Illinois Supreme Court states that a mortgagee must name a personal representative for a deceased mortgagor in a mortgage foreclosure proceeding for the circuit court to acquire subject matter jurisdiction. See also Illinois Supreme Court Rule 113(i); 735 ILCS 5/13-209; 735 ILCS 5/15-1501(h).

735 ILCS ILCS 5/2103(b); if mortgage is on land in two different counties, in what county is the foreclosure filed? This statute states: "Any action to quiet title to real estate, or to partition or recover possession thereof or to foreclose a mortgage or other lien thereon, must be brought in the county in which the real estate or some part of it is situated."

735 ILCS 5/15-1403; Strict Foreclosure
Strict foreclosure is a foreclosure proceeding that begins with the lender filing a complaint with the court. In the complaint the lender alleges the existence of the mortgage and the fact that the borrower has defaulted in repaying the mortgage. The lender then requests that the court bar, or *foreclose*, the borrower from exercising his right of redemption--that is, his right to go the lender after he has defaulted and repay the lender in full, including any interest owed. The court would allow the owner a certain amount of time to repay the debt. If the time period expired without such a redemption, the right to redeem terminated and fee simple title vested in the lender.

Strict foreclosure differs from the foreclosure we usually see, which is called *judicial foreclosure,* in that with strict foreclosure there is no judicial sale.

735 ILCS 5/15-1405; power of sale foreclosures are not permitted in Illinois.

In a few states courts will enforce a "power of sale" clause that is contained in the mortgage. This clause provides for a *private* sale of the land in order to satisfy the outstanding mortgage debt owed after there is a default. In a power of sale foreclosure, a judge does not oversee the sale. He does not confirm that certain steps were taken, such as proper notices being given to all necessary parties. An Illinois court will not enforce a mortgage clause that allows for a non-judicial foreclosure sale.

735 ILCS 5/15-1200.5; abandoned residential property

720 ILCS 5/21-3; criminal trespass to real property

735 ILCS 5/15-1402; consent foreclosure

Unlike judicial sale foreclosure, with a consent foreclosure there is no sale and there is no deed issued. Instead, title vests in the mortgagee by the terms of the consent judgment. The mortgagee's title is free and clear of all subordinate liens and other interests which would have been disposed of by a judicial sale--except for liens in favor of the United States, which by federal law cannot be affected without a sale. In this regard, see See 28 USCA section 2410(c).

735 ILCS 5/15-1207 defines a mortgage.

735 ILCS 5/15-1106(2); real estate installment contracts *must* be foreclosed under the IMFL if certain factors apply.

765 ILCS 605/9(h); a lien for condominium assessments may, upon the recording of the lien, be foreclosed under the IMFL.

735 ILCS 5/1-101 *et seq.*; filing the foreclosure complaint

735 ILCS 5/15-1401; deed in lieu of foreclosure

735 ILCS 5/2-203; service on individuals

735 ILCS 5/2-204; service on private corporations

735 ILCS 5/2-205; service on partnerships and partners

735 ILCS 5/2-205.1; service on voluntary unincorporated associations

735 ILCS 5/2-206; mechanism for service when the defendant is out of state or cannot be found or is concealed within the State of Illinois. An affidavit must be filed with the court setting forth the relevant facts. Publication is also had.

735 ILCS 5/9-107; service by posting a notice

735 ILCS 5/9-107.5; service to unknown occupants

735 ILCS 5/15-1502; details a procedure by which the interests and liens of "non-record" claimants may be terminated, even though such claimants are not named as defendants in the foreclosure.

735 ILCS 5/15-1210; defines a non-record claimant

735 ILCS 5/15-1602; provides that a mortgagor may reinstate a mortgage after there has been a default.

735 ILCS 5/15-1603; with respect to residential real estate, the redemption period ends seven months from the Jurisdiction Date or three months from the date the judgment of foreclosure was entered, whichever is later.

735 ILCS 5/15-1603, with respect to non-residential real estate, the redemption period ends six months from the Jurisdiction Date or three months from the date the judgment of foreclosure was entered, whichever is later.

735 ILCS 5/15-1604; any party can seek a shortened redemption period if the court finds in its judgment that the land has been abandoned, in which case the redemption period ends thirty days after the entry of the judgment of foreclosure; or, the court finds in its judgment that the value of the mortgaged land as of the date of judgment was less than ninety percent of the amount required to redeem and the mortgagee has waived any and all rights to a deficiency judgment against the mortgagor and any other parties that are personally liable for the debt. In such an instance, the redemption period ends at the expiration of the period for reinstatement or sixty days from the entry of the judgment of foreclosure, whichever is later.

735 ILCS 5/15-1601; a mortgagor can waive redemption under certain conditions.

735 ILCS 5/15-1507; details the prerequisites of a proper judicial sale.

735 ILCS 5/15-1508(e); deficiency judgment

735 ILCS 5/15-1604; Additional thirty-day redemption period for residential real estate;
If the land is “residential real estate,” as defined in the IMFL; if the purchaser at the sale was a mortgagee who was a party to the foreclosure (or its nominee); and
if the price obtained at the sale was less than the amount required to redeem.
If all three of the above requirements are met, the mortgagor will have an additional thirty days after the date the sale is confirmed to redeem.

735 ILCS 5/15-1509(c) provides that the deed will act as a bar to all claims of parties to the foreclosure and nonrecord claimants, unless the judgment specifies otherwise.

735 ILCS 5/15-1501(a); necessary parties; if a party is not served, the mortgage foreclosure will go on, but subject to the person’s interests.

735 ILCS 5/15-1501(b); permissible parties

735 ILCS 5/15-1701; right to possession

735 ILCS 5/15-1501; necessary and permissible parties

35 ILCS 205/1; 35 ILCS 205/216; by statute, real estate taxes and special assessments are a first lien superior to all other liens.

65 ILCS 5/11-31-1; 65 ILCS 5/11-31-2, by statute, demolition liens and receiver's liens are superior to all other liens, except taxes.

65 ILCS 5/11-20-7; weed cutting liens have priority over mortgage liens.

65 ILCS 5/11-20-8; rat extermination liens have priority over mortgage liens.

65 ILCS 5/11-20-12; liens for the removal of trees that have Dutch elm disease have priority over mortgage liens.

65 ILCS 5/11-20-13; garbage/debris liens have priority over mortgage liens. (But note that liens arising for the nonpayment of water or sewer charges enjoy *no* special statutory priority.)

735 ILCS 5/15-1501(g); State of Illinois lien

735 ILCS 5/2-413; unknown owners; this statute provides that if there are any interested persons whose names are unknown, they can be made parties to the action by filing an affidavit with the court, stating that their names are unknown. Publication is then had as to these "unknown owners." See also 735 ILCS 5/2-206, 207.

735 ILCS 5/15-1503; requirements for a proper notice of foreclosure. It should be recorded in the county in which the land is located.

735 ILCS 5/2-203; service of process

735 ILCS 5/2-206; service by publication; if a defendant is out of state, or is in the state but cannot be found, or is hiding in the state, so that he cannot be served with personal service, the plaintiff can serve notice by publication. The clerk of the court must also mail a copy of the publication to the defendant. The clerk will file a certificate, indicating that he has done so.

735 ILCS 5/15-1401 - deeds in lieu of foreclosure

735 5/15-1503, notice of foreclosure

735 ILCS 5/15-1504; provides a suggested form of foreclosure complaint.

735 ILCS 5/2-301; special appearances.

735 ILCS 5/15-1508(b); confirmation of sale.

735 ILCS 5/15-1507; notice of sale.

735 ILCS 5/15-1509; judicial deed

735 ILCS 5/15-1509; 735 ILCS 5/2-1401, right to appeal

735 ILCS 5/15-1402(a); consent foreclosure; the mortgagee's title shall be free of all junior liens and interests.

735 ILCS 5/15-1603(c); if the automatic stay is lifted thirty days *or* less prior to the end of the redemption period, then the redemption period is extended for thirty days from the date of the order that lifts the stay.

735 ILCS 5/15-1207(e); collateral assignments of beneficial interest

735 ILCS 5/15-1501(d); tenants as permissible parties

735 ILCS 5/2-203, 206; the filing of a non-personal service affidavit.

735 ILCS 5/13-115; A mortgage foreclosure must be commenced within ten years after the right to bring the action accrues.

735 ILCS 5/15-1501; notes that a foreclosure can go forward without all parties being named. However, "any disposition of the mortgaged real estate shall be subject to the interests of all other persons not made a party. . . ."

735 ILCS 5/2-1401(e); post-judgment matters.

55 ILCS 5/3-5010.7; Recorder can bar nonrecord claimants from recording an interest in the property subject to foreclosure unless there is court approval.

765 ILCS 605/18.5(g-1); the purchaser of a unit of a common interest community (see 765 ILCS 160/1-1 *et seq*.) at a judicial foreclosure sale has to pay a "proportionate share" of the common expenses for the unit.

React Financial v. Long, 852 N.E.2d 277 (3rd Dist. 2006); because the plaintiff creditor was not made a party to the case, it had the right to file a separate foreclosure proceeding under Section 15-1501 of the IMFL. It can do so without first paying off the first mortgage, and it can do so even after the judgment of

foreclosure is entered.

ABN AMRO Mortgage Group, Inc. v. McGahan, *"ABN AMRO Mortgage Group, Inc. v. McGahan*," by Richard F. Bales, *Real Property*, December 2010, see *ABN AMRO Mortgage Group, Inc. v. Nona L. McGahan*, 237 Ill. 2d 526, 931 N.E.2d 1190 (2010).

"The Role of the Special Representative in Foreclosure following ABN AMRO," by Donald P. Shriver, *Real Property*, January 2011, see *ABN AMRO Mortgage Group, Inc. v. Nona L. McGahan*, 237 Ill. 2d 526, 931 N.E.2d 1190 (2010).

Mid-America Federal Savings v. Liberty Bank, 562 N.E.2d 1188 (2nd Dist. 1990); a second position lienholder lost its priority to the third position lienholder for failure to file its answer in a foreclosure suit where it was named as a party. The court held that the second-place lienholder failed to act with diligence, thereby losing its position in line.

Skach v. Gee, 137 Ill. App. 3d 216 (1985); landowners claimed unsuccessfully that their mortgages being foreclosed were invalid liens because of incorrect due dates and mortgage amounts.

"Condominium Assessments and Mortgage Foreclosure: A Study of 765 ILCS 6059(g)," by Richard F. Bales, *Real Property*, July 2011.

"Final Order in Mortgage Foreclosure Action Bars All Claims against the Mortgagee, even a Claim for Fraud upon the Court," by James V. Noonan, *Real Property*, September 2019, regarding *Taylor v. Bayview Loan Servicing, LLC*, 2019 IL App (1st) 172652.

"Mortgage Foreclosure Defense: Mortgagors Beware," by Michael J. Maslanka, *Real Property*, May 2019, regarding *Bank of New York Mellon v. Wojcik*, 2019 IL App (1st) 180845

Foreclosure, Consent Foreclosure

735 ILCS 5/15-1402

Editor's Notes:

Section 15-1402 of the IMFL, or 735 ILCS 5/15-1402, provides for a procedure whereby a mortgage may be foreclosed with the mortgagor's consent. This method of foreclosure is called a *consent foreclosure*. Unlike the usual type of foreclosure proceeding, no sale is held and no deed is issued in a consent foreclosure. Rather, title vests in the mortgagee by the terms of the consent judgment itself. The mortgagee's title is free and clear of all subordinate liens and other interests that would have been disposed of by a judicial sale, except for

liens in favor of the United States of America, which by federal statute cannot be affected without a judicial sale. Even if a federal revenue lien is recorded after the recording date of the notice of foreclosure, the consent foreclosure will have no effect on the federal revenue lien. The consent foreclosure will not eliminate the federal revenue lien. See 28 U.S.C. 2410(c).

Consent foreclosure has advantages for both the mortgagor and the mortgagee. It benefits the mortgagee because the lender can obtain title to the land quickly, without waiting for the expiration of the redemption period. It is beneficial to the mortgagor because further litigation expenses are avoided. It is also beneficial to the mortgagor because the mortgagee must waive its right to seek a deficiency judgment.

Foreclosure, Deed in Lieu

735 ILCS 5/15-1401; deed in lieu of foreclosure

Foreclosure, Federal

12 USC 3751 *et seq*., Single-Family Mortgage Foreclosure Act

12 USC 3701 *et seq*., Multi-Family Mortgage Foreclosure Act

Forfeiture, Money Laundering

720 ILCS 5/29B-1(C)(4)(I); forfeiture of real estate

Fraud

735 ILCS 5/4-101(9); A creditor may seek an attachment against land owned by the debtor when the debt sued for was fraudulently contracted on the part of the debtor.

765 ILCS 940/1 *et seq*.; Mortgage Rescue Fraud Act

55 ILCS 5/3-5010.5; county recorders can establish a “fraud referral and review process.”

“Stealing Houses,” by Frank Pellegrini, *Real Property*, March 2021.

Fraudulent Transfers

740 ILCS 160/1 *et seq*., Illinois Uniform Fraudulent Transfer Act

See also *Premier Property Management, Inc. V. Chavez*, 191 Ill.2d 101, 728 N.E.2d 476 (2000). For information on common law fraud, see “Fraud and

Misrepresentation in Real Estate Transactions," Part I, by Robert Kratovil, *Real Property*, June 1986; "Fraud and Misrepresentation in Real Estate Transactions," Part II, by Robert Kratovil, *Real Property*, August 1986.

Editor's Notes:

Generally speaking, title company examiners stop searching the name of an owner of land when the owner conveys the land. But what if the owner of the land conveys the property, into, e.g., an Illinois land trust with a deed that is exempt from the payment of transfer stamps? What if a husband and wife convey the land to themselves as tenants by the entirety with a deed that is exempt from the payment of transfer stamps? Did the owners of the land convey the property with the intent to defraud a creditor?

In this type of situation, the examiner should continue to search the names of the owners and should consider showing as a title exception any post-conveyance judgment or other lien.

Generally speaking, a creditor has four years from when the transfer was made to file a cause of action under this statute. See 740 ILCS 160/10.

Heirship

755 ILCS 5/2-1; rules of descent and distribution; heirship

McNamara v. McNamara, 303 Ill. 191, certiorari denied, 260 U.S. 734; *McCormick v. Hall*, 337 Ill. 232.

755 ILCS 5/2-4(d), (adopted children and heirship): "For purposes of inheritance from or through a natural parent and for determining the property rights of any person under any instrument, an adopted child is not a child of a natural parent, nor is the child a descendant of a natural parent . . . unless one or more of the following conditions apply. . . ."

Home Repair and Remodeling Act

815 ILCS 513/1 *et seq*.

Here are some cases:

Central Illinois Electrical Services, LLC v. Slepian, 358 Ill. App. 3d 545, 831 N.E.2d 1169 (3rd Dist. 2005)

Smith v. Bogard, 377 Ill. App. 3d 842, 879 N.E.2d 543 (4th Dist. 2007)

MD Electrical Contractors, Inc. v. Abrams, 369 Ill. App. 3d 309 (2006); affirmed,

228 Ill. 2d 281 (2008)

Kunkel v. P.K. Dependable Construction, LLC, 387 Ill. App. 3d 1153, 902 N.E.2d 769 (5th Dist. 2009)

K. Miller Construction Company, Inc., v. Joseph J. McGinnis, 394 Ill. App. 3d 248, 913 N.E.2d 1147 (1st Dist. 2009) This case is in direct opposition to *Smith v. Bogard*, 377 Ill. App. 3d 842, 879 N.E.2d 543 (4th Dist. 2007)

Artisan Design Build v. Bilstrom, 397 Ill. App. 3d 317 (2nd Dist. 2009)

John Behl, d/b/a/ Behl Construction v. Gingerich, 396 Ill. App. 3d 1078 (4th Dist. 2009)

Tom Geise Plumbing, Inc. v. Taylor, 396 Ill. App. 3d 289 (4th Dist. 2009)

Roberts, d/b/a Roberts Cleaning, Maintenance and More v. Adkins, 397 Ill. App. 3d 858 (3rd Dist 2010)

Fandel v. Allen, 398 Ill. App. 3d 177 (3rd Dist. 2010)

Universal Structures v. Buchman, 402 Ill. App. 3d 10 (1st Dist., 2010)

"Caveat Contractor: Recent Cases Interpret the Home Repair and Remodeling Act," by Brian R. Kalb, *Illinois Bar Journal*, June 2008.

"Home Repair and Remodeling Act Final Word: The Supreme Court Speaks and Listens to the Legislature," by Steven B. Bashaw, *Real Property*, November 2010. This article concerns *K. Miller Construction Company, Inc., v. Joseph J. McGinnis*, 394 Ill. App. 3d 248, 913 N.E.2d 1147 (1st Dist. 2009)

"The Home Repair and Remodeling Act—Can We Fix It?" by Adam B. Whiteman, *Real Property*, February 2010.

Home Repair and Remodeling Insurance May Not Cover Contractors Violating the Home Repair and Remodeling Act," by Nathan B. Hinch, *Real Property*, November 2010.

"Illinois Supreme Court Holds that Oral Contracts Not Necessarily Unenforceable Pursuant to Home Repair and Remodeling Act, but Why Risk It?" by Michael P. Tomlinson, *Real Property*, November 2010. This article concerns *K. Miller Construction Company, Inc., v. Joseph J. McGinnis*, 394 Ill. App. 3d 248, 913 N.E.2d 1147 (1st Dist. 2009).

"Constructing a Bridge Between the Home Repair and Remodeling Act and the Illinois Mechanics Lien Act," by Adam B. Whiteman, *Real Property*, October

2018.

Home Rule

Rivera v. Bank of New York Mellon & Bayview Loan Servicing, LLC, by Joseph W. Rogul, *Real Property*, July 2021, regarding *Rivera v. Bank of New York Mellon & Bayview Loan Servicing, LLC*, 2021 IL App (1st) 192188, 198 N.E.3d 1055, 459 Ill. Dec. 678 (2021)

Homestead

735 ILCS 5/12-901 provides as follows: Every individual is entitled to an estate of homestead to the extent in value of $15,000 of his or her interest in a farm or lot of land and buildings thereon, a condominium, or personal property, owned or rightly possessed by lease or otherwise and occupied by him or her as a residence, or in a cooperative that owns property that the individual uses as a residence. That homestead and all right in and title to that homestead is exempt from attachment, judgment, levy or judgment sale for the payment of his or her debts or other purposes and from the laws of conveyance, descent and legacy, except as provided in this Code . . . .

735 ILCS 5/12-901; see above; the Homestead Act is applicable to personal property; as the beneficial interest in a land trust is personal property, any assignment of said beneficial interest should contain, if applicable, a waiver of homestead rights.

735 ILCS 5/12-904 provides three methods of releasing, waiving, or conveying a homestead interest: “No release, waiver or conveyance of the estate so exempted shall be valid, unless the same is in writing, signed by the individual and his or her spouse, if he or she have one, or possession is abandoned or given pursuant to the conveyance...but if a conveyance is made by an individual as grantor to his or her spouse, such conveyance shall be effectual to pass the title expressed therein to be conveyed thereby, whether or not the grantor in such conveyance is joined therein by his or her spouse.”

These three methods are:

One, signing the deed or other document;

Two, Abandonment;

Three; giving up possession pursuant to the conveyance (i.e., moving out. Thus, generally speaking, homestead should not be an issue at the typical real estate closing. When the buyer did a “walk through” prior to closing, was the house empty of all personal property? If so, it appears that homestead has been waived.)

765 ILCS 5/27 states: “And no release or waiver of the right of homestead by the husband or wife shall bind the other spouse unless such other spouse joins in such release or waiver.”

750 ILCS 65/16; the Married Women Act: “Neither the husband nor wife can remove the other or their children from their homestead without the consent of the other, unless the owner of the property shall, in good faith, provide another homestead suitable to the conditions in life of the family....”

735 ILCS 5/12-909; assuming that homestead is not waived, a judgment of less than $15,000 is not enforceable against the land: “No sale shall be made of the premises on such judgment unless a greater sum than $15,000 is bid therefor. If a greater sum is not so bid, the judgment may be set aside or modified, or the enforcement of the judgment released, as for lack of property.”

735 ILCS 5/12-906; When a homestead is conveyed by the owner thereof, such conveyance shall not subject the premises to any lien or incumbrance to which it would not be subject in the possession of such owner; and the proceeds thereof, to the extent of the amount of $7,500, shall be exempt from judgment or other process, for one year after the receipt thereof, by the person entitled to the exemption, and if reinvested in a homestead the same shall be entitled to the same exemption as the original homestead.”

735 ILCS 5/12-902 provides that the homestead exemption continues after the death of the individual who has the homestead estate.

735 ILCS 5/12-903; the purchase money mortgage exception to homestead: “No property shall [by virtue of the Homestead Act] be exempt...for a debt or liability incurred for the purchase or improvement thereof....”

35 ILCS 200/9-275, erroneous homestead exemption lien (Cook County only)

Deutsche Bank v. Dolci, 2012 IL App (2nd) 111275-U; All owners of the land must execute the mortgage of the land. It is not sufficient for one spouse to execute the mortgage and the other spouse waive homestead.

Homeowners’ Energy Policy Statement Act

765 ILCS 165/1 *et seq.*

Section 5 of the Act states that the legislative intent of this statute is to encourage the development and use of solar energy systems and accordingly, to prevent homeowners’ associations, common interest community associations, and condominium unit owners’ associations from adopting measures that prevent the use of solar energy systems.

Section 15: The adoption of any bylaw of exercise of any power by a homeowners' association, common interest community association, or condominium unit owners' association that prohibits or has the effect of prohibiting the installation of a solar energy system is prohibited.

Section 20: No deed restrictions or covenants shall prohibit a solar energy system from being installed on a building. If the building is subject to a homeowners' association, common interest community association, or condominium unit owners' association. However, the entity may determine the specific location where a solar energy system may be installed on the roof of the building.

Within 120 days after an association receives a request for a policy statement, or receives an application for the installation of a system, the association shall adopt an energy policy statement regarding, among other things, the location, design, and architectural requirements of solar energy systems. The policy statement shall be included in its homeowners or condominium declaration.

Section 20 states that the policy statement may indicate whether a wind energy collection system, a rainwater collection system, or a composting system is allowed.

Section 35: Any entity, other than a public entity, that willfully violates the Act shall be liable for actual and consequential damages.

Section 45: The Act will not apply to any building that is greater than thirty feet in height.

Illinois Entity Omnibus Act

805 ILCS 415/101 *et seq.* This statute provides for the conversion of an Illinois entity, such as a corporation, into a different type of Illinois entity; the conversion of an Illinois entity into a different type of foreign entity; and the conversion of a foreign entity into a different type of Illinois entity.

Illinois State Tax Lien Registration Act

"What You Need to Know About the Illinois State Tax Lien Registration Act," by Nicky Sonntag, *Real Property*, August 2022.

Illinois Trust Code

760 ILCS 3/1 *et seq*.

Editor's Notes: The following sections of the Illinois Trust Code may be of particular interest to the real estate attorney and the title examiner:

102 The Trust Code does not apply to land trusts

103 Definitions

303 Representation by others

409 Trust duration

605 Revocation of trust provisions by divorce or annulment

703 Co-trustees

704 Vacancy in trusteeship

705 Resignation of trustee

706 Removal of trustee

807 Delegation by trustee

812 Successor trustees

815 General powers of the trustee

816 Specific powers of the trustee

1013 Certification of trust

1201 Trust decanting[1]

"Potential Real Estate Concerns under the New Illinois Trust Code," by Paul Peterson, *Real Property*, March 2020.

[1] When someone decants wine, the person pours the wine from the original bottle into another container. Wine decanting is done to separate the wine from the sediment that is at the bottom of the bottle. One pours off the good part and leaves the bad part behind.

It is possible to decant an irrevocable trust. Just like decanting wine, the attorney pours the assets of the old trust—the trust that has outdated or undesirable terms—into another trust, leaving the unwanted terms behind in the old trust. This effectively allows the attorney to set up a new trust for one or more of the same beneficiaries of the original trust and fund it with assets from the old trust.

Illinois Medical Commission

70 ILCS 915/1 *et seq.*

Implied Warranty of Habitability

1324 W. Pratt Condominium Assoc. v. Platt Construction Group, 936 N.E.2d 1093 (1st Dist. 2010)

Installment Contracts

765 ILCS 75/1 *et seq*., Dwelling Unit Installment Contract Act

Interpleader

735 ILCS 5/2-409

Islamic Financing

It is against Islamic law (Shariah) to pay or receive interest. That being the case, how do Muslims following Shariah buy a home?

Lenders offer financing plans that do not charge interest. Instead, the lenders make loans "halal," or "permitted," by charging a fee or "rent," which is their profit.

Murabaha
This is the cost-plus sale model; it is a bank transaction similar to an installment contract.

Ijara
This is the net lease model; it is a bank transaction resembling a sale and leaseback.

Musharaka
This is a shared ownership model; it is a non-bank transaction involving co-ownership.

For more information, see https://www.devonbank.com/faith-based-financing/

Joint Tenancy

765 ILCS 1005/0.01 *et seq.*; the Joint Tenancy Act; see also *Minonk State Bank v. Grassman*, 95 Ill.2d 392 (1983); *In Re Marriage of Dowty*, 146 Ill. App. 3d (1986); *In Re Marriage of Dudek*, 201 Ill. App. 3d 995 (1990); *Sondin v. Bernstein*, 126 Ill. App. 3d 703 (1984); *Engelbrecht v. Engelbrecht*, 323 Ill. 208 (1926); *Harmes v. Sprague*, 107 Ill.2d 215 (1984); "Severance of Joint Tenancies

by Mortgages: A Contextual Approach," by Taylor Mattis, *Southern Illinois University Law Journal*, No. 1, 1977; "Recent Decisions," *Illinois Bar Journal*, March 1986; "Joint Tenancy and Tenancy by the Entirety: The Pros and Cons," by Guerino J. Turano and Philip H. Ward, *Illinois Bar Journal*, June 1995; "The Trap of Joint Tenancy," by Myles L. Jacobs, *Real Property*, June 1995; *Sathoff v. Sutterer*, 373 Ill. App. 3d 795, 869 N.E.2d 354, 311 Ill. Dec. 680 (5th Dist. 2007).

765 ILCS 1005/1; the default tenancy is tenancy in common

A bankruptcy petition does not sever a joint tenancy; see *Maniez v. Citibank*, 404 Ill. App. 3d 941 (2010).

"Effect of Judgment Lien on Death of Joint Tenant," by Emily R. Vivian, *Real Property*, October 2022, regarding *Westberg v. Barcroft, et al*., 2022 IL App (2d) 210543.

Judgments, Federal

Title 28, Chapter 176, Section 3201; a judgment in favor of the United States in a civil action creates a lien on all real property of a debtor upon (in Illinois) the recording of a certified copy of the abstract of the judgment. The lien has a statute of limitations for twenty years, and it can be renewed for an additional twenty years.

Note that the above pertains to judgments in favor of the United States. On the other hand, see Title 28, Chapter 125, Section 1962; this statute, which indicates that it does not apply to judgments in favor of the United States, states that every judgment in entered in a district court within a state shall be a lien in the same manner and extent as if it were a judgment entered in a state court.

See also Title 18, U.S.C. Section 3613(c).

Judgments, Foreign

735 ILCS 5/12-661, Uniform Foreign-Country Money Judgments Recognition Act

Judgments, homestead exemption

See 735 ILCS 5/12-909; assuming that homestead is not waived, a judgment of less than $15,000 is not enforceable against the land: "No sale shall be made of the premises on such judgment unless a greater sum than $15,000 is bid therefor. If a greater sum is not so bid, the judgment may be set aside or modified, or the enforcement of the judgment released, as for lack of property."

Judgments, Recording of Findings, Decision, and Order

65 ILCS 5/11-31.1-10
65 ILCS 5/11-31.1-11.1
65 ILCS 5/11-31.1-12

See also Recording of Findings, Decision and Order

Judgments, State

735 ILCS 5/12-101 *et seq.;* the Judgment Act

735 ILCS 5/12-101; "A judgment is not a lien on real estate for longer than 7 years from the time it is entered or revived, unless the judgment is revived within 7 years after its entry or last revival and a new memorandum of judgment is recorded prior to the judgment and its recorded memorandum of judgment becoming dormant."

735 ILCS 5/12-157; The death of the judgment debtor can extend the limitations period by an additional year, to eight years. That is, a judgment may not be enforced against the debtor during the one-year period following the debtor's date of death.

735 ILCS 5/2-1402; 735 ILCS 5/12-152, 735 ILCS 5/12-153, 735 ILCS 5/12-154; 735 ILCS 5/12-115; 735 ILCS 5/12-119, 735 ILCS 5/12-120, 735 ILCS 5/12-121; 735 ILCS 5/12-122; 735 ILCS 5/12-145; 735 ILCS 5/12-144.5; 735 ILCS 5/12-132; 735 ILCS 5/12-115; Supreme Court Rule 277; enforcing judgments

735 ILCS 5/12-650 *et seq*., foreign judgments

735 ILCS 5/12-101 *et seq.*; child support judgments; "any lien hereunder arising out of an order for support shall be a lien only as to and from the time that an installment or payment is due under the terms of the order."

305 ILCS 5/10-10; a variety of interested agencies or persons, including the Illinois Department of Public Aid, a unit of local government, the States Attorney, or the person requiring support, may bring an action in the circuit court for the entry of a child support order.

735 ILCS 5/12-101; 735 ILCS 5/13-218; revival of judgments
Although the statute of limitations for a judgment is seven years from the time it is entered (not recorded), provides that a judgment may be revived at any time within twenty years from the date the judgment was entered.

735 ILCS 5/12-101(d); *Wolff v. Groshong*, 101 Ill.App.3d 606 (1981); When a judgment is revived, it is a lien on the real estate of the judgment debtor from the time a transcript, certified copy or memorandum of the order of revival is recorded.

735 ILCS 5/2-1303; interest rate of judgments is 9% a year, but if the judgment debtor is a unit of local government, then the interest rate is 6% a year.

735 ILCS 5/2-1401 sets forth the law on the appeal of or "direct attack" on judgments.

65 ILCS 5/11-31.1-11.1; 5/11-31.1-12 concern Administrative Adjudications. These have the same effect as judgments.

"Effect of Judgment Lien on Death of Joint Tenant," by Emily R. Vivian, *Real Property*, October 2022, regarding *Westberg v. Barcroft, et al*., 2022 IL App (2d) 210543.

Judgments, State, Clearance

A judgment may be waived seven years from the date the judgment was entered, provided there was no revival of the judgment. The judgment can also be waived seven years from the date it was revived.

A judgment may be waived upon the recording of a satisfaction and release of judgment.

A judgment may be waived upon the recording of a release of land from judgment.

Release of Land from Judgment

This document will not always lessen the amount of the judgment debt. It does, though, release specific land from the lien of the judgment. (It this respect, it is similar to a partial release of mortgage.) It is always recorded. It usually will not have to be filed with the court case.

A recorded judgment (or memorandum thereof) will usually not contain a legal description of the property. This is because a judgment is a general lien against all land that the judgment debtor owns in the county, now or in the future. But because a release of land from judgment is releasing specific land from the lien of the judgment, it will always contain a legal description.

This document can be very useful when the debtor owns more land than that being insured. This being the case, it is possible that the judgment creditor will execute a release of land from judgment, releasing a portion of land from the lien of the judgment. The creditor might be willing to do this (probably also in exchange for at least a partial payment) because there is other land that remains subject to the full lien of the judgment.

Judicial Privacy Act

705 ILCS 90/1-1 *et seq*.

Land Ownership

“An Exploration of Noncitizens’ Rights to Hold Property in Illinois,” by Carlos Cisneros Vilchis, *Real Property*, July 2023.

Land Trusts

See “Trusts”

Leases

735 ILCS 5/12-105; “real estate” as it relates to judgments includes leasehold estates when the unexpired term exceeds five years.

“How to Avoid Being Taken to the Cleaners by Coin-Operated Laundry Room Companies,” by Samuel H. Levine and Harold I. Levine, *Real Property*, March 1988.

Applegate Apartments Limited Partnership v. Commercial Coin Laundry Systems, 276 Ill. App.3d 433, 657 N.E.2d 1172, 212 Ill. Dec. 827 (1995); notice to tenant in foreclosure proceeding.

“Commercial Tenancies: Clearly Define Every Term in a Lease Agreement,” by Justin C. Strane, *Real Property*, June 2016, regarding *Battaglia v. 736 N. Clark Corp*., 2015 IL App (1st) 142437, 47 N.E.3d 314, 399 Ill. Dec. 809 (2015).

Legal Descriptions

765 ILCS 5/35c; this amendment to the Conveyancing Act was added in 1987 and 1988. The intent of this legislation was to eliminate legal descriptions that incorporate, by reference only, legal descriptions contained in other documents. For example: "...thence East along said section line to the Southwest corner of that property described in document R88-11151; thence Northerly along the Westerly line of said property...."

In this regard, see also Richard F. Bales, "Public Act 85-0373 or To Know Which Road is Paved with Good Intentions," 33 *Real Property* 1 (1987); Richard F. Bales, "Another Amendment to the Conveyancing Act, or, Retrieving the Baby from the Bath Water," 34 *Real Property* 2 (1988).

"Descriptions and Plats," 39 *Illinois Bar Journal* 439 (1951)

"The Fundamentals of Legal Descriptions," 42 *Illinois Bar Journal* 672 (1954)

"Practical Observations on Problems in Legal Descriptions," 43 *Illinois Bar Journal* 34 (1954)

765 ILCS 225/1 *et seq.;* State Planes Coordinate System

“Pay by Legal”; 35 ILCS 200/20-210

Legal Descriptions, sufficiency of

The general rule in Illinois is that a legal description is sufficient if a competent surveyor can locate the land with reasonable certainty. See *Smiley v. Fries*, 104 Ill. 416 (1882); *Village of Auburn v. Goodwin*, 128 Ill. 57, 21 N.E. 212 (1889); *Kane v. McDermott*, 191 Ill. App. 3d 212, 547 N.E.2d 708 (1989); *Westpoint Marine, Inc. v. Mary A. Prange and Pool 24 Tug Service, Inc.*, 349 Ill. App. 3d 1010, 812 N.E.2d 1016 (4th Dist. 2004); *City of Virginia v. Mitchell*, 2013 IL App. (4th) 120629, 991 N.E.2d 936, 372 Ill. Dec. 446 (2013).

Licences

Perbix v. Verizon North, 396 Ill. App. 3d 652 (4th Dist. 2009), licenses are revocable.

Liens, Equitable

In *Trustees of Zion Methodist Church v. Smith*, 335 Ill.App. 233 (1948) the court determined that a promissory note on which the landowner wrote, “This note is secured by a real estate mortgage on (legal description of the land,” was an *equitable mortgage* on the land, for it clearly expressed an intention that the land should act as security for the debt. For cases concerning equitable liens, see *First Bank of Roscoe v. Rinaldi*, 262 Ill.App.3d 179, 634 N.E.2d 1204, 199 Ill. Dec. 850 (2nd Dist. 1994); *LaSalle Bank v. Lopez*, 316 Ill.App.3d 515, 736 N.E.2d 619, 249 Ill. Dec. 425 (2000).

In *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 941 N.E.2d 329, 346 Ill. Dec. 771 (1st Dist. 2010), the appellate court determined that a deed absolute on its face was nonetheless an *equitable mortgage*. See also *Robinson v. Builders Supply & Lumber Co.*, 223 Ill.App.3d 1007 (1991). Both these cases concern people who unwittingly convey their homes to mortgage predators.

Liens, False

Some so-called “fringe” organizations have recorded “common law” liens against federal judges and other public officials. This practice was pioneered by the *Posse Comitatus* (from the Latin phrase meaning “force of the county”), a far

right social movement that opposes the United States federal government. These liens, which have no factual or legal basis, are sometimes called *false liens*. The recording of these liens, or the filing of frivolous lawsuits with the intent to clog the court system, is sometimes called *paper terrorism*. The U.S. Congress has responded to the false lien problem by criminalizing the filing of false liens against certain parties; see 18 U.S.C. Sec. 1521. See also the Judicial Privacy Act (705 ILCS 90/2-1); the Unlawful Clouding of Title Act (720 ILCS 5/32-13); Erica Goode, "In Paper War, Floor of Liens is the Weapon," *New York Times*, August 23, 2013, p. A1.

Liens, Federal (and Their Statutes of Limitations)

Federal Estate Tax Lien (26 U.S. Code 6324) This is a lien on the property of the estate of a decedent. The statute of limitations is 10 years from the date of death of the decedent.

Federal Revenue Lien (26 U.S. Code 6321; 26 U.S. Code 6322; 26 U.S. Code 6323) The federal revenue lien is a lien on the property of any person who fails to pay his or her federal income tax. The statute of limitations is ten years from the assessment date of the tax--it was changed from six years to ten years effective 1990. Recorded federal revenue liens now include a "self-releasing" feature. The lien document will state a date after which the IRS can neither enforce the lien nor extend its life. If the lien is not enforced or extended prior to the expiration of the statute of limitations (the date shown on the lien), the lien "self-releases"--i.e., the lien automatically releases itself, without a certificate of release being recorded. Indeed, the IRS will not even record a release.

Judgment Lien, federal (28 U.S. Code 3201) a judgment in favor of the United States in a civil action creates a lien on all real property of a debtor upon (in Illinois) the recording of a certified copy of the abstract of the judgment. The lien has a statute of limitations for twenty years, and it can be renewed for an additional twenty years. See also 735 ILCS 5/12-502.

Note that the above pertains to judgments in favor of the United States. On the other hand, see 28 U.S. Code 1962; this statute, which indicates that it does not apply to judgments in favor of the United States, states that every judgment in entered in a district court within a state shall be a lien in the same manner and extent as if it were a judgment entered in a state court.

Liens, Federal (IRS), Clearance

A federal revenue lien may be enforced only within ten years of the assessment date. The IRS, however, may extend the enforcement period for an additional ten years by re-filing the lien. This re-filing must be done no later than thirty days after the expiration of the original lien period.

If the IRS has not re-filed its lien prior to the date shown in column (e) of the recorded federal revenue lien, then the title examiner may then waive the lien based on the passage of time.

If the IRS has re-filed the lien, or if the lien has not yet expired because of the passage of time, then the examiner must turn to one of the other clearance methods below:

Release of Lien; once the IRS gets paid it will release the lien.

Discharge of Property; this removes the lien from specific property.

Subordination; this subordinates the IRS lien to one or more other creditors.

Withdrawal; a withdrawal removes the recorded IRS lien.

Non-attachment; this is used when a person with a similar name is confused with the taxpayer.

Liens, State (and Their Statutes of Limitations)

Annexation Agreements (65 ILCS 5/11-15.1-1) Annexation Agreements "shall be valid and binding for a period of not to exceed 20 years from the date of its execution."

Association Lien (Common Interest Community Association Lien) 765 ILCS 160/1-35(d)(2)

Attorneys Lien (770 ILCS 5/1) Attorneys Liens attach to any verdict, judgment, or order entered and to any money or property which may be recovered on account of a suit, claim, demand, or cause of action. See *Clarke v. Ireland*, 347 Ill.App.354, 106 N.E.2d 818 (1st. Dist. 1952). Notice must be served on the defendant in order for there to be a valid lien; in this regard, see *TM Ryan Co. v. 5350 South Shore LLC*, 361 Ill. App. 3d 352 (1st Dist. 2005). The attorney's lien is a creature of statute. See *Kespohl v. Northern Trust Co*., 93 Ill.App.2d 211, 236 N.E.2d 268 (1st Dist. 1968); *Pedersen and Haupt, P.C. v. Main Street Village West, Part I, LLC*, 2012 IL App. (1st) 11297; *DiMonte & Lizak, LLC v. Village of Calumet Park*, 2014 IL App (1st) 132127-U; *Chicago Title and Trust Company, as Trustee under Trust No. 1095507 and Suncoast Investment, Inc. v. Levine*, 333 Ill. App. 3d 420 (3rd Dist 2002);

The statute provides that "on petition filed by such attorneys or their clients any court of competent jurisdiction shall, on not less than five days notice to the adverse party, adjudicate the rights of the parties and enforce the lien." There is

no statute of limitations. Both the *Pedersen and Haupt* case and the *DiMonte & Lizak* case make it clear that foreclosure is not a remedy for enforcing this lien.

Business Broker Lien (815 ILCS 307/10-1 *et seq.*) Business brokers assist third parties in the purchase and sale of businesses. The broker has a right to a lien in the amount due the broker under the contract upon the assets of the business that was the subject of the contract. It has a two-year statute of limitations.

Claim Against Estate (755 ILCS 5/18-12) This is a claim against the property of a decedent. 755 ILCS 5/18-12(b) provides that when an estate is not probated, the claims period is two years from the date of death of the decedent. 755 ILCS 5/18-3 indicates that the claims period for probated estates is six months from the date of the first publication of a notice stating information regarding the death of the decedent or three months from the date of mailing or delivery of said notice to creditors, whichever is later. 755 ILCS 5/18-14 indicates that a claim against the estate of a decedent is a lien on the land.

Commercial Real Estate Broker's Lien (770 ILCS 15/10) This is a lien on commercial real estate arising from written contracts for brokerage services. The lien attaches when the notice of lien is recorded. It expires unless a foreclosure proceeding is filed within two years of the recording of the notice.

Condominium Assessment Lien 765 ILCS 605/9) The Condominium Property Act provides for the assessment of unit owners for the payment of common expenses. An assessment become a lien on the land at the time the assessment is delinquent, and the lien is enforceable upon the recordation of a notice of lien. There is no statute of limitations.

Common Interest Community Association Lien, 765 ILCS 160/1-35(d)(2). A common interest community is any real estate other than a condominium or cooperative wherein an owner is obligated to pay for the maintenance and improvement of the common areas. The real estate may include, but not be limited to, an attached or detached townhome, a villa, or a single family home. There is no statute of limitations.

Condominium Assessment Lien, Master Associations, 765 ILCS 605/18.5(g)(2). There is no statute of limitations.

Contracts (735 ILCS 5/13-205, oral contracts, five years; 735 ILCS 5/13-206, written contracts, ten years)

Demolition Lien (65 ILCS 5/11-31-1 for municipalities, 55 ILCS 5/5-1121 for counties) This is a lien for the costs incurred by a municipality or county in the repair or demolition of an unsafe building. There is no statute of limitations. (A three year limitation was repealed effective 1989). See also *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106 (2004), which declared the demolition statute

constitutional. See also *Harris v. Zrayitel*, 408 Ill. App. 3d 1123 (1st. Dist. 2011); see also *Strong v. The City of Peoria*, 930 N.E.2d 561 (2010); (a holder of a tax sale certificate not named as a necessary party in a demolition case is entitled to actual damages only; he is not entitled to the diminution in value (before and after the demolition).

Drainage Assessment (70 ILCS 605/5-17) The commissioners of a drainage district have the power to levy and collect drainage assessments. There is no statute of limitations.

Environmental Liens, Illinois (65 ILCS 5/11-31-1(F) There is no statute of limitations.

Erroneous Homestead Exemption lien, Cook County (35 ILCS 200/9-275) There is no statute of limitations. However, the general statute of limitations for unpaid real estate taxes is twenty years. See 35 ILCS 200/20-180.

General Real Estate Tax Lien (35 ILCS 200/20-180) This is an annual tax on real estate collected by the county. A delinquent but unsold tax becomes unenforceable twenty years after the delinquency date. Most title companies, though, will insist that title to the land be in a bona fide purchaser before waiving unpaid taxes because the statute requires the tax records to be marked "unenforceable." If taxes are sold at tax sale, the lien of the certificate of sale expires one year after the expiration of the redemption period.

Homeowners Association lien (non-condominium) There is no statutory reference for this type of lien, and thus there is no statutory statute of limitations. Consider, though, the ten-year statute of limitations for written contracts found at 735 ILCS 5/13-206. (For oral contracts, see 735 ILCS 5/13-205.) See also the Common Interest Community Association lien at 765 ILCS 160/1-35(d)(2).

Illinois Income Tax Lien (35 ILCS 5/1104) This is a state lien on the property of any person who fails to pay his or her state income tax. The statute of limitations is 20 years from the date of recording of the lien. The previous five-year statute of limitations was extended to 20 years effective 1984.

Note that if a title company agrees to endorse over a lien in favor of the Illinois Department of Revenue, it must notify the State of Illinois. See 215 ILCS 155/22.

Illinois Transfer (Inheritance) Tax Lien (35 ILCS 405/10) This is a lien upon property transferred by gift or at death for the tax due by reason of the gift or death. The statute of limitations is ten years from the date of gift or death.

Judgment Lien (state), including child support lien (735 ILCS 5/12-101) A judgment is a lien on the debtor's property for seven years from the date the judgment is rendered (not from the date any memorandum of judgment is

recorded). The death of the judgment debtor can extend the limitations period by an additional year, to eight years. The lien may be extended for additional seven-year periods, and it can even be revived after a seven-year period has expired. In no event, however, may the lien be enforceable beyond twenty years from the date it was entered. (Note, though, that because of a statutory amendment, child support liens now have no statute of limitations.)

Judgment in favor of the State of Illinois (735 ILCS 5/12-401)

Lottery; Illinois Lottery Law Lien (20 ILCS 1605/10.3)
Lottery sales agents are personally liable for lottery ticket sale proceeds. The Department of the Lottery shall have the right to file a lien on all personal and real property of any person so personally liable. The lien has the same statute of limitations as a Retailers' Occupation Tax lien, which is twenty years.

Mechanics Lien (including property manager lien) (770 ILCS 60/1 et seq.) This is a lien for the cost of labor, services, or materials a contractor or sub-contractor furnishes to the building or improvements located on the land. Generally speaking, the statute of limitations is two years from the date the work was completed. See, though, *Garbe Iron Works, Inc. v. Priester* 99 Ill.2nd 84, 457 N.E.2d 422 (1983), wherein the Supreme Court held that a bankruptcy filing by a party who would be a necessary defendant in a mechanics lien foreclosure extends the time within which the lien claimant may file a foreclosure. See also the topic heading, "Mechanics Liens."

Mortgage (735 ILCS 5/13-116) If the mortgage has a due date on its face, then the lien expires 20 years after the due date. If there is no due date, then the mortgage expires 30 years after the date of the instrument. The title insurer might require that title to the land be in a bona fide purchaser before it will waive a mortgage based on the statute of limitations. A mortgage foreclosure must be commenced within ten years after the right to bring the action accrues. (735 ILCS 5/13-115)

Municipal Tax (65 ILCS 5/8-3-15) The corporate authorities of a municipality can enforce the collection of any tax by recording a notice of lien. There does not appear to be any statute of limitations for this lien. However, the statute does state that "a municipality creating a lien may provide that the procedures for its notice and enforcement shall be the same as that provided in the Retailers' Occupation Tax Act...." As noted below, this lien has a twenty-year statute of limitations.

Order (735 ILCS 5/2-1304) When a party to an action is required to perform any act other than the payment of money, or, to refrain from performing any act, the court may, in the order, provide that the same shall be a lien upon the real estate of the party until the order is complied with. Since this statute also states that this lien "shall have the same force and effect, and be subject to the same

limitations and restrictions, as judgments for the payment of money....", it appears that the statute of limitations would be the same as for a judgment.

Public Aid Liens These liens were statutory liens that arose pursuant to the Illinois Public Aid Code, which is found at 305 ILCS 5/1-1 *et seq.* 305 ILCS 5/3-9 and 305 ILCS 5/5-13 indicated that a public aid lien could attach to real estate.

See also Illinois Administrative Code § 102.210 and 42 U.S.C. § 1396p(b)(1).

Public Act 102-1037, effective June 2, 2022, repealed the statutes relating to public aid liens.

Nelson v. Fogelstrom, 5 Ill. App.3d 804, 284 N.E.2d 339 (1972), which indicates that an Illinois public aid lien against the beneficiary of an Illinois land trust does not attach to the land owned by the land trustee.

Hines v. The Department of Public Aid, 221 Ill.2d 222, 850 NE2d 148 (2006), in which the court ruled that the Department of Public Aid could not assert a claim against a decedent *spouse's* estate.

Estate of Ries, 2021 IL App (2d) 191027. This case concerned a claimant who reached a compromise of a Medicaid lien arising from her personal injury. After her death her estate consisted largely of the remaining proceeds from her personal injury settlement. The court held that this money was part of her estate, and that the State of Illinois could validly file a claim against her estate for benefits that were not related to the personal injury settlement.

Recapture Agreement (65 ILCS 5/9-5-1) Pursuant to an ordinance or an annexation agreement, a municipality may contract with a subdivider to reimburse the subdivider a portion of the costs to install water mains, sewers, roadways, or other public improvements. 65 ILCS 5/9-5-2 provides that the recording of this contract between the municipality and the subdivider puts all parties on notice "of the fact that there will be a charge in relation to such property for the connection to and use of the facilities constructed under the contract.

Receiver's Lien (65 ILCS 5/11-31-2) There is no statute of limitations. The lien is a lien that is prior to all other liens except for taxes. See also 735 ILCS 5/15-1704; 765 ILCS 605/14.5; 770 ILCS 60/1(b); 770 ILCS 60/12.

Retailers Occupation Tax Lien (35 ILCS 120/5a) The Department of Revenue has a lien on the real estate of any person against whom a tax is assessed. There is a twenty-year statute of limitations from the date the lien was recorded.

Removal Liens, Note: 65 ILCS 5/11-20-15 provides that if a municipal removal lien arises under Section 11-20-7, 11-20-8, 11-20-12, or 11-20-13, there is a two

year statute of limitations, as measured from the recording date of the lien.

Removal of Weeds Lien (Weed Lien) (65 ILCS 5/11-20-7 for municipalities, 60 ILCS 1/105-15 for townships) A municipality or township can provide for the cutting of weeds when the owner of real estate fails to cut them. The cost of doing so is a lien on the real estate. For municipalities, there is a two year statute of limitations set forth in 65 ILCS 5/11-20-15(e). There is no statute of limitations for township weed liens.

Removal of Pests Lien (Pest Extermination Lien) (65 ILCS 5/11-20-8, 65 ILCS 5/11-20-15) A municipality may provide for the extermination of pests from private property when the owner of said property refuses to exterminate the pests. For municipalities, there is a two-year statute of limitations set forth in 65 ILCS 5/11-20-15(e).

Removal of Infected Tree Lien (65 ILCS 5/11-20-12, 65 ILCS 5/11-20-15) A municipality may provide for the treatment or removal of diseased elm trees or ash trees. The cost to remove the tree (but apparently not the cost to treat the tree) is a lien on the real estate. For municipalities, there is a two year statute of limitations set forth in 65 ILCS 5/11-20-15(e).

Removal of Garbage, Debris and Graffiti Lien (65 ILCS 5/11-20-13; 65 ILCS 5/11-20-15) A municipality may provide for the removal of garbage, debris, and graffiti from private property when the owners of said property refuse to undertake such removal. The cost is a lien on the real estate. There is a two year statute of limitations set forth in 65 ILCS 5/11-20-15(e).

Removal of Garbage and Debris Lien (65 ILCS 5/11-31-1) This is the demolition lien statute. But note that this statute also refers to the removal of “garbage, debris, and other hazardous, noxious, or unhealthy substances or materials.” There is no statute of limitations. See 65 ILCS 5/11-31-1(a). See also the citation for “Demolition Lien, above.

Removal of Garbage and Debris Lien (county; 55 ILCS 5/5-1118, 55 ILCS 5/5-1121) There is no statute of limitations

Sanitary District Lien (70 ILCS 3010/17) Charges or rates for sanitary district services shall be a lien on the real estate for which sewerage service is supplied. There is no statute of limitations. The lien attaches to the land at the time the charges become delinquent.

Senior Citizen Property Tax Deferral Lien (320 ILCS 30/1 et seq.) This statute allows a senior citizen to defer all or a portion of his or her real estate taxes. The County Collector records a notice of this tax deferral and the state actually pays the taxes. The amount of lien is for the deferred taxes, together with interest. The property cannot be "sold or transferred" until the lien is paid. In addition, upon the death of the taxpayer, the lien for deferred taxes and interest shall be

recovered from the estate of the taxpayer within one year of the date of death.

Sewer and Water Lien (Municipal) (65 ILCS 5/11-139-8) Charges for municipal sewer and water services shall be a lien on the real estate for which water and sewerage service is supplied. There is no statute of limitations. See also 65 ILCS 5/11-141-16.

Sidewalk Construction and Repair Lien (65 ILCS 5/11-84-1) A municipality, by ordinance, may provide for the construction and repair of sidewalks, payment for which to be by special taxation of the adjoining parcels of land. There is no statute of limitations.

Special Assessment (65 ILCS 5/9-2-65) Special assessments are levied by a municipality to fund a particular service project that is intended to benefit only a specific area. At one time there was a thirty-year statute of limitations for such liens. However, the Illinois Supreme Court, in *G.D. Hardin, Inc. v. Village of Mount Prospect*, 99 Ill.2nd 96, 457 N.E.2d 429 (1983), held that this statutory limitation was unconstitutional. Hence, there is no longer any statute of limitations. Nonetheless, it is possible that a title company, under certain circumstances, may waive old but still unpaid special assessments. See also 65 ILCS 5/9-2-70.

Unemployment Compensation Lien (820 ILCS 405/2400; 820 ILCS 405/2401) The Director of the Department of Labor has a lien on the real estate of an employer from whom contributions for unemployment compensation are due. The statute of limitations is three years from the date the lien was recorded.

Uniform Commercial Code Financing Statement, or UCC Statement (810 ILCS 5/9-403) A financing statement executed by a borrower is a lien on fixtures or other pledged collateral. It is effective for five years from the date of recording, but it may be extended for additional five year periods by the recording of continuation statements that are recorded within six months of the expiration of the then current five year period. When a financing statement is recorded contemporaneously with a recorded mortgage, and thus serves as additional security for the mortgage debt, most title companies, notwithstanding the five year statute of limitations, will not waive the financing statement until the mortgage is released or paid through a closing escrow.

But see also 810 ILCS 5/9-515(b). A UCC filed in conjunction with a public finance transaction or a manufactured home transaction may have a statute of limitations of 30 years.

Vehicle Use Tax (625 ILCS 5/3-1001 et seq.) Vehicle Use Tax; 35 ILCS 5/1101(a) indicates that the nonpayment of this tax is a lien on the land. See also 35 ILCS 5/1103(a); 35 ILCS 5/1104; 35 ILCS 750/1-5 *et seq*. There is a twenty year statute of limitations; see 35 ILCS 5/1104.

Vendor's Lien See *Stump v. Swanson Development Company*, 2014 IL App (3d) 110784. Citing *Krajcir v. Egidi*, 305 Ill. App. 3d 613 (1999), the court described a vendor's lien as follows: "In cases where a lien has not been reserved expressly, a lien is raised in equity in favor of the vendor who has parted with legal title without receiving payment of the full purchase price; it arises in every sale and conveyance of land when the purchaser has not paid in full. Such an implied lien is not an interest or estate in realty or a specific, absolute charge thereon, but an equitable right in the vendor by a proceeding in chancery to resort to the property in case the purchase price is not paid; it is not a debt or right of property, but merely a remedy for the debt which is limited to the property or interest therein sold." Thus, a vendor's lien is not a recorded document. There is no formal statute of limitations.

Weed Cutting Lien (65 ILCS 5/11-20-7 for municipalities, 60 ILCS 1/105-15 for townships) A municipality or township can provide for the cutting of weeds when the owner of real estate fails to cut them. The cost of doing so is a lien on the real estate. For municipalities, there is a two year statute of limitations set forth in 65 ILCS 5/11-20-15(e). There is no statute of limitations for township weed liens.

Life Estates

Editor's Notes:

Adam owns lot 1. Adam conveys lot 1 as follows: "to Ben for life." Ben has a life estate in lot 1. But when Ben dies, the life estate terminates, and the title to lot 1 reverts back to Adam. Thus, Adam, the *reversioner*, has the *reversionary* interest. Ben, who has the life estate, is called the *life tenant*. See *Keogh v. Peck*, 316 Ill. 318, 147 N.E. 266 (1925). Ben's life estate and Adam's reversionary interest equal the complete bundle of sticks. The life estate and the reversionary interest equal a complete fee simple interest.

Fred owns lot 3. Fred conveys lot 3 to George in the following manner: "to George for life, remainder to Harry." George has a life estate in lot 3. But when George dies, the title to the lot goes to Harry, a third party. It does not revert to Fred. Harry, the *remainderman*, has a *remainder* interest. See *Raritan State Bank v. Huston*, 329 Ill. 604 (1928).

Unless the instrument of creation provides otherwise, the life tenant, remainderman, and reversioner all have the power to convey, encumber, or lease his or her interest. See *Clark v. Leavitt*, 335 Ill. 184, 166 N.E. 538 (1929).

Generally speaking, the life tenant can use the property as he sees fit, provided that no damage is done to the reversionary or remainder interest. See *Chicago & A.R. Co. v. Goodwin*, 111 Ill. 273 (1884).

Basically, a life tenant has a duty to the reversioner or the remainderman—the duty to prevent waste to the property. See *Sexton v. Marine Bank of Springfield*, 247 Ill.App.3d 763, 617 N.E.2d 869, 187 Ill.Dec. 412 (4th Dist. 1993).

Waste occurs when the life tenant destroys, misuses, alters, or neglects the property, thereby prejudicing the reversioner's or remainderman's right to possession or diminishing the value of the land. See *Hausmann v. Hausmann*, 231 Ill.App.3d 361, 596 N.E.2d 216, 172 Ill.Dec. 937 (5th Dist. 1992).

A life tenant must make ordinary repairs but not extraordinary ones. For example, in *Honeyman v. Heins*, 131 Ill.App.2d 981, 268 N.E.2d 907 (4th Dist. 1971) fire destroyed the home. The remainderman wanted the insurance money collected by the life tenant. The remainderman claimed that the life tenant failed to make ordinary repairs by not rebuilding the home to its original condition. The court ruled that the scope of ordinary repairs did not include replacing the building.

The life tenant can cultivate and harvest crops planted prior to the termination of the life estate. See *Keays v. Blinn*, 234 Ill. 121, 84 N.E. 628 (1908).

The life tenant may have the right to cut, sell, or remove timber if the land is not damaged or diminished in value. See *McDole v. McDole*, 39 Ill.App. 274 (1890); *Stewart v. Wood*, 48 Ill. App. 378 (1892); and *Chapman v. W.F. Epperson Circled Heading Co*., 101 Ill.App.161 (1901).

The life tenant must maintain the buildings, fences, and other improvements on the land. See *Thelin v. Hupe*, 397 Ill. 44, 72 N.E.2d 735 (1947).

The life tenant must pay taxes and assessments. See *Coppens v. Coppens*, 395 Ill. 326, 70 N.E.2d 54 (1947).

A life tenant has no duty to make permanent improvements to the land. Therefore, he cannot claim reimbursement from the reversioner or the remainderman if he does. See *Leininger v. Reichle*, 317 Ill. 625, 148 N.E. 384 (1925).

What are the remedies available to the reversioner or remainderman for a breach of the life tenant's duties? Actual and punitive damages and injunctive relief; see *Wise v. Potomac National Bank*, 393 Ill. 357 (1946).

An executor cannot normally maintain an action for waste. Such action must be had by either the reversioner or the remainderman. See *Page v. Davidson*, 22 Ill. 112 (1859).

Poruba v. Poruba, 396 Ill. App. 3d 214 (3rd Dist. 2009); Plaintiff sought to

partition the life estate and the remainder; the court said that this could not be done. A life estate and a remainder interest are two separate estates in land. There is nothing to partition.

Limited Liability Companies

805 ILCS180/1-1 *et seq*.; limited liability companies

805 ILCS180/5-5; When a new LLC is created, a document called an *Articles of Organization* must be executed and filed with the Illinois Secretary of States's office. This document contains information about the name, principal place of business, purpose of the LLC, and the name of the registered agent.

805 ILCS 180/15-5; The Limited Liability Company Act requires that only the bare necessities of a business entity be included in the Articles of Organization. Although the Act does govern its members, it is possible that the members of an LLC will want more detail in how their business is conducted. For this reason the members may wish to execute a document called an *Operating Agreement.* But the Act does not require this agreement, nor does it require that it be filed with the Secretary of State or be recorded.

The Operating Agreement usually contains information on topics such as the following: Delegation of management responsibilities to persons who may or may not also be members; Capital contributions of members; Methods of financing LLC operations; Distributions of LLC profits; Expansion of membership

805 ILCS 180/15-1; An LLC may be managed by its members or managed by a manager.

805 ILCS 180/5-5 and 805 ILCS 180/15-5; if a Limited Liability Company is in title, the executing managers or members must have the authority to bind the company. This authority is verified by reviewing the company's Articles of Organization and its Operating Agreement and all amendments thereto.

Carollo v. Irwin, 2011 Ill. App. 1st 102765 (2011); the LLC must be in legal existence for a document executed by an agent of the LLC to be enforceable.

805 ILCS 180/5-5, Articles of Organization

805 ILCS 180/5-5, Operating Agreement

805 ILCS 180-1-26; Low-profit Limited Liability Company

805 ILCS 180/15-1(a), Unless otherwise set forth in the operating agreement, management of a LLC defaults to member-managed.

805 ILCS 180/15-1, In a member-managed company, any matter relating to the business of the company may be exclusively decided by the member (if there is only one member), or by a majority of the members, if there is more than one member, 805 ILCS 180/15-1

805 ILCS 180/15-1, In a manager-managed company, any matter relating to the business of the company may be exclusively decided by the manager (if there is only one manager), or by a majority of the managers, if there is more than one manager.

806 ILCS 180/15-1, In a manager-managed company, any matter relating to the business of the company may be exclusively decided by the manager (if there is only one manager), or by a majority of the managers, if there is more than one manager.

However, if the transaction in question is a sale of all of the assets of the LLC, then all members of the LLC (regardless of management) must consent to the sale. See 805 ILCS 180/15-1(d)(10).

Limited Liability Companies, Series

805 ILCS 180/37-40

The operating agreement must establish or provide for the series. See 805 ILCS 180/37-40(a). Illinois Secretary of State Form LLC-5.5(S), which is the Articles of Organization, must be filed with the Secretary of State.

A form called a “certificate of designation” for each series must be filed with the Secretary of State. This certificate must contain the name of each series. See 805 ILCS 180/37-40(b); 805 ILCS 180/37-40(d).

Limited Liability Company, winding up

See 805 ILCS 180/35-4(c):

> (c) A person winding up a limited liability company's business (1) may preserve the company's business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, dispose of and transfer the company's property, settle disputes by mediation or arbitration, and perform other acts necessary or appropriate to winding up and (2) shall discharge the company's debts, obligations, or other liabilities, settle and close the company's business and marshal and distribute the assets of the company pursuant to Section 35-10.

Editor's Notes:

Assume that a LLC owns a tract of land. The LLC wishes to sell the land. The LLC was involuntarily dissolved three years ago. The attorney for the LLC claims that the LLC does not have to reinstate itself because the conveyance of the land is for "winding up" the LLC. Is the attorney correct?

This may not be correct. If the proposed sale is taking place more than one year after the limited liability company has been dissolved, the title company underwriter should consider whether the proposed sale is really a winding up of the affairs of the limited liability company. The underwriter might want to ask that the limited liability company be reinstated in good standing before insuring the proposed transaction.

In this regard, again see 805 ILCS 180/35-4(c): "A person winding up a limited liability company's business may preserve the company's business or property as a going concern for a reasonable time . . . and transfer the company's property." A year is reasonable. Two or three years may not be reasonable.

As an alternative to reinstatement, consider this option: a statement from the member or manager of the LLC, stating that the proposed conveyance is part of the winding up process of the LLC; a quit claim deed executed by the LLC to the manager or member, a special warranty deed, to be executed by the manager or member, as appropriate, to the proposed insured; and a personal undertaking executed by the manager or member, as appropriate, but executed personally, with no limitation as being executed as member or manager. The exception for the undertaking would be: "Any and all consequences arising from the failure of _____, a LLC, to be reinstated prior to the execution of the deed to _____, said consequences to include but not be limited to the payment of all State of Illinois fees and costs and penalties."

Again, the LLC should quit claim to the manager or member, and then the manager or member should execute a warranty deed to the new buyer. (A special warranty deed is acceptable.) In the event the State of Illinois levied began to foreclose a lien against the land, and the title company was forced to pay the lien, the title company would be subrogated to the rights of its Insured, and then would be able to seek compensation pursuant to the warranties made in the warranty deed (or special warranty deed). See Section 13 of the 2021 owner's title insurance policy.

(Illinois) Marketable Title Act

735 ILCS 5/13-118 *et seq*.; is a forty-year limitation on certain claims to real estate; for those claims not barred, see 735 ILCS 5/13-120;

735 ILCS 5/13-114 (75-year limitation).

See *Illinois Marketable Title Act*, by Harry Q. Rohde, *Chicago-Kent Law Review*, 39, 1 (April 1962), indicates (p. 73) that "while the meaning of the term 'easement' is clear, it must be determined what the term 'interest in the nature of an easement' is intended to include. [See 735 ILCS 5/13-120] It might be contended that this terminology would include covenants and restrictions affecting the use of land."

Arclar Company v. Gates, 17 F.Supp.2d 818 (1998); The decision states that "The purpose of [735 ILCS 5/13-114] is to prevent clouds on title from lingering for more than 75 years. It applies to competing chains of title, adverse interests, and the like where the title to the land is at issue or could be affected.

Lis Pendens

735 ILCS 5/2-1901 *et seq.*; in this regard, see *Radovanov v. Land Title Co. of America,* 189 Ill.App.3d 433, 545 N.E.2d 351 (1989), the so-called "title surprise" case. See also "The Use and Abuse of the Doctrine of Lis Pendens," by David F. Black, *Real Property*, February 1981; "The Twelfth Rule in Chancery: An Introduction to Lis Pendens," by Ronald F. Dietrich, *Trial Briefs*, March 1987; "The Use of Lis Pendens," by Dennis R. Bordyn, *Agricultural Law*, August 2004; *Ringier America Inc. v. Enviro-tecnics Ltd*., 284 Ill.App.3d 1102, which indicates that the recording of a lis pendens is not slander of title; Illinois Rule of Professional Conduct 1.2(f)(1), 1.2(f)(2); *American National Bank v. Bentley Builders*, 241 Ill.Dec. 499, 719 N.E.2d 360 (1999); *First Midwest v. Pogge*, 293 Ill. App. 3d 359 (4th Dist. 1997).

Note that 735 ILCS 5/2-1901 states that the court may "authorize the making of a deed, mortgage, lease or other conveyance of any or all of the real estate affected or involved, in which event the party to whom the deed, mortgage, lease or other conveyance of the real estate is made and those claiming under him or her shall not be bound by such action or proceeding."

First Midwest v. Pogge, 293 Ill. App. 3d 359 (4th Dist. 1997) states that "under the doctrine of lis pendens, one who obtains an interest in property during the pendency of a suit affecting it is bound to the result of that litigation as if he had been a party from the outset."

Does the recording of the lis pendens constitute slander of title? See *Ringier America v. Enviro-Technics*, 284 Ill. App. 3d 1102 (1st Dist. 1996).

"Justices of the Seventh Circuit Court of Appeals as Law Professors," by Michael J. Rooney," *Real Property*, August 2023, regarding *Guerrero v. Howard Bank*, 74 F. 4th 818 (2023).

Malpractice

Snyder v. Heidelberger, 953 N.E.2d 415 (2011); before an attorney drafts a deed or Transfer on Death Instrument on behalf of a client, the attorney should first review the chain of title to the land and make sure that the party executing the deed or Transfer on Death Instrument is the current owner of the land.

Crawford v. Hayen, 2020 IL App. (1st) 200076.

"*Crawford v. Hayen*: The Infamous Count VI," by Michael J. Rooney, *Real Property*, September 2021, regarding *Crawford v. Hayen*, 2020 IL App. (1st) 200076

Manufactured Homes

765 ILCS 170/5-35; Conveyance and Encumbrance of Manufactured Homes as Real Property and Severance Act

Marriage

750 ILCS 5/201 *et seq.* generally; see section 5/212 for prohibited marriages; see section 5/213.1 for prohibition against same sex marriages; see section 5/214 for invalidity of common law marriages.

Mechanics Liens

770 ILCS 60/0.01 *et seq.*; Illinois Mechanics Lien Act

770 ILCS 60/1; mechanics liens earn interest at 10 percent a year.

770 ILCS 60/5; contractor's statement

770 ILCS 60/6; Section 6 of the Act requires that "the work is done or material furnished within three years from the commencement of said work or the commencement of furnishing said material. Thus, the three-year period begins with the beginning of work for which the mechanics lien is asserted and not with the date upon which the contract for the work is entered into. See *Doornbos Heating and Air Conditioning v. Schlenker*, 403 Ill. App. 3d 468 (1st Dist. 2010).

770 ILCS 60/7; the mechanics lien claimant has four months from the time he competed the services or labor to record his mechanics lien claim or file an action to enforce his lien.

> But a bankruptcy filing can *toll*, or extend, the four-month secret lien period. See *Garbe Iron Works v. Priester*, 99 Ill. 2d 84 (1983).

770 ILCS 60/7; Section 7 of the Act requires that the mechanic's lien include only

three things: "a brief statement of the contract, the balance due after allowing all credits, and a sufficiently correct description of the lot, lots or tracts of land to identify the same." In this regard, see *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership*, 314 Ill. App. 3d 848, 731 N.E.2d 394, 246 Ill. Dec. 866 (1st. Dist. 2000). Here the first District held that a mechanics lien was not enforceable against third parties because it did not contain a "work completion date." While the court admitted that section 7 of the Act did not require a work completion date, it stated that "nevertheless that requirement must be inferred."

But note that the *Merchants Environmental Industries* case was a first district (Cook County) case. The land in question is in DuPage County, which is in the second district. In a second district appellate court decision, *National City Mortgage v. Bergman*, 405 Ill. App. 3d 102, 939 N.E.2d 1, 345 Ill. Dec. 272 (2nd Dist. 2010) the court held that a lien claimant does *not* have to show a contract completion date on the face of the claim. The second district looked to *First Federal Savings & Loan Ass'n of Chicago v. Connelly*, 97 Ill. 2d 242, 454 N.E.2d 314, 73 Ill. Dec. 454 (1983) for the principle that mechanics lien statutes must be strictly construed.

770 ILCS 60/9; two-year statute of limitations from the work completion date

Title companies have sometimes waived recorded mechanics lien claims if the lien includes a "work completion date" and the examiner can verify that no suit has been filed within the requisite two-year period.

However, *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, suggests that title companies should not rely on work completion dates in waiving recorded mechanics liens. For example, at one point in this opinion the court stated: "*In sum, plaintiffs' lien claims are enforceable on their face, since (1) the incorrect dates on plaintiffs' liens do not invalidate their claims; (2) plaintiffs' statements of incorrect dates do not constitute binding judicial admissions."*

Because of this case, it is possible that a title company will use the recording date of mechanics lien claims in measuring the statutory (770 ILCS 60/9) two-year time period.

However, before the examiner waives a recorded mechanics lien claim because of its age, the examiner must consider two things:

First, 770 ILCS 60/9 indicates that a lien claimant can perfect his lien rights by either filing his own proceeding or by filing a counterclaim in an existing cause of action, such as in a pending mortgage foreclosure case. See also *Bank of New York v. Jurado*, 2012 IL App. (1st) 112116.

Therefore, an examiner should not waive a recorded mechanics lien claim (or ignore the rights of a mechanics lien claimant) until the examiner has reviewed any pending proceeding (especially a mortgage foreclosure proceeding) to make sure that the lien claimant has not filed a counterclaim in a mortgage foreclosure proceeding or filed his own mechanics lien foreclosure proceeding.

Second, the two-year statute of limitation for the enforcement of mechanics liens can be *tolled*, or temporally halted, if one of the parties to a mechanics lien claim (such as the owner or the lien claimant) files bankruptcy. This was the holding in the landmark Illinois Supreme Court case, *Garbe Iron Works v. Priester*, 99 Ill. 2d 84 (1983).

An examiner should not waive a recorded mechanics lien claim because it is “out on time” until the examiner has searched all parties named in the recorded lien for possible bankruptcies. If the examiner uncovers a bankruptcy, the examiner should consult a title company underwriter.

Mechanics Liens, Enhancement

770 ILCS 60/16

Editor’s Notes:

Under the doctrine of enhancement, the priority of the mechanics lien is determined by taking the value of the land and building (if any) before the improvement, and the value after the improvement. The difference is called "enhancement," or, "enhancement in value created by the improvement." See *Moulding-Brownell Corp. v. E.C. Delfosse Construction Co.,* 304 Ill. App. 491, 26 N.E. 2d 709 (1940).

In recent years, this doctrine has undergone some changes.

See the Illinois Supreme Court case, *LaSalle Bank National Association v. Cypress Creek 1, LLP*, 242 Ill. 2d 231, 950 N.E.2d 1109, 351 Ill. Dec. 281 (2011).

LaSalle Bank made a construction loan to Cypress Creek, LLP. Cypress Creek hired Eagle Concrete and Edon Construction to do the work. Eventually, LaSalle Bank filed a foreclosure case after determining that there were insufficient funds to finish the project.

The Illinois Supreme Court stated that the Mechanics Lien Act gives priority to mechanics lien creditors only to the value of *their own* improvements. The court stated that the Act gives priority to the lender as to the value of the land at the time the contract with the lien holder was made. The court rejected the lien claimants’ interpretation of the Act, which would give a lien creditor priority

to the added value of *all* the improvements, not just the improvements for which the individual lien claimant added to the land and which form the basis for his lien.

The court stated that to hold otherwise would unjustly enrich a lien claimant to the detriment of an owner or lender who funded improvements other than those that form the basis of the lien of said lien claimant.

In response to this case, the Illinois General Assembly passed House Bill 3636. The bill was signed into law on February 11, 2013, as Public Act 97-1165.

This Public Act essentially reverses the *Cypress Creek* decision. Section 16 now provides that a lender has priority only as to the value of the land at the time before the contract was made. Lien claimants take priority for the value of *all* improvements constructed after the contract, not just the specific improvements made by an individual contractor.

What follows is the significant portion of the amended Section 16 of the Act. See especially the italicized words at the end.

When the proceeds of a sale are insufficient to satisfy the claims of both previous incumbrancers and lien creditors, the proceeds of the sale shall be distributed as follows: (i) any previous incumbrancers shall have a paramount lien in the portion of the proceeds attributable to the value of the land at the time of making of the contract for improvements; and (ii*) any lien creditors shall have a paramount lien in the portion of the proceeds attributable to the value of all subsequent improvements made to the property.*

Pursuant to Section 16 of the Act, the mechanics lien will always have some kind of priority over the lien of a mortgage. If the construction contract predates the recording of the construction mortgage (or other mortgage), then the lien will have absolute priority. See Section 1(a) of the Act. But even if the construction contract is dated *after* the mortgage was recorded, the lien will still have a limited enhancement priority as to the improvements constructed on the land.

In other words, enhancement is only a priority problem when the construction contract is let after the recording of the mortgage. If the construction contract is let prior to the recording of the mortgage, any resulting mechanics lien will have absolute priority over the mortgage.

Mechanics Liens, the Public Construction Bond Act

770 ILCS 60/23; this is section 23 of the Mechanics Lien Act; see also 30 ILCS

550/1 *et seq.*; 30 ILCS 550/1 *et seq.* is the Public Construction Bond Act. This statute provides that any official making a contract for a public work that costs over $5,000 must require every contractor to furnish a bond. Any subcontractor then has the right to sue on the bond. But to perfect his lien, he must first file a notice of his claim with the governmental entity awarding the construction contract within 180 days after last furnishing work or materials. The subcontractor must also give a copy of the notice to the contractor within ten days of filing the notice with the entity. Remember that Public Act 93-0562 amended the Public Construction Bond Act, effective August 20, 2003. The statute now provides the following: "A waiver of rights under the Mechanics Lien Act shall not constitute a waiver of rights under this Section unless specifically stated in the waiver."

Mechanics Liens, Demand to File Suit

770 ILCS 60/34; "Demand to file suit"
Section 34 of the Illinois Mechanics Lien Act allows a homeowner to submit a "demand to file suit" to a mechanics lien claimant. That is, the owner can make written demand on the person claiming the lien and demand that he commence to enforce his lien within thirty days. If he does not, the lien is forfeited.

Section 34 states the following; note that the operative word is "must": "*A written demand under this Section must contain the following language in at least 10 point bold face type: 'Failure to respond to this notice within 30 days after receipt, as required by Section 34 of the Mechanics Lien Act, shall result in the forfeiture of the referenced lien.'"* (emphasis added) Because the operative word is "must," the demand letter *must* contain this language.

If the owner files for chapter 7 bankruptcy protection, the lien claimant cannot bring suit within 30 days, as there is the automatic stay of Section 362 of the Bankruptcy Code. The automatic stay freezes, or "stays," all legal proceedings against the debtor or the debtor's property. The lien claimant will be unable to bring suit until this stay has been lifted. See *Garbe Iron Works v. Priester*, 99 Ill. 2d 84 (1983).

The 30-day Section 34 statute of limitation for the enforcement of mechanics liens can be *tolled*, or temporally halted, if one of the parties to a mechanics lien claim, such as the owner or lien claimant, files bankruptcy. This tolling lasts until the automatic stay is lifted. The number of days in which the automatic stay was in effect is then added to the 30-day Section 34 limitations period. That is, the 30-day statute of limitations is extended by the number of days that the automatic stay was in effect. See *Chicago Whirly, Inc. v. Amp Rite Electric Company, Inc.*, 304 Ill. App. 3d 641, 710 N.E.2d 45, 237 Ill. Dec. 622 (1st Dist. 1999).

Section 34 of the Illinois Mechanics Lien Act is only applicable to recorded liens. One cannot use Section 34 to eliminate a lien claimant who has not yet recorded

his mechanics lien claim. See *Krzyminski v. Dziadowiec*, 296 Ill. App. 3d 710, 695 N.E.2d 1275 (1998).

770 ILCS 60/35; Section 35 of the Illinois Mechanics Lien Act spells out additional details concerning the demand to file suit. When a mechanics lien has been filed, and there is a demand to file suit, and a suit is not instituted, the owner can demand in writing that the lien claimant release the lien within ten days after receipt of such written demand. If the lien claimant does not do so, he is liable to the owner for $25.00.

At one time title companies would insist that the owner then go into court and seek recovery of the $25.00. Upon obtaining a $25.00 judgment, the title company would waive the lien, as the legal sufficiency of the lien was *res judicata*. Now, though, court cases such as *Pickus Construction & Equipment Co. v. Bank of Waukegan*, 158 Ill. App.3d 141 (1987); *Vernon Hills III Limited Partnership v. St. Paul and Marine Insurance Company*, 678 N.E.2d 374 (1997) indicate that the lien is forfeited after the initial 30 days. Therefore, for smaller liens (e.g., $25,000 or less), title companies may not require the additional step of Section 35. For larger liens, however, title companies may insist that the attorney comply with Section 35. These title companies might be concerned, e.g., that a court might find that the Section 34 notice was defective and thus the lien was still valid and enforceable.

Mechanics Liens, Miscellaneous

770 ILCS 60/38.1; An owner (defined as an “applicant” in the Act) can file a petition to substitute an eligible surety bond for real property that is subject to a mechanics lien claim.

Note that if there is no pending proceeding to foreclose the mechanics lien, the applicant may file the petition at any time. If there is a pending proceeding, then the applicant must file the petition in the proceeding before five months have elapsed since the filing of the complaint or counterclaim.

Once a surety bond is approved pursuant to court order, the court will enter an order substituting the eligible surety bond for the property subject to the mechanics lien. The order results in lifting the mechanics lien claim from the real estate. The lien claim will only be enforceable against the proceeds of the eligible surety bond. If the attorney records the court order and a copy of the approved bond, the title examiner can waive all title exceptions relating to the mechanics lien claim.

Home Repair and Remodeling Act; 815 ILCS 513/15 (written contract); 815 ILCS 513/20 (consumer rights brochure). If a contractor failed to furnish the homeowner a written contract or a consumer rights brochure, would that be a defense against a mechanics lien arising under this Act?

Action Plumbing v. Bendowski, 934 N.E.2d 35 (2nd Dist., 2010); see section 17(b) of the Mechanics Lien Act; a bidder at a foreclosure sale (or an insured owner) is not liable for attorney's fees in connection with a mechanics lien foreclosure case.

Mostardi-Platt Assoc. v. Czerniejewski, 399 Ill. App. 3d 1205 (5th Dist. 2010); a feasibility study for the holder of an option to purchase is not lienable work, as this is a benefit to the holder of the option; it is not a benefit to the landowner or to the land.

LaSalle Bank National Association v. Cypress Creek, 242 Ill. 2d 231 (2011), lien claimant priority v. lender priority.

For a mechanics lien to be valid, the labor performed and the materials used must constitute an improvement to the land. It cannot just be repair work or maintenance. The work and materials must enhance the value of the land. See *Fettes, Love & Sieben, Inc. v. Simon*, 46 Ill.App.2d 232 (1964); *L. J. Keefe Co., Inc. v. Chicago and Northwestern Transportation Co.*, 287 Ill.App.3d 119 (1997).

"Death of the Mechanics Lien?," by Richard C. Jones, Jr., *Real Property*, May 2011. This article concerns *LaSalle Bank National Association v. Cypress Creek 1, LLP*, 242 Ill. 2d 231, 950 N.E.2d 1109, 351 Ill. Dec. 281 (2011).

"Navigating Mechanics Liens Through Hostile 'Ground Lease" Territory," by Phillip R. Van Ness, *Real Property,* October 2011.

"Luxury Condominium Mechanics Lien Issues in Illinois," by Paul Peterson, *Real Property*, March 2021

Mechanics Liens; Underwriting at the Closing Table

Editor's Notes:

See 770 ILCS 60/7; the mechanics lien claimant has four months from the work or services completion date to either bring an action to enforce his lien or record the lien to affect the rights of a third-party purchaser or lender. This means that if the title company has raised an exception for possible mechanics liens, the title company may waive the exception if it can be shown that no work was done or services performed (like the delivery of materials) within six months from the date of closing. (Title companies usually want at least a two month "cushion" to add to this four-month rule. Title companies want to make sure that no lien was recorded in the title insurance "gap" between the commitment date and the day of closing.)

With this in mind, consider the following situations:

Example: A home is completed in January. It is being sold in August, seven months later. The submitted lien waivers are less than satisfactory. The closing is a sale to a purchaser for value. Is there a problem? Does the closer halt the closing until satisfactory lien waivers are produced?

No, there is no problem. Remember the four-month rule.

To be safe, the examiner should quickly date down the commitment to make sure that no mechanics lien has been recorded. In addition, all parties to the mechanics lien, including the owner and the lien claimant, should be searched for possible pending bankruptcies, because a bankruptcy filing can *toll*, or extend, the four-month secret lien period. See *Garbe Iron Works v. Priester*, 99 Ill. 2d 84 (1983). Assuming that no lien has been recorded, there should not be a problem in closing the transaction—although the examiner might consider getting a personal undertaking from the seller for the costs of defending a mechanics lien that might get recorded after the date of closing.

Example: A builder is selling a home to a purchaser. The closer recognizes the builder, and so the closer asks for a set of lien waivers. The builder gives the closer some waivers, but the builder is missing about half of them. Is there a problem?

There may not be a problem. When was the work completed? For example, does the builder have a landscaping waiver? If so, what is its date? If the closer is closing on November 1, and the landscaping waiver is dated April 1, there probably is little risk in giving mechanics lien coverage. Why? Again, remember the four-month rule. To affect the rights of third parties such as purchasers and lenders, the lien must be recorded within four months from the date work was completed. Generally speaking, landscaping is one of the last things to be done to a home. If the home was landscaped on April 1, and it is now November 1, there seems to be little risk in closing this transaction.

Similarly, if the landscaping work was performed two months ago, and the closer is missing the “rough carpentry labor” lien waiver, there also seems to be little risk. Why? “Rough carpentry” would have been performed fairly early in the construction process. If landscaping was done two months ago, the chances are great that rough carpentry was done more than four months ago.

Example: But the four-month rule is not absolute. Consider the following:

The title commitment discloses a pending mortgage foreclosure case and a recorded mechanics lien claim. There has not yet been a foreclosure sale, and the examiner has a current payoff of the mortgage, which includes the payment of attorney’s fees. The mechanics lien was recorded two years and three months ago.

Because the mechanics lien was recorded more than two years ago, is the lien "out on time?" Can the examiner waive the mechanics lien at closing?

No, the examiner cannot waive the mechanics lien, at least not yet. See 770 ILCS 60/9; see especially the italicized portion below:

> *Such suit shall be commenced or counterclaim filed* within two years after the completion of the contract, or completion of the extra or additional work, or furnishing of extra or additional material thereunder.

That is, the lien claimant could have perfected his lien rights by filing a counterclaim to foreclose his mechanics lien claim in the mortgage foreclosure proceeding. By doing so, the lien claimant does not have to record a lis pendens. See also *Bank of New York v. Jurado*, 2012 IL App. (1st) 112116.

Before the examiner can waive the mechanics lien, he must check the mortgage foreclosure case to make sure that the lien claimant has not filed a counterclaim.

Example: A builder has built a new home, and he comes to closing with no waivers at all. Is the closing cancelled?

Not necessarily. When was the certificate of occupancy issued? If the builder can furnish a certificate of occupancy that is at least six months old, perhaps the title company will waive the exception for possible mechanics liens.

Merger

Traditionally, obligations set forth on a real estate contract would merge with the deed from the seller to the purchaser. Recent case law, however, indicates that the courts are recognizing exceptions to the merger doctrine. See, e.g., *Andrew Chapman v. Anchor Lumber*, 355 Ill. App. 3d 435 (3rd Dist. 2005, merger); *Neppl v. Murphy*, 316 Ill.App.3d 581, 736 N.E.2d 1174, 249 Ill.Dec. 736 (1st Dist. 2000, no merger); *Coughlin v. Gustafson*, 332 Ill. App. 3d 406, (1st Dist. 2002, no merger); *Czarobski v. Lata*, 371 Ill. App. 3d 346 (1st Dist., 2007; no merger of real estate taxes due to mutual mistake.) *Czarobski v. Lata* has been affirmed by the Illinois Supreme Court; see *Czarobski v. Lata*, 227 Ill. 2d 364, 882 N.E.2d 536 (2008); see also *Illingworth v. Bean*, 894 N.E.2d 958 (3rd Dist., 2008).

"Post-Closing Issue? Don't Count on the Merger Doctrine to Save You," by Daniel A. Huntley, *Real Property*, November 2018

Mezzanine Financing

Editor's Notes:

Mezzanine financing involves a situation where the owner of land is, e.g., a corporation, partnership, or limited liability company. This "owning entity" is executing a mortgage. But in addition to this mortgage, there will also be a second loan, a loan made to the partners, members, or shareholders of the owning entity in exchange for a collateral pledge of the partners', members', or shareholders' equity interest in the owning entity.

It is called "mezzanine financing" because it is a tier of financing that is between first mortgage financing and the unsecured equity that the partners, members, or shareholders have in their respective partnerships, LLCs, or corporations.

See the ALTA 16-06 endorsement.

Mineral Law

225 ILCS 710/1	Fluorspar and Underground Limestone Mines Act
765 ILCS 505/1	Mining Act of 1871
765 ILCS 510/1	Mineral Lease Release of Record Act
765 ILCS 515/1	Severed Mineral Interest Act
765 ILCS 520/1	Oil and Gas Rights Act
765 ILCS 525/1	Oil and Gas Recovery Act
765 ILCS 540/1	Coal Rights Act

765 ILCS 515/11; adverse possession of severed mineral interests.

The legal definition of "minerals" is broader than the general or scientific definition. For example, oil and gas are classified as minerals. See *Poe v. Ulrey*, 233 Ill. 56, 84 N.E. 46 (1908).

In *Kinder v. LaSalle County Carbon Coal Co*., 310 Ill. 126, 141 N.E. 537 (1923), the Illinois Supreme Court concluded that a conveyance of "all bituminous or stone, coal and other minerals" did not include limestone, gravel, or sand. Thus, the court narrowly construed the meaning of "other minerals."

However, courts in subsequent cases, known as the "coal and other mineral cases," have chosen to follow a broader legal definition of "mineral." See, e.g., *Jilek v. Chicago, Wilmington & Franklin Coal Co*., 382 Ill. 241, 47 N.E.2d 96, (1943); *Novak v. Smith*, 197 Ill. App. 3d 390, 554 N.E.2d 652 (5th Dist. 1990). In the *Novak* case, e.g., the court ruled that a conveyance of "oil, gas, and other minerals" would likely be construed to include coal.

But on the other hand, the court in *Save Our Little Vermillion Environment, Inc., v. Illinois Cement Company*, 311 Ill. App. 3d 747, 244 Ill. Dec. 275 (3rd Dist., 2000) looked to *Kinder* with approval, holding that a reservation of "the coal and

other minerals underlying" the property did not include limestone. In other words, according to the Third District, limestone is not a mineral.

Department of Natural Resources v. Waide, 2013 IL App (5th) 120340; illustrates the perils of bad draftsmanship of documents.

"Hydraulic Fracturing in Illinois—What is an Owner to Do?," by William J. Anaya, *Real Property*, September 2013.

"Royalties and Existing Oil and Gas Leases with Horizontal Drilling Technology May not be What it Seems," *Real Property*, January 2014.

"Ramsey Herndon LLC v. Lisa Whiteside: Illinois Supreme Court Offers a Primer on Leasing Mineral Rights," by Sharon L. Eiseman, regarding *Herndon LLC v. Whiteside*, 2017 IL 121668

"Tax Deed Epilogue," by John C. Robison, Jr., *Real Property*, April 2022.

Mines

765 ILCS 95/1, *et seq*., the Mine Subsidence Disclosure Act. This act requires disclosure to "transferees" and lenders of insurance claims paid for mine subsidence

Minors

760 ILCS 20/1 *et seq*.; (Illinois Uniform Transfers to Minors Act); this Act regulates the transfer of property to minors; real property (including the necessary deed language) is discussed at 760 ILCS 20/10(5); a conveyance of real property by the custodian would be insurable, see 760 ILCS 20/13 and 760 ILCS 20/14, but the proceeds check would probably have to be made payable to "X, as custodian of Y, a minor."

760 ILCS 20/10 gives the necessary language for the deed: "I (transferor) hereby transfer to _____ (name of custodian), as custodian for (name of minor) under the Illinois Uniform Transfers to Minors Act, the following: (legal description of land)

Misrepresentation

Napcor Corporation v. JP Morgan Chase Bank, 406 Ill. App. 3d 146 (2010); a purchaser of real estate is entitled to rely on the truthfulness of the statements contained in a disclosure report; an "as is" provision in the purchase agreement cannot be a defense to a fraudulent misrepresentation about the property.

Mobile Homes

810 5/9-515(b) provides that if a financing statement is filed in connection with a public-finance transaction or manufactured-home transaction, the statement is effective for a period of thirty years after the date of filing if it indicates that it is filed in connection with a public-finance transaction or manufactured-home transaction.

765 ILCS 170/5-1 *et seq.*; Conveyance and Encumbrance of Manufactured Homes as Real Property and Severance Act

ALTA Form 7, Form 7.1, and Form 7.2 are all 2006 policy endorsements that deal with manufactured housing.

Moorman Doctrine

The so-called *Moorman* Doctrine, or Economic Loss Doctrine, bars a plaintiff from recovering in negligence for losses that are purely economic, that is, losses that do not involve personal injury or property damage. The *Moorman* Doctrine applies to both products and services.

See *Moorman Manufacturing Co. v. National Tank Co*., 91 Ill. 2d 69 (1982); Mark C. Friedlander and Andrea B. Friedlander, "Malpractice and the *Moorman* Doctrine's 'Exception of the Month,'" *Illinois Bar Journal* 86 (November 1998); Timothy L. Bertschy, "The Economic Loss Doctrine in Illinois After *Moorman*," *Illinois Bar Journal* 71 (February 1983); Timothy L. Bertschy, "Negligent Performance of Service Contracts and the Economic Loss Doctrine," *The John Marshall Law Review*, volume 17, number 2, (Spring, 1984); Hon. Sheldon Gardner and Matthew Sheynes, "The *Moorman* Doctrine Today: A Look at Illinois' Economic-Loss Rule," *Illinois Bar Journal* 89 (August 2001); *1324 W. Pratt Condominium Assoc. v. Platt Construction Group*, 936 N.E.2d 1093 (1st Dist. 2010)

Mortgages (in General)

205 ILCS 5/5a; reverse mortgages; a reverse mortgage is designed to help "land rich but cash poor" senior citizens. It involves the conversion of equity built up in the senior citizen's home. "Reversing" the usual format, the borrowers are not required to repay the loan until the senior citizen dies, sells the home, or is absent from the home for a prolonged period of time. The loan is repaid either by the estate of the senior citizen, after he dies, or by the proceeds from the sale of the home.

205 ILCS 5/5d; 815 ILCS 205/4.1 *et seq.*; revolving credit mortgage
The revolving credit mortgage, by statute, provides that *all* advances, both present and future, will have priority from the time the mortgage is recorded. 205 ILCS 5/5d, e.g., provides that the revolving credit mortgage shall be valid and

have priority over all subsequent liens and encumbrances, including statutory liens, except taxes and assessments levied on said real property.

735 ILCS 5/15-1301; as a general rule, a mortgagee is a lien on the real estate only to the extent that it has actually disbursed the funds secured by the mortgage. See also 765 ILCS 5/39.

735 ILCS 5/15-1302(b)(2); "all monies advanced or applied, whenever advanced or applied, in accordance with the terms of a reverse mortgage shall be a lien from the time the mortgage is recorded."

740 ILCS 80/0.01 *et seq.*; 765 ILCS 5/1; mortgage must be in writing

765 ILCS 5/11; form of a mortgage; in this regard, see *Northridge Bank v. Lakeshore Commercial Finance Corporation*, 48 Ill.App.3d 82 (1977), which indicates that the mortgage must contain a dollar amount and a "cap" on additional advances.

On the other hand, see *In re Shara Manning Properties, Inc*., 475 B.R. 898, Bankr. C.D. Ill. (2010); if a second lender has knowledge of a first mortgage, the fact that the first mortgage may not contain all the information set forth in section 11 of the Illinois Conveyances Act does not necessarily invalidate the mortgage.

The fact that a mortgage may not contain all the information set forth in section 11 of the Illinois Conveyances Act (765 ILCS 5/11) does not necessarily invalidate the mortgage. In *Gifford State Bank v. Richardson* (*In re Crane*), 742 F.3d 702 (7th Cir. 2013), the U.S. Court of Appeals for the 7th Circuit held that a bankruptcy trustee cannot avoid an Illinois mortgage as to unsecured creditors due to lack of constructive notice because the mortgage does not state on its face the maturity date and interest rate of the loan.

765 ILCS 5/28; the mortgage must be recorded in order to put third parties on notice of the lien. It must be recorded in the county in which the land is located. There can be no prohibition on recording a mortgage.

765 ILCS 5/30; a mortgage does not take effect as to creditors and subsequent purchasers without notice until it is recorded. The mortgage is void as to all creditors and subsequent purchasers, without notice, until it is recorded.

765 ILCS 5/31; mortgages, deeds, and other documents shall be deemed of notice to third parties when they are recorded, even if they are not acknowledged.

765 ILCS 5/31; the mortgage does not have to be acknowledged in order to be recorded.

765 ILCS 5/39; a mortgage becomes a lien on the land when it is recorded.

765 ILCS 5/39; 735 ILCS 5/15-1302; priority of obligatory advances; the statute states that as to subsequent purchasers and judgment creditors, a mortgage is a lien only from the time monies are advanced or applied, unless the monies are advanced or applied within eighteen months after the recording of the mortgage, unless the mortgagee is by contract obligated to make such advance or application.

765 ILCS 905/1 *et seq*.; (Mortgage Act)

765 ILCS 905/5; constructive mortgage; deed as security for a mortgage; equitable mortgage: “Every deed conveying real estate, which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage.”

765 ILCS 905/13; allows a junior mortgagee to make payments on any prior mortgage that may be in default

765 ILCS 910/1 *et seq*.; Mortgage Escrow Account Act

810 ILCS 5/9-402; financing statements

815 ILCS 205/4; general interest rate; prepayment penalties

815 ILCS 205/4(2)(a); generally speaking (i.e., with some exceptions), whenever the rate of interest exceeds 8% per year on a residential mortgage, it is unlawful to charge a prepayment penalty. Note that the Illinois Supreme Court has ruled that Illinois prepayment prohibitions are preempted by Federal law. See *U.S. Bank National Association v. Clark*, 216 Ill. 2nd 1109, 348 Ill. App. 3d 856 (2005); see also *Dannewitz v. EquiCredit Corp. of America*, 362 Ill. App. 3d 82, 839 N.E.2d 1060 (1st Dist., 2005). See also 205 ILCS 205/4, which relates to general interest rate; prepayment penalties. See also 205 ILCS 635/5-8.

815 ILCS 505/2T; A lender cannot demand that title insurance for an owner-occupied residence be issued by a particular title insurance company.

765 ILCS 945/1 *et seq*.; Reverse Mortgage Act

In re Bulgarea, 08 B 19992 (U.S. Bank. Court, N.D. Ill. 2010); mortgage is recorded outside the chain of title; it was recorded in the wrong county.

Deutsche Bank v. Dolci, 2012 IL App (2nd) 111275-U; all owners of the land must execute the mortgage of the land. It is not sufficient for one spouse to execute the mortgage and the other spouse waive homestead.

In Re Wirth, 355 BR 60 (N.D. Ill., 2005); the signature of a person as "borrower" on a mortgage is not sufficient to create a security interest if that person is not defined as a borrower in the mortgage.

In re Heaver, BR 09-B-73096 (Bankr. N.D. Ill., 2012); a mortgage recorded before the deed to the mortgagor is recorded outside the property's chain of title, and therefore, the mortgage is avoidable by the bankruptcy trustee.

Peoples National Bank, N.A. v. Jones, 482 B.R. 257 (S.D. Ill. 2012); The failure of a cross-collateralization clause in a mortgage to specifically describe the additional amounts of debt limits the lender's recovery to the amount of the original note.

Mortgages, Due on Sale Clause

12 USCA, Garn-St. Germain Act of 1982; title 12, ch. 13, sec. 1701j-3, exemptions to the enforcement of mortgage due on sale clause; *Northern Commercial Bank v. Northwest National Bank*, 126 Ill. App. 3d 581; *Damen Savings and Loan Association v. Heritage Savings Bank*, 103 Ill. App. 3d 301, 431 N.E.2d 34 (1982)

Mortgages, Equitable

765 ILCS 905/5; deed as security for a mortgage; equitable mortgage: "Every deed conveying real estate, which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage"; *Robinson v. Builders Supply & Lumber Co*., 223 Ill.App.3d 1007, 586 N.E.2d 316, 166 Ill. Dec. 358 (1991); *Trustees of Zion Methodist Church v. Smith*, 335 Ill. App. 233 (1948); 765 ILCS 5/30; *185 North Wabash, LLC v. Lake Wabash, LLC*, 344 Ill. App. 3d 1209 (1st Dist. 2003); "When is a Sale-Leaseback an Equitable Mortgage," by Gregory A. Thorpe and John C. Murray, *Real Property*, March 2005; *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 941 N.E.2d 329 (1st Dist. 2010).

See also 765 ILCS 940/1 *et seq*.; the Mortgage Rescue Fraud Act

Mortgages, Execution of

In Re Wirth, 355 BR 60 (N.D. Ill., 2005); the signature of a person as "borrower" on a mortgage is not sufficient to create a security interest if that person is not defined as a borrower in the mortgage.

Mortgages, Home Equity

First American Title Insurance Company v. TCF Bank, F.A., 286 Ill. App. 3d 268, 676 N.E.2d 1003 (1997); First American paid *down* the home equity loan, but it

did not pay it *off*. The lender was not obligated to release the home equity mortgage after it received the title company's payoff check until it received from the owner/mortgagor a request to issue the release.

Mortgages, Foreclosure of

See also Foreclosure, Mortgage

Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1101 *et seq.*

Patrick L. Cogswell v. Citifinancial Mortgage Company, 624 F.3d 395 (7th Circuit, 2010); need original note to foreclose mortgage; reviewed in *Real Property*, December 2010.

"Mortgage Foreclosures: The Need to Exhibit the Original Note," by Jeffrey G. Liss, *Real Property,* August 2011.

Wing Street of Arlington Heights Condominium Association v. Kiss the Chef Holdings, LLC, 2016 IL App(1st) 142563.

1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co., 2015 IL 118372.

"When Worlds Collide—Condominium Law v. Foreclosure Law and *1010 Lake Shore Association v. Deutsche Bank National Trust Company*," by Joseph R. Fortunato, *Real Property*, February 2016, regarding *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co*., 2015 IL 118372.

Village of Algonquin v. Lowe (2nd Dist. 2011); judgment voided for lack of personal jurisdiction; parties were using a portion of the land, and they were not served; discussion of *ABN AMRO Mortgage Group, Inc. v. Nona L. McGahan*, 237 Ill. 2d 526, 931 N.E.2d 1190 (2010).

Condominium Assessments and Mortgage Foreclosure: A Study of 765 ILCS 605/9(g)," by Richard F. Bales, *Real Property*, July 2011.

"Here We Go Again: Timeliness of Post-Foreclosure Sale Assessment Payments Left Unresolved in *Andersonville South Condominium Association v. Federal National Mortgage Association*," by Barbara Starke Tishuk, *Real Property*, December 2017, regarding *Andersonville South Condominium Association v. Federal National Mortgage Association*, 2017 IL App. (1st) 161875.

"1010 Lake Shore Association v. Deutsche Bank National Trust Company: The Reexamination of an Extinguished Lien," by Philip J. Vacco, *Real Property,* September 2014, regarding *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co*., 2015 IL 118372.

"Such a Deal! What Buyers of REO and Foreclosure-Auctioned Properties and Their Attorneys Must Know Before They Buy," by Erica Minchella, *Real Property*, October 2017.

"The Existence of an Executed Loan Modification Will Justify Setting Aside a Foreclosure Sale under Illinois Foreclosure Law," by James Noonan, *Real Property*, August 2020, regarding *Deutsche Bank N.A. v. Cortez*, 2020 IL App (1st) 192234

Mortgage Fraud Act

765 ILCS 940/1 *et seq.*

Mortgages, Lenders

205 ILCS 635/1-1 *et seq*., Residential Mortgage License Act of 1987

815 ILCS 120/1 *et seq*., Illinois Fairness in Lending Act

Mortgages, Purchase Money Mortgage Doctrine

Even though a purchase money mortgage may be recorded *after* a judgment or other general lien—such as a state or federal income tax lien—is recorded against the mortgagor, the purchase money mortgage will still be a first lien on the land. That is, the previously recorded general lien is automatically subordinated to the purchase money mortgage, even though the purchase money mortgage is recorded *after* the general lien is recorded.

Application of Busse, 124 Ill. App. 3d 433 (5th Dist. 1984); *Bank of Homewood v. Gembella*, 48 Ill. App. 2d 316 (1st Dist. 1964).

The purchase money mortgage doctrine is applicable to federal tax liens; see 26 USCA 6321, 26 USCA 6322; see also Revenue 68-57, also released as Technical Information Release 957, dated January 11, 1968; see also *Slodov v. United States*, 436 U.S. 238, 56 L.Ed. 251.

However, note that the lien of a federal *judgment* is *not* automatically subordinated to the lien of a purchase money mortgage.

Mortgages, Release of

765 ILCS 935/1 et seq.; Mortgage Certificate of Release Act; see also 765 ILCS 905/2 *et seq.*

765 ILCS 905/2 *et seq*.; lender's duty to release a mortgage

765 ILCS 905/2; form of mortgage release

765 ILCS 905/4; Failure of the lender to release a mortgage; penalties
Wilmington Savings Fund Society, FSB v. Herzog, 2024 IL App (1st) 221467; a mortgage is released in error.

S.E.C. v. Equitybuild, 101 F.4th 526 (7th Cir., 2024); The Seventh Circuit Court of Appeals held that the payment of a mortgage loan is not enough to extinguish the lien of the mortgage; there must also be delivery of a valid release. In this case, payoff statements were received from a loan servicer and payments were sent. However, the loan servicer misappropriated the funds instead of disbursing the money to the lenders. The release, which was obtained from and signed by the loan servicer, was held to be facially invalid and ineffective. The Seventh Circuit held that the Illinois Mortgage Act, 765 ILCS 905 *et seq*., abrogated the common law rule that payment extinguishes a mortgage lien. The court held that "under the Illinois Mortgage Act, payment alone does not extinguish any pre-existing interest absent a valid release."

Mortgage Rescue Fraud Act

765 ILCS 940/1 *et seq*.

Mortgages, Residential Mortgage License Act of 1987

205 ILCS 635/1-1 *et seq.*

Mortgages, Reverse

765 ILCS 945/1 *et seq*.

Mortgages, Statutes of Limitation

735 ILCS 5/13-116; if the mortgage has a due date on its face, then the lien expires 20 years after the due date.

735 ILCS 5/13-116; if there is no due date, then the mortgage expires 30 years after the date of the instrument.

735 ILCS 5/13-116; 735 ILCS 5/13-117; the above statutes of limitation can be extended for unlimited time periods of ten years each by the recording of an extension agreement or affidavit.

735 ILCS 5/13-115; a mortgage foreclosure must be commenced within ten years after the right to bring the action accrues.

735 ILCS 5/13-206; a mortgage foreclosure must be commenced within ten

years after the right to bring the action accrues.

Mortgages, Miscellaneous

Harris, N.A. v. Sauk Village Development, LLC, 2012 IL App (1st) 120817; Chicago Title Land Trust Company land trust conveyed too much property. It arranged for a corrective deed to be recorded, but it failed to correct the mortgage.

Municipalities, Estoppel Against

Estoppel against a municipality will lie only in extraordinary circumstances. Two factors must be met: One, there must be an affirmative act on the part of the municipality. The affirmative act can not be based on the unauthorized act of a ministerial officer beyond the scope of his duties, like the actions of the clerk here. Rather, it must be an act of the municipality itself, such as a legislative enactment. And two, there must be an inducement of substantial reliance as a result of the affirmative act. See *Village of Wadsworth v. Kerton*, 311 Ill. App. 3d 829, 726 N.E.2d 156, 244 Ill. Dec. 560 (2d Dist 2000). See also *Patrick Engineering v. The City of Naperville*, 2012 IL 113148.

Municipalities and Municipal Corporations

65 ILCS 5/11-74- *et seq*.; The Industrial Project Revenue Bond Act

65 ILCS 5/11-76-1 *et seq.*; municipal corporations; for home rule, see Article 7, Section 6, Illinois Constitution; for non-home rule, see Article VII, Section 7. See also 50 ILCS 605/2 (transfer of land from municipal corporation to municipal corporation); 50 ILCS 605/4 (transfer of land to state); 70 ILCS 705/6 (Fire protection district); 605 ILCS 10/8 (Toll Highway Authority); 105 ILCS 5/5-22 *et seq.*; (school district)

65 ILCS 5/11-76-1 *et seq.*; a home rule unit can sell municipal property by either following this statute or adopting whatever rules it chooses; which it adopts by ordinance.

Section 65 ILCS 5/11-76-1; Section 65 ILCS 5/11-76-2; A non-home rule unit can sell municipal property when in the opinion of the corporate authorities the real estate is no longer needed by the city or village. This power shall be exercised by an ordinance passed by three-fourths of the corporate authorities of the city or village then holding office, at either a regular meeting or a special meeting. But before the corporate authorities sell the land by virtue of the ordinance, notice of the proposal to sell the land shall be published once each week for three consecutive weeks in a daily or weekly paper published in the city or village, and if there is no such paper, then in some paper published in the county in which the city or village is located.

65 ILCS 5/11-74.4-4; Municipality can mortgage property in a redevelopment project area; see also 65 ILCS 5/11-74.5-3.

Noncitizens

“An Exploration of Noncitizens’ Rights to Hold Property in Illinois,” by Carlos Cisneros Vilchis, *Real Property*, July 2023.

Notary Act

5 ILCS 312/1-101 *et seq.*; Notary Act

See also 765 ILCS 5/19 *et seq.*, 765 ILCS 5/31, 765 ILCS 5/35c

765 ILCS 5/20; acknowledgements in Illinois, in the United States, in foreign countries. 765 ILCS 5/20(3) allows a document to be notarized “before any judge, justice or clerk thereof or before any mayor or chief officer of any city or town having a seal, or before a notary public or commissioner of deeds, or any ambassador, minister or secretary of legation or consul of the United States or vice consul, deputy consul, commercial agent or consular agent of the United States in any foreign republic . . . or before any officer authorized by the laws of the place where such acknowledgment or proof is made to take acknowledgments of conveyances of real estate or to administer oaths in proof of the execution of conveyances of real estate.”

765 ILCS 5/20, 765 ILCS 5/22; foreign acknowledgements

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart G, “Notarial Acts,” Section 176.610, “Persons Physically Unable to Sign Documents.”

Notary Act, The Statute

5 ILCS 312/1-104, definitions

5 ILCS 312/3-102, Notarial record

5 ILCS 312/3-107, Journal

5 ILCS 312/6-101, Notarial acts and forms

5 ILCS 312/6-103, Certificate of notarial acts

5 ILCS 312/6-104, Acts prohibited

5 ILCS 312/6-105, Short form notary certificates

Notary Act, Do Documents Have to be Notarized to Be Recorded?

Editor's Notes: Do documents have to be notarized in order to be recorded? See 765 ILCS 5/31:

"Deeds, mortgages and other instruments of writing relating to real estate shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, *though not acknowledged or proven according to law*; but the same shall not be read as evidence, unless their execution be proved in manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof." Thus, 765 ILCS 5/31 suggests that documents do not have to be notarized in order to be recorded.

However, see 765 ILCS 5/35c: "Whenever any deed or instrument of conveyance or other instrument to be made a matter of record is executed, the signatures of the parties making the conveyance shall be acknowledged by a notary public. . . . Failure to comply with this provision shall not invalidate the instrument." This seems to nullify 765 ILCS 5/31. That is, 765 ILCS 5/35c suggests that documents must be notarized in order to be recorded.

"To Record or Not to Record, that is the Question," by John C. Robison, Jr., *Real Property*, September 2017.

Notary, Illinois Administrative Rules

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart A, "Notary Public Records."

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart B, "Appointments."

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart C, "Course of Study and Examination."

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart D, "Notary Public Application Requirements."

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart E, "Notary Public Remittance Agent."

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart F, "Duty, Fees, Authority."

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart G,

“Notarial Acts.”

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart H, “Remote Notarial Acts.”

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart I, “Electronic Notarizations.”

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart J, “Journal.”

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart K, “Administrative Hearings.”

“Illinois Secretary of State Adopts Administrative Rules Making Amendments to the Illinois Notary Public Act Effective,” by Ray Prather, *Real Property*, July 2023.

Notary, Electronic

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart H, “Remote Notarial Acts.”

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart I, “Electronic Notarization.”

“Illinois Secretary of State Adopts Administrative Rules Making Amendments to the Illinois Notary Public Act Effective,” by Ray Prather, *Trusts & Estates*, June 2023.

5 ILCS 312/2-102.5, Online application system

5 ILCS 312/2-102(b), Remote notarizations

5 ILCS 312/2-102(d), Electronic notarial acts

5 ILCS 312/2-102.7, Registration of electronic notarization technology

5 ILCS 312/2-105(b), bond for remote or electronic notarizations

5 ILCS 312/6-102.5, Remote notarial acts

5 ILCS 312/-101, Seal and signature for electronic notarizations

5 ILCS 312/6A-101 *et seq*., Electronic notarial acts and forms

Electronic Wills and Remote Witnesses Act, 755 ILCS 6/5-5 *et seq*.

“Illinois Notary Law Changes,” by Kevin J. Stine, *Real Property*, March 2022.

“Illinois Notary Law Changes,” by Kevin J. Stine, *Real Property*, May 2022.

“Notary Public Law Status,” by Joseph Rogul and Tiffany Thompson, *Real Property*, November 2022.

Notary, Journal

Illinois Administrative Rules, Title 14, Subtitle A, Chapter I, Part 176, Subpart J, “Journal.”

Notice

715 ILCS 5/1 *et seq*., Notice by Publication Act

Notice, Deeds

When it comes to the recording of deeds and notice, there are three types of statutes: race, notice, and race-notice.

The Illinois statute relative to deeds, recording, and notice, is 765 ILCS 5/30:

“All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record.”

In a state with a race recording statute, the party who records his deed first will be given priority regardless of any notice of any prior unrecorded deeds. In a notice recording state, an unrecorded deed is invalid as against a subsequent bona fide purchaser for value and without notice. In a race-notice state, an unrecorded deed is invalid against a subsequent purchaser for value who first records his deed without knowledge of any prior unrecorded deeds.[2]

See below for examples of each type of notice:

[2] See “The Illinois Conveyances Act: A 200-Year-Old Labyrinth Whose Changing Walls Continue to Provide Inadequate Protection for Subsequent Purchasers,” by Cory Torgesen, at https://law.siu.edu/_common/documents/law-journal/articles-2013/12%20-%20Torgesen%20Comment%20-%20final%20redo.pdf

Race Statute
Principle: He who records first wins.
Example:
Day One: Zeke sells land to Adam
Day Two: Zeke sells same land to Baker
Whoever records his deed first is the owner. It is a *race* to the courthouse.

Race-Notice Statute
Principle: A subsequent purchaser for value wins only if two things are present: one, at the time of the second deed, the subsequent purchaser had no actual or constructive notice of the first deed, and two, if the subsequent purchaser records before the first purchaser records.
Example:
Day One: Zeke sells land to Adam
Day Two: Zeke sells same land to Baker
With race-notice, Baker, the second purchaser, owns the land only if one, Baker had no notice of the prior sale to Adam, and two, if Baker records his deed before Adam records his deed.

Notice Statute
Principle: A subsequent purchaser for value wins if, at the time of the second deed, the subsequent purchaser had no actual or constructive notice of the first deed. In other words, a subsequent purchaser for value without notice wins.
Example:
Day One: Zeke sells land to Adam
Day Two: Zeke sells same land to Baker
With a notice statute, Baker will own the land so long as Baker was not aware of the prior sale to Adam. However, if Adam records his deed before the sale to Baker, the recording of the first deed will be deemed to give Baker constructive notice of the sale to Adam.

However, if Baker purchases the land without notice, and Adam LATER records his deed after the sale to Baker but even before Baker records his deed, then Baker still wins. Baker wins, even though Adam's deed got recorded first. Why? Baker bought the land without notice of the sale to Adam.

Based on Illinois' statute (765 ILCS 5/30), some scholars feel that Illinois is a "notice" state. Other scholars, however, feel that Illinois is a "race-notice" state. Illinois case law is not clear on this issue.[3]

[3] "The Basics of Title Searching" by Ward F. McDonald and Trent T. Seegmiller, *Ward on Title Examinations*, sec. 11.2 (IICLE, 2005); Michael J. Rooney, *Searching Illinois Real Estate Titles*, sec. 1.8 (Ill. Inst. For CLE, 1978); "The Illinois Conveyances Act: A 200-Year-Old Labyrinth Whose Changing Walls Continue to Provide Inadequate Protection for Subsequent Purchasers," by Cory Torgesen, at https://law.siu.edu/_common/documents/law-journal/articles-2013/12%20-%20Torgesen%20Comment%20-%20final%20redo.pdf

Nuisances

765 ILCS 5/38a; Conveyance of land damaged by nuisance.

Orders

735 ILCS 5/2-1304(b); orders for conveyances.

Partition of Real Estate

735 ILCS 5/17-101 *et seq.*; *Schuck v. Schuck*, 413 Ill. 390, 108 N.E.2d 905 (1952).

Partnerships

805 ILCS 206/100 *et seq.*; partnerships

805 ILCS 206/101(f); a partnership is an association of two or more persons to carry on as co-owners a business for profit.

805 ILCS 206/103(b)(3)(ii); states that a partnership agreement may specify the number or percentage of partners needed to authorize or ratify a transaction (after disclosure of all material facts.)

805 ILCS 206/303; Statement of Partnership Authority; partnerships may wish to limit the authority of partners to bind the partnership. To do this, the new Act allows a partnership to file a Statement of Partnership Authority in the office of the Secretary of State. This statement thus can supplement or curtail the normal authority of specific partners. But to be effective in a real estate transaction, the Statement of Partnership Authority must also be recorded in the county in which the partnership real estate is located.

805 ILCS 206/304; Statement of Denial; this is a denial of a partner's authority.

805 ILCS 206/704; Statement of Dissociation

805 ILCS 206/805; Statement of Dissolution

805 ILCS 206/907, 805 ILCS 206/908; Statement of Merger

805 ILCS 206/1001; Statement of Qualification

805 ILCS 206/1001, 805 ILCS 206/1102; Statement of Withdrawal

805 ILCS 206/203; title to partnership property is held by the partnership and not

by the partners.

805 ILCS 206/502 indicates that a partner's interest in the partnership is a share in profits and losses and the right to receive distributions, and these are personal property, not real property.

805 ILCS 206/203, 805 ILCS 206/204; when is real estate partnership property; when it is acquired in the partnership name; when it is acquired in the name of one or more persons with an indication in the deed of the grantee's capacity as a partner or of the existence of a partnership (even if the deed does not name the partnership); when it is purchased with partnership assets, even if the deed does not identify the grantees as described above.

805 ILCS 206/504; makes it clear that a judgment creditor of a partner can only reach a partner's transferable interest in the partnership, and this is personal property pursuant to 805 ILCS 206/502; the judgment creditor, though, could foreclose on the debtor's transferable interest in the partnership and thus even become a partner; but the judgment creditor can only obtain a lien on a partner's interest in the partnership, which is personal property. The creditor cannot obtain a lien on partnership real estate.

805 ILCS 206/302 contains the rules for a valid transfer of partnership property. If title to partnership real property is vested in the partnership's name, then any partner may execute the deed, unless: the partnership agreement provides otherwise; a recorded Statement of Partnership authority provides otherwise; a recorded Statement of Denial provides otherwise. (A Statement of Denial denies a person's authority or status as a partner.) If title to partnership property is held in the name or names of partners, the deed must be executed by the record title holders.

805 ILCS 206/905; merger of partnerships (In this regard, see the Entity Omnibus Act)

805 ILCS 206/801 indicates when a partnership is dissolved and its business wound up: when all the partners agree; when the express term of the partnership has expired; when the specific undertaking of the partnership has been accomplished.

The death, legal disability, or insolvency of a partner does not automatically cause a dissolution of the partnership unless the partnership agreement provides otherwise.

But a partnership is dissolved if within ninety days of a partner's death, at least half of the remaining partners agree to dissolve the partnership.

805 ILCS 206/802(a); Winding Up

The partnership is terminated when the process of winding up its business is terminated. But at any time between dissolution and termination, all partners may agree to cancel the dissolution and resume the partnership business as if the dissolution had not occurred.

805 ILCS 206/1001(b); any partnership may become a limited liability partnership upon approval by the number of partners needed to amend the partnership agreement.

805 ILCS 206/503; unless stated otherwise in the partnership agreement, a partner's transfer of his or her partnership interest or dissociation from the partnership will not cause a dissolution of the partnership.

Party Walls

65 ILCS 5/11-30-1: "The corporate authorities of each municipality may regulate fences and party walls."

Illinois Law & Practice, Party Walls, § 1 *et seq*.; *Corpus Juris Secundum*, Party Walls, § 1; *Finch v. Theiss*, 267 Ill. 65, 107 N.E. 898 (1915); *Illinois State Bank of Quincy v. Neece*, 43 Ill. App. 3d 470, 357 N.E. 2d 228, 2 Ill. Dec. 251 (1976); *Wert v. John R. Thompson Co*., 234 Ill. App. 458 (1924); *Nilson Bros. v. Kahn*, 314 Ill. 275, 145 N.E. 340 (1924).

Beasley v. Pelmore, 259 Ill. App. 3d 513, 631 N.E. 2d 749, 197 Ill. Dec. 527 (1994); Neither adjoining party of a party wall has the right to destroy or remove the party wall.

A party wall may become a party wall in three different ways: by written agreement, by statute, or by prescription. See *Illinois Law & Practice*, Party Walls, § 1.

Person, Definition of

Illinois Administrative Code, ch. 74, sec. 760.100

25 ILCS 170/2(a)

720 ILCS 5/2-15

Plats

55 ILCS 5/5-1036; vacation of town plats

765 ILCS 205/0.01 *et seq.;* the Plat Act; Section 1 of the Plat Act describes how plats of subdivision should be prepared. The Plat Act states (with exceptions)

that a plat must be prepared whenever the owner of land subdivides it into two or more parts, any of which is less than five acres in size. The plat must set forth all public streets and alleys; it must set forth all “ways for utility services”; the "tracts, parcels, lots, or blocks" should be identified by progressive numbers, giving their precise dimensions; the plat must show all angular and linear data relative to the exterior boundaries of the land; it should set forth the names of the public streets, and the width and extent of streets. See also *Ruble v. Sturhahn*, 348 Ill.App.3d 667, 810 N.E.2d 278, 284 Ill. Dec. 625 (4th Dist. 2004).

A statutory dedication is a dedication that is in strict conformity to the Plat Act. With a statutory plat, the fee simple ownership of the street vests in the public. A common law plat is any plat that is *not* created in accordance with the Plat Act. With a common law plat, the public gets only an easement interest. The fee simple ownership of the street vests in the owner of the adjoining lot. (If a parcel of land in a plat of subdivision was identified as “Outlot A,” would this plat then be a common law plat, as it did not conform to the Plat Act, because it was not a numbered lot?)

765 ILCS 205/1.005; when a plat of subdivision is recorded, the owner shall submit a nortarized statement with the plat; the statement should indicate, to the best of the owner’s knowledge, the school district in which each tract, parcel, lot, or block lies.

765 ILCS 205/1.02; 65 ILCS 5/7-1-40; annexation plats

65 ILCS 5/7-1-24; 65 ILCS 5/7-1-25; 65 ILCS 5/7-1-40; plats of disconnection from annexation

765 ILCS 205/2; the plat must be recorded by the land surveyor who prepared the plat.

55 ILCS 5/3-5029 states that “no person shall offer or present for recording or record any map, plat or subdivision of land situated in any incorporated city, town or village, nor within 1 ½ miles of the corporate limits of any incorporated city, town or village which has adopted a city plan” unless it has been approved by the corporate authorities, pursuant to 65 ILCS 5/11-15-1.

55 ILCS 5/5-1041 provides that any subdivision plat of property not within any city, village or incorporated town must be submitted to the county board or its designated officer for approval.

65 ILCS 5/11-15-1 provides that “if any municipality has approved a subdivision ordinance pursuant to [65 ILCS 5/11-12-4 *et seq.*], all subdivision plats shall be submitted for approval and approved in the manner provided in such ordinance. Until approved by the corporate authorities, or such officer designated by them, no such map, plat or subdivision plat shall be entitled to record in the proper

county or have any validity whatever." See also 65 ILCS 5/11-12-6; 65 ILCS 5/11-12-9.

65 ILCS 5/11-12-8 deals with the procedures for municipal approval of plats of subdivision and resubdivision.

55 ILCS 5/5-1042 provides a listing of the matters that county boards may regulate, by ordinance or resolution, in reviewing or approving plats of subdivision.

55 ILCS 5/3-5029 provides that the subdivision plat must be "under the seal of a registered Illinois land surveyor."

55 ILCS 5/3-5029 provides that a plat of subdivision of any lands "bordering on or including any public waters of the State " must be approved by the Department of Natural Resources. See also 615 ILCS 5/7.

55 ILCS 5/3-5029 provides that no person shall record a plat without indicating whether any part of the land is located within a special flood hazard area as identified by the Federal Emergency Management Agency.

35 ILCS 200/9-50; the chief county assessment officer may make or purchase maps and plats.

35 ILCS 200/9-55 requires plats of "subdivision, dedication, or dedication" to be signed by the county clerk, affirming that there are no delinquent taxes or special assessments.

35 ILCS 200/9-55; requires owner of land to survey and plat land if it can only be described by metes and bounds; requires plats of subdivision to be signed by the county clerk, affirming that there are no delinquent taxes or special assessments.

35 ILCS 200/9-60; if owner of land does not survey and plat land, the County Clerk can have the land surveyed and platted.

35 ILCS 200/10-30; under certain circumstances, the platting and subdivision of property does not increase the assessed valuation of the property.

35 ILCS 200/10-31; under certain circumstances, the platting and subdivision of property does not increase the assessed valuation of the property.

55 ILCS 5/5-1109; preparation of assessment maps in counties of less than 1,000,000.

65 ILCS 5/11-14-1 states that "the corporate authorities in each municipality have power by ordinance to establish, regulate and limit the building or setback lines

on or along any street. . . . "[These powers] shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted."

765 ILCS 205/2; The plat must be acknowledged by the owner of the land; submitted to the city council or board of trustees of the municipality; and be subject to certain approvals. The plat must be recorded.

765 ILCS 205/3; "The acknowledgment and recording of a [plat created under the Plat Act] shall be held in all courts to be a conveyance in fee simple of such portions of the premises platted as are marked or noted on such plat as donated or granted to the public. . . and the premises intended for any street, alley, way, common or other public use in any city, village or town, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended."

765 ILCS 205/5a: The recorder shall not record any deed that attempts to convey property contrary to the provisions of the Plat Act.

765 ILCS 205/6; Any plat may be vacated by the owner of the premises at any time before the sale of any lot therein, by a written instrument to which a copy of the plat is attached, declaring it to be vacated.

765 ILCS 205/7; vacation of part of a plat; see also the "vacations" topic below.

765 ILCS 205/8; canceling a plat

765 ILCS 205/9; highway plats; monuments; recording plats; exception for railroads

765 ILCS 205/11; any unauthorized person who removes a survey marker shall be guilty of a Class A misdemeanor.

765 ILCS 210/1 *et seq*.; Judicial Plat Act; the Act provides that when a decedent's land is to be partitioned off into parcels and sold, a surveyor must prepare a survey of the land that sets forth the parcels of land.

225 ILCS 330/44; A surveyor is entitled to have his plats recorded; plats are prima facie evidence in a court of law.

Do plats have to be notarized to be recorded? See 765 ILCS 5/31:

"Deeds, mortgages and other instruments of writing relating to real estate shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, *though not acknowledged or proven according to law*; but the same shall not be read as evidence, unless their execution be proved in

manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof."

However, see 765 ILCS 5/35c: "Whenever any deed or instrument of conveyance or other instrument to be made a matter of record is executed, the signatures of the parties making the conveyance shall be acknowledged by a notary public. . . . Failure to comply with this provision shall not invalidate the instrument." This seems to nullify 765 ILCS 5/31. See also 765 ILCS 5/19 *et seq.*, 765 ILCS 5/35; 765 ILCS 5/35c. In this regard, see *King v. The DeKalb County Planning Department*, 394 Ill. App. 3d 699 (2nd Dist. 2009), a plat was held to be such a document. See also *Federal National Mortgage Ass'n v. Kuipers*, 314 Ill. App. 3d 631 (2000).

Certificates of Correction; Section 1270.59 of Title 68: "Professions and Occupations," of the Illinois Administrative Code, which is found at https://www.ilga.gov/commission/jcar/admincode/068/06801270sections.html

65 ILCS 5/11-12-12, plats of consolidation; see also *Schwebl v. Seifer*, 208 Ill. App. 3d 176, 567 N.Ed.2d 37, 153 Ill. Dec. 322 (1991).

35 ILCS 200/10-35; assessment of common areas; e.g., common areas that are used for recreational or similar residential purposes and which are assessed to a separate owner and are located on separately identified parcels shall assessed at one dollar per year.

55 ILCS 5/5-1037; a county board may change the name of any town plat.

65 ILCS 5/11-12-6; concerns a map of a municipality's official comprehensive plan.

65 ILCS 5/11-12-9; jurisdictional boundary line between corporate authorities

615 ILCS 5/7; the Department of Natural Resources must review and approve any subdivision plat bordering or including any public waters of the State of Illinois.

765 ILCS 5/30; plats and other documents that are authorized to be recorded do not take effect as to creditors and subsequent purchasers without notice until they are recorded.

Illinois Administrative Code, Title 68, section 1270.56(d)(1); a surveyor may delay putting in lot corner monumentation if the surveyor feels that the monuments would be destroyed by grading or utility installation. The monuments must be in place within twelve months of the recording of the plat.

765 ILCS 205/1 *et seq*. The Plat Act

765 ILCS 210/1 *et seq*. The Judicial Plat Act

Plat Act

765 ILCS 205/1 *et seq.*

765 ILCS 205/1; generally speaking, a plat must be prepared whenever the owner of land subdivides it into two or more parts, any of which is less than five acres in size.

The plat must show all angular and linear data along the exterior boundaries of the tract of land being subdivided, the names and width of all public streets and all known and permanent monuments. The lots, blocks, or parcels must be numbered by progressive numbers. The dimensions of the lots, blocks, or parcels must be shown. The plat must set forth all "ways for utility services." See also *Ruble v. Sturhahn*, 348 Ill.App.3d 667, 810 N.E.2d 278, 284 Ill. Dec. 625 (4th Dist. 2004).

765 ILCS 205/1.005; when an owner records a plat, the owner must submit with the plat a notarized statement indicating, to the best of the owner's knowledge, the school district in which the land lies.

765 ILCS 205/2; the plat must be acknowledged by the owner of the land; submitted to the city council or board of trustees of the municipality; and be subject to certain approvals. The plat must be recorded. Except in municipalities with a population of 1,000,000 or more, the plat must be approved by the Illinois Department of Transportation when roadway access is via a state highway. The plat must show the mailing address of the person submitting the plat for recording. The recorder shall not record a plat unless the plat is at least 8 and ½ inches by 14 inches but not more than 30 inches by 36 inches. In counties of 1,000,000 or more in population, the recorder must not record a plat until 6 copies of the plat are delivered to the recorder.

765 ILCS 205/2; The plat must be recorded by the land surveyor who prepared the plat, or a person designated by that land surveyor, or upon the death, incapacity, or absence of that land surveyor, by the owner of the land or his or her representative.

765 ILCS 205/3 states: "The acknowledgment and recording of a [plat created under the Plat Act] shall be held in all courts to be a conveyance in fee simple of such portions of the premises platted as are marked or noted on such plat as donated or granted to the public. . . and the premises intended for any street, alley, way, common or other public use in any city, village or town, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended."

765 ILCS 205/6 states: “Any plat may be vacated by the owner of the premises at any time before the sale of any lot therein, by a written instrument to which a copy of the plat is attached, declaring it to be vacated.” See *Ruble v. Sturhahn*, 348 Ill.App.3d 667, 810 N.E.2d 278, 284 Ill. Dec. 625 (4th Dist. 2004)

765 ILCS 205/7; a portion of a plat may be vacated pursuant to 765 ILCS 205/6. See *Ruble v. Sturhahn*, 348 Ill.App.3d 667, 810 N.E.2d 278, 284 Ill. Dec. 625 (4th Dist. 2004)

765 ILCS 205/8; when a plat is vacated, the recorder shall, upon the recording of the vacation, write across the plat or the part so vacated the word, “vacated.”

765 ILCS 205/9; when a party lays out, locates, opens, widens, extends, or alters, a highway, road, street, alley, public ground, toll road, railroad, reservoir, or canal, the party must prepare a plat. The provisions of this section do not (in part) apply to a railroad.

765 ILCS 205/11; any unauthorized person who removes a survey marker shall be guilty of a Class A misdemeanor.

Plat Act, Court Cases

Heerey v. City of Des Plaines, 225 Ill.App.3d 203 (1992), the court held that a plaintiff who was merely seeking to remodel his building, and not subdivide it or sell it, did not have to first have the property subdivided. In other words, the Plat Act was not applicable.

Orrin Dressler, Inc. v. Village of Burr Ridge, 173 Ill.App.3d 454 (1988), the owner of the land felt that the proposed subdivision of his land was exempt from the Plat Act, as it was a "...division into no more than two parts of a particular parcel or tract of land existing on July 17, 1959...". The plaintiff felt that the transaction was exempt, since the original parcel was divided into two parts, but then the lot line between two of the resulting parts was merely "relocated." The court disagreed.

Lambach v. Town of Mason, 386 Ill. 41 (1944) the court ruled that the plat of subdivision violated the Plat Act. The Plat Act in force at that time required that a stone be set as a future monument, and that the stone be referenced on the plat of subdivision. Here, no such stone was placed, nor was it designated on the plat.

Plat Vacations

55 ILCS 5/5-1036; a county board may authorize the vacation of any town plat when the plat is not within any incorporated town, village or city, on the petition of two-thirds of the owners thereof, provided that any such order of vacation shall

be passed by the affirmative vote of at least two-thirds of the members of the county board.

765 ILCS 205/6 states: "Any plat may be vacated by the owner of the premises at any time before the sale of any lot therein, by a written instrument to which a copy of the plat is attached, declaring it to be vacated." See *Ruble v. Sturhahn*, 348 Ill.App.3d 667, 810 N.E.2d 278, 284 Ill. Dec. 625 (4th Dist. 2004)

765 ILCS 205/7; a portion of a plat may be vacated pursuant to 765 ILCS 205/6. See *Ruble v. Sturhahn*, 348 Ill.App.3d 667, 810 N.E.2d 278, 284 Ill. Dec. 625 (4th Dist. 2004)

765 ILCS 205/8; when a plat is vacated, the recorder shall, upon the recording of the vacation, write across the plat or the part so vacated the word, "vacated."

Powers of Attorney

755 ILCS 45/1-1 *et seq.*; Illinois Power of Attorney Act.

Fort Dearborn Life Insurance Co. v. Holcomb, 736 N.E.2d 578 (1st District, 2000), June 1988 *Illinois Bar Journal*.

765 ILCS 5/28; the power of attorney should be recorded.

"The Real Estate P.O.A.," by Michael J. Maslanka, *Real Property*, February 2023.

"Powers of Attorney from the Title Company Perspective Following AMCORE Bak v. Hahnaman-Alrecht," by Richard F. Bales *Real Property,* March 2002

Predatory Lending Database

765 ILCS 77/70 *et seq.*

The purpose of the Predatory Lending Database program is to reduce predatory lending practices by helping the borrower to understand the terms and conditions of the loan for which the borrower has applied.

Presumptively Void Transfers

755 ILCS 5/4a-5

"The So-called Presumptively Void Transfers Act: Yet Another Trap for the Unwary," *Real Property*, October 2016.

"The Presumptively Void Transfers to Caregivers Act in Illinois: Mercy with

Justice," by Kenneth F. Berg, *Real Property*, May 2018.

"Presumptively Void Transfers to Caregivers: A Bit of Mercy Please?" by Paul Peterson, *Real Property*, January 2018.

Privacy

55 ILCS 5/3-5047; Privacy, removal of personal information. Upon request by any person, the recorder shall redact or remove that person's social security number, employer taxpayer identification number, driver's license number, State identification number, passport number, checking account number, savings account number, credit card number, debit card number, or personal identification (PIN) code from any internet website maintained by the recorder or used by the recorder to display public records.

Process, Service of

735 ILCS 5/2-203; service on individuals

735 ILCS 5/2-204; 805 ILCS 5/5.25 *et seq*.; service on private corporations

805 ILCS 105/105.25; service of process on domestic or foreign corporations

805 ILCS 105/105.30; service of process on foreign corporations not authorized to do business in Illinois

735 ILCS 5/2-205; service on partnerships and partners

735 ILCS 5/2-205.1; service on voluntary unincorporated associations

805 ILCS 180/1-50; service on limited liability companies

805 ILCS 180/45-55; service on foreign limited liability companies

735 ILCS 5/2-206; mechanism for service when the defendant is out of state or cannot be found or is concealed within the State of Illinois. An affidavit must be filed with the court setting forth the relevant facts. Publication is also had.

Process, Service of, by Publication

735 ILCS 5/2-206; service by publication; if a defendant is out of state, or is in the state but cannot be found, or is hiding in the state, so that he cannot be served with personal service, the plaintiff can serve notice by publication. The clerk of the court must also mail a copy of the publication to the defendant. The clerk will file a certificate, indicating that he has done so.

735 ILCS 5/2-206 states that the plaintiff must file an affidavit “showing that the defendant resides or has gone out of this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him or her, and stating the place of residence of the defendant, if known, or that upon *diligent inquiry* his or her place of residence cannot be ascertained.” (Emphasis added.)

Cook County Circuit Court Rule 7.3: Pursuant to 735 ILCS 5/2-206 (a), due inquiry shall be made to find the defendant(s) prior to service of summons by publication. In mortgage foreclosure cases, all affidavits for service of summons by publication must be accompanied by a sworn affidavit by the individual(s) making such "due inquiry" setting forth with particularity the action taken to demonstrate an honest and well directed effort to ascertain the whereabouts of the defendant(s) by inquiry as full as circumstances permit prior to placing any service of summons by publication.

Public Property

Gilmore v. Powers, 403 Ill. App. 3d 930 (2010); Homeowners are not liable for an injury that occurs on the home’s parkway (area between the sidewalk and the street).

“Does the Term ‘Sidewalk’ Encompass a Private Walkway?” by Emily R. Vivian, regarding *Hussey v. Chase Manor Condominium Association*, 2018 IL App (1st) 170437

Public Trust Doctrine

Units of government own “trust resources,” like parks, as a trustee, and that these resources cannot be conveyed if the transfer would diminish or defeat traditional public access to and the use of those resources.

Trustees of Schools Town 16 N., R. 11 W., in Morgan County v. Braner, 71 Ill. 546 (1874); *Paepcke v. Public Housing Commission of Chicago*, 46 Ill.2d 330, 263 N.E.2d 11 (1970); *Illinois Central and the Public Trust Doctrine in State Law,*” 15 Va. Envtl. L.J. 713 (Summer, 1996)

Purchase Money Mortgage Doctrine

See Mortgages, Purchase Money Mortgage Doctrine

Quiet Title

“Quiet Title (Not the Library, Silly),” by Hal R. Morris, *Real Property*, March 2005

Harris, N.A. v. Sauk Village Development, LLC, 2012 IL App (1st) 120817,

Chicago Title Land Trust Company land trust conveyed too much property. It arranged for a corrective deed to be recorded, but it failed to correct the mortgage.

755 ILCS 5/20-6: “In any proceeding to sell or mortgage real estate the court may: Investigate and determine all questions of conflicting and controverted titles arising between any of the parties, remove clouds from any title or interest involved therein, and invest the mortgagee or purchaser with a good and indefeasible title to the property sold or mortgaged.”

Railroads (in general)

220 ILCS 5/7-102; The consent of the Illinois Commerce Commission is no longer needed for the sale of railroad property. This statute also provides that an entity cannot condemn the property belonging to a railroad without the approval of the Illinois Commerce Commission (ICC).

605 ILCS 5/6-302; If a subdivided lot is on one side of a street, and on the other side there is no subdivision, but instead there is a creek, river, or railroad tracks, then upon vacation, the entire street vacates in favor of the subdivision; none of the street goes to the creek, the river, or the railroad tracks.

765 205/9; a railroad is not subject to section 9 of the Plat Act; refers to abandonment.

65 ILCS 5/7-1-5.3; recreational “rail trails”; abandoned railroad rights-of-way

Railroads (analysis of railroad deeds; fee simple or easement interest)

Tallman v. Eastern Illinois and Peoria Railroad Company, 379 Ill. 441 (1942). “A right of way” was an easement.

Cleveland, Cincinnati, Chicago and St. Louis Railway Company v. Central Illinois Public Service Company, 380 Ill. 130 (1942). A “right of way” was an easement.

Keen v. Cleveland, Cincinnati, Chicago and St. Louis Railway Company, 392 Ill. 362 (1945). “A piece of land” was a fee simple interest.

McVey v. Unknown Shareholders of Inland Coal and Washing Company, 100 Ill.App.3d 584 (1981). A “right of way” was an easement.

Sowers v. Illinois Central Gulf Railroad Company, 152 Ill.App.3d 163 (1987). A “strip of land” was a fee simple interest. (But see dissent; Judge Welch would have found only an easement.)

Penn Central v. Commonwealth Edison Company, 159 Ill.App.3d 419 (1987). A

"strip of land" was a fee simple interest.

Monticello Railroad Company v. Caldwell (circuit court of Champaign County). Here there was an 1867 condemnation. While the condemnation could have been in fee simple, the court noted that the condemnation petition stated that the railroad sought a "right of way" across the land. When the railroad stopped using the land, the "right of way" was abandoned and title was quieted in the owner of the underlying fee simple estate.

Schnabel v. County of DuPage, 101 Ill.App.3d 553 (1981). "A portion or a strip" of land for use by the Aurora, Elgin and Chicago Railway Company as a right of way was only an easement interest.

Urbaitis v. Commonwealth Edison 143 Ill.2d 458 (1989). "A piece or parcel of land" was a fee simple interest. Here the court stated that the reference to a "right of way" did not limit the estate granted, that the reference to "right of way" was only to the use of the land.

Marlow v. Malone, 315 Ill.App.3d 807, 734 N.E.2d 195 (2000). This case interprets 43 U.S.C. § 912, which concerns the vesting of title to railroads after a railroad company abandons a right-of-way that was originally granted by the United States.

Diaz v. Home Federal Savings and Loan Association of Elgin, 337 Ill. App. 3d 722, 786 N.E.2d 1033 (2002)

Clark v. CSX Transportation, Inc., 737 N.E.2d 752 (2000), an Indiana case that analyzes the wording of railroad deeds.

Radon

"Radon as an Issue for Real Estate Closings," by Myles Jacobs, *Real Property*, March 2012.

"New Radon Requirements and Changes to Radon Disclosure in 2013," by Kelly M. Greco, *Real Property*, February 2013.

420 ILCS 46/1 *et seq*., Illinois Radon Awareness Act

Recapture Agreements

65 ILCS 5/9-5-1*et seq.*

"Caught by Recapture," by Michael G. Cortina, *Real Property*, April 2016, regarding *F.R.S. Development Co. v. American Community Bank and Trust*, 2016 IL App. (2d) 150157.

Receivers

735 ILCS 5/15-1704; receiver's lien, see 65 ILCS 5/11-31-2.

Recorder

55 ILCS 5/3-5001 *et seq.*

55 ILCS 5/3-5013; the Recorder may record copies of documents.

735 ILCS 5/15-1217; "to record" in terms of the Illinois Mortgage Foreclosure Law.

765 ILCS 45/1 *et seq*., Destroyed Public Records Act

55 ILCS 5/3-5047; Privacy, removal of personal information. Upon request by any person, the recorder shall redact or remove that person's social security number, employer taxpayer identification number, driver's license number, State identification number, passport number, checking account number, savings account number, credit card number, debit card number, or personal identification (PIN) code from any internet website maintained by the recorder or used by the recorder to display public records.

Recording of Findings, Decision, and Order

65 ILCS 5/11-31.1-10
65 ILCS 5/11-31.1-11.1
65 ILCS 5/11-31.1-12

Editor's Notes:

A "Recording of Findings, Decision and Order" is a form of municipal judgment that arises under the Illinois Municipal Code. The title examiner will often see this document when the City of Chicago is the plaintiff. These findings usually (but not always) concern building code matters. The findings are issued by an administrative law officer pursuant to an administrative hearing.

This document is basically a judgment on steroids, in that the document is not always cured just by the payment of money.

This Recording of Findings performs two functions. One, it acts as a recorded judgment, indicating that the defendant owes money to the municipality. But two, it also acts as a recorded notice of a municipal building code or other municipal code violation—which means that the attorney and the title examiner must be concerned with Covered Risk 5 of the 2021 owner's policy.

Covered Risk 5 insures against loss or damage by reason of:

> *A violation or enforcement of a law, ordinance, permit, or governmental regulation (including those relating to building and zoning), but only to the extent of the violation or enforcement described by the enforcing governmental authority in an Enforcement Notice that identifies a restriction, regulation, or prohibition relating to:*
> *a. the occupancy, use, or enjoyment of the Land;*
> *b. the character, dimensions, or location of an improvement on the Land;*
> *c. the subdivision of the Land; or*
> *d. environmental remediation or protection on the Land.*

This Recording of Findings constitutes a Covered Risk 5 notice. But, as noted above, it also functions as a recorded money judgment (or memorandum thereof).

Assume that the defendant owns two Chicago properties—123 Elm Street and 456 Oak Street. Assume that the document has the property index number of 123 Elm Street, and so it is recorded against this specific property. But assume that the "Address of Violation"—the land that is subject to the building code violation—is 456 Oak Street.

If the title company is insuring a mortgage or conveyance of 123 Elm Street, then all the clearance that the examiner needs to waive this document is evidence that the money judgment has been paid. (Remember that a judgment is a general lien that attaches to all property that the defendant owns in the county in which the judgment, or memorandum thereof, is recorded.)

If the title company is insuring the property that is the subject of the building code violation—the so-called "Address of Violation" property—in this case, 456 Oak Street—then the examiner needs both evidence that the money judgment has been paid and also evidence that the building code violation has been remedied before the examiner can waive this document from the title commitment.

When reviewing clearance for waiving the building code violation, the examiner should consider the nature of the violation. Can the violation be cured merely by the cleaning up of debris? If so, the examiner might consider waiving the violation if the examiner is furnished a statement in writing that all the requisite cleanup work has been performed.

In this regard, the "department" referenced on the first page of the Recording of Findings that concerns a "cleanup violation" will probably be the "Streets and Sanitation" Department. On the other hand, the "department" concerning a more

serious code violation matter will probably be the “Buildings” Department.

Religious Freedom and Marriage Fairness Act

750 ILCS 80/1 *et seq*.

Residential Real Estate

765 ILCS 70/2; all contracts for the sale of a dwelling structure may be recorded; any provision in a contract that prohibits the contract buyer from recording the contract is void.

765 ILCS 75/2; any installment contract for the sale of a dwelling structure shall be voidable at the election of the buyer unless a certificate of compliance regarding notice of code violations is attached.

Residential Real Property Disclosure Act

765 ILCS 77/1 *et seq*.

Erlenbush v. Largent, 353 Ill. App. 3d 949 (4th Dist. November 30, 2004)

Grady v. Sikorski, 349 Ill. App. 3d 774 (2004)

Skarin Custom Homes, Inc.v. Ross, 388 Ill. App. 3d 739 (2009)

“Real Property Disclosure Reports: Avoiding Unnecessary Legal Risks,” *Real Property*, by Dan Huntley, January 2018.

“Selling Residential Real Property? Attention! New Law Ahead! 765 ILCS 77/1 *et seq*. The Illinois Residential Real Property Disclosure Act,” by Colleen L. Sahlas, *Real Property*, June 2022.

“Residential Real Property Disclosure Act Amended,” by Philip Vacco, *Real Property*, September 2023.

Retaining Walls

Illinois Law & Practice, Adjoining Landowners, § 2 *et seq*.; *Schroeder v. City of Joliet*, 189 Ill. 48, 59 N.E. 550 (1901); *Quincy v. Jones*, 76 Ill. 231 (1875); Adjacent Landowner Excavation Protection Act, codified as 765 ILCS 140/1 *et seq*., *Biel v. Metropolitan Life Ins. Co*., 15 Ill. App. 3d 410, 304 N.E. 2d 449, (1973); *Illinois Law & Practice*, Adjoining Landowners, § 2.

Rights of First Refusal

Crestview Builders, Inc. v. Noggle Family Limited Partnership, 352 Ill. App. 3d 1182, 816 N.E.2d 1132 (2d Dist., October 2004); the right of first refusal was not enforceable because it did not include a method of determining the price of the property. (What if the right of first refusal does not indicate how many days the party given the right has to exercise it? Would the right be similarly unenforceable? Probably not; consider a "commercially reasonable" time period of thirty days from the receipt of the right.) The rule against perpetuities does not apply to rights of first refusal. See 765 ILCS 305/4(a)(7).

Note that the Illinois Condominium Property Act also contains a right of first refusal. See 765 ILCS 605/30.

Roads and Highways

765 ILCS 20/1; Covenants of Warranty Act; No covenant of warranty shall be considered as broken by the existence of a highway on the land conveyed, unless otherwise particularly specified in the deed.

"Country Roads: Who Owns Them?," by Robert F. Russell, Real Property, July 2011

Roads, Private

605 ILCS 5/2-202; streets and alleys may be created as private rights-of-way on a plat of subdivision. However, if the public has been using the right-of-way for more than 15 years, then the right-of-way may have expanded to a public right-of-way.

City of Chicago v. Hogberg, 217 Ill. 180 (1905); the court ruled that if a plat of subdivision creates private streets; these streets are easements in favor of all the lot owners.

General Auto Service Station v. Maniatis, 328 Ill.App.3d 537, 765 N.E.2d 1176, 262 Ill. Dec. 568 (1st Dist. 2002); a private road generally arises when someone subdivides land and sets aside a portion of it as a private road (or private alley).

Illinois District of American Turners, Inc. v. Rieger, 329 Ill. App. 3d 1063, 770 N.E.2d 232, 264 Ill. Dec. 338 (2nd Dist. 2002); a private road can be lost by adverse possession.

Bigelow v. The City of Rolling Meadows, 372 Ill. App. 3d 60, 805 N.E.2d 221 (1st Dist 2007); if there is no clear intent to dedicate a right-of-way to the public, a private use is created.

"Nightmare on _____ Street: The Hidden Costs of Private Streets and Reciprocal Easements," by Adam B. Whiteman, *Real Property*, August 2012.

Roads, Utility Easements in

65 ILCS 5/11-135-7; allows for the construction of water mains along, upon, under and across highways and street.

605 ILCS 5/9-113; a public utility has the right to install underground utilities in roads that are statutory dedications. Such underground installations are regarded as being within the easement for highway purposes, in favor of the public. But 605 ILCS 5/9-113 provides limitations on the right to put underground utilities in roads that are common law dedications. This statute indicates that the consent of the underlying fee owner of the land is a necessary prerequisite to the installation of any utilities. Note that Public Act 93-357, effective January 1, 2004, adds new subsection (h-1) to 605 ILCS 5/9-113 and drastically amends subsection (l). This new subsection, although ambiguous, suggests that if the tax assessing officials have exempted that portion of the landowner's land that falls within the highway, the public utility does not have to obtain the landowner's consent to the location of utility equipment in that portion of the owner's land that falls within the highway.

605 ILCS 5/9-113(a); the "written consent of the appropriate highway authority" is needed for the installation of any utilities in or along a highway or township or district road.

Benno v. Central Lake County Joint Action Water Agency, 242 Ill. App. 3d 306, 609 N.E.2d 1056 (2nd Dist. 1993)

Richard F. Bales, "New Legislation Concerning Utilities and Rights-of-Way," Illinois State Bar Association's *Real Property* newsletter, May 2004.

Howard Samson, "Road Conveyancing after *Benno*," Illinois State Bar Association's *Real Property* newsletter, May 2004.

Roads, Vacation of

55 ILCS 5/5-1036; vacation of town plats; a county board may authorize the vacation of any town plat when the plat is not within any incorporated town, village or city, on the petition of two-thirds of the owners thereof, provided that any such order of vacation shall be passed by the affirmative vote of at least two-thirds of the members of the county board. See also 55 ILCS 5/5-1037; a county board may also change the name of any town plat.

65 ILCS 5/11-91-2; 65 ILCS 5/11-91-3; Generally speaking, when a street or road is vacated, ownership of the vacated parcel splits equally to the adjoining landowners. See *Piper v. Reder*, 44 Ill. App.2d 431 (1963); *Prall v. Burckhartt*, 299 Ill. 19 (1921). But in 1997 Public Act 90-179 amended 65 ILCS 5/11-91-1. It

provided that with a vacation of a street or alley, if only one abutting landowner makes payment, then the *entire width* of the street or alley could inure to the benefit of that one landowner. In 1999 the Illinois Supreme Court in *Chavda v. Wolak*, 188 Ill.2d 394, 721 N.E.2d 1137 (1999), ruled that the statute was constitutional. 65 ILCS 5/11-91-1 also provides for the reservation of utility facilities in the vacated street or alley.

765 ILCS 5/7a; Since October 3, 1969, when a street or alley is vacated, and when the lot adjacent to this vacated parcel is conveyed, the vacated parcel does not have to be specifically included in the deed in order for it to be conveyed. As long as the deed does not specifically *exclude* the vacated parcel, the deed conveys the vacated parcel as well.

605 ILCS 5/6-302; some people have argued that this statute stands for the proposition that if a subdivided lot is on one side of a street, and on the other side there is no subdivision, but instead there is a creek, river, or railroad tracks, then upon vacation, the entire street automatically vacates in favor of the subdivision; none of the street goes to the creek, the river, or the railroad tracks. However, this is not the case. The statute provides as follows:

> *The highway commissioner of any road district may in his discretion reduce the width of any existing township or district road to a width of 40 feet, if the reduction is petitioned for by a majority of the landowners along the line of such road within the district. When possible the land vacated by reducing the width of the road shall be taken equally from each side of the road. In cases of natural obstruction on one side of the road or where the road extends along the right-of-way of any railroad, river or canal, the commissioner is authorized to reduce the width of road on one side only.*

765 ILCS 205/6; Any plat may be vacated by the owner of the premises at any time before the sale of any lot therein, by a written instrument to which a copy of the plat is attached, declaring it to be vacated.

65 ILCS 5/11-61-2; 65 ILCS 5/11-91-1; 65 ILCS 5-11-91-2; These statutes relate to a municipal (Chavda) vacation

65 ILCS 5/11-61-2; 65 ILCS 5/11-91-1; 65 ILCS 5/11-91-2 ;These statutes relate to a municipal (non-Chavda) vacation

605 ILCS 5/5-109; 605 ILCS 5/5-110; These statutes relate to a county right-of-way vacation.

70 ILCS 805/6; This statute relates to a forest preserve vacation.

65 ILCS 5/11-91-1 and 605 ILCS 5/5-109 indicate that a vacation ordinance may reserve utility facilities in a vacated municipal or county right-of-way.

765 ILCS 205/6 provides: "Any plat may be vacated by the owner of the premises at any time before the sale of any lot therein, by a written instrument to which a copy of the plat is attached, declaring it to be vacated." The statute also provides that if the plat contained easements, the vacation instrument shall reserve, in favor of the easement holder, these easements in order to provide utility service to the land. See *Ruble v. Sturhahn*, 348 Ill.App.3d 667, 810 N.E.2d 278, 284 Ill. Dec. 625 (4th Dist. 2004)

765 ILCS 205/7; any part of a plat may be vacated as provided in 765 ILCS 205/6, but such vacation shall not destroy the rights of the other lot owners. See *Ruble v. Sturhahn*, 348 Ill.App.3d 667, 810 N.E.2d 278, 284 Ill. Dec. 625 (4th Dist. 2004)

65 ILCS 5/11-61-2: "The corporate authorities of each municipality may vacate, lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds. . . ."

65 ILCS 5/11-91-2: "Except in cases where the deed, or other instrument, dedicating a street or alley, or part thereof, has expressly provided for a specific devolution of the title thereto upon the abandonment or vacation thereof, whenever any street or alley, or any part thereof, is vacated under or by virtue of any ordinance of any municipality, the title to the land included within the street or alley, or part thereof, so vacated, vests in the then owners of the land abutting thereon, in the same proportions and to the same extent, as though the street or alley has been dedicated by a common law plat (as distinguished from a statutory plat) and as though the fee of the street or alley had been acquired by the owners as a part of the land abutting on the street or alley."

605 ILCS 5/5-109; a county board may vacate a county highway or part of a county highway. This statute also provides for the reservation of utility facilities in the vacated county highway or part of a county highway.

605 ILCS 5/5-110; when the county board vacates a county highway or part of a county highway, the county board shall have a legal description of the vacated land recorded. The recorder shall mark any recorded plat of the highway in a manner that shows the vacation.

605 ILCS 5/6-301 *et. seq*.; the "laying out, widening, altering or vacating township and district roads."

605 ILCS 5/9-127(a): "Except as provided in subsections (b), (c), and (d) and in cases where the deed, or other instrument, dedicating a highway or part thereof, has expressly provided for a specific devolution of the title thereto upon the

abandonment or vacation thereof, whenever any highway or any highway or any parts thereof is vacated under or by virtue of any Act of this State or by the highway authority authorized to vacate the highway, the title to the land included within the highway or part thereof so vacated, vests in the then owners of the land abutting thereon, in the same proportions and to the same extent, as though the highway had been dedicated by a common law plat (as distinguished from a statutory plat) and as though the fee of the highway had been acquired by the owners as a part of the land abutting on the highway except, however, such vacation shall reserve to any public utility with facilities located in, under, over or upon the land an easement for the continued use, if any, by such public utility."

Court cases: *Chavda v. Wolak*, 188 Ill.2d 394, 721 N.E.2d 1137 (1999)

See also Vacations

Rule Against Perpetuities

765 ILCS 305/1 *et seq.*

Schools

105 ILCS 5/5-22 *et seq.*; see also 105 ILCS 5/7-28, which deals with the transfer of title of county school sites and buildings; title is automatically vested in the name of the regional board of school trustees.

Scrivener's Error

Schaffner v. 514 West Grant Place Condominium Association, 324 Ill. App. 3d 1033, 756 N.E.2d 854, 258 Ill. Dec. 580 (2001). A scrivener's error is a clerical error, an error resulting from a minor mistake or inadvertence. In this case the court ruled that the omission of the only two outdoor parking spaces in a development cannot be considered a "minor mistake or inadvertence."

Searching Title

Snyder v. Heidelberger, 2011 111052

Service of Process

735 ILCS 5/2-203; service on individuals

735 ILCS 5/2-204; service on private corporations

735 ILCS 5/2-205; service on partnerships and partners

805 ILCS 206/1001(c)(3); service on limited liability partnerships

735 ILCS 5/2-205.1; service on voluntary unincorporated associations

735 ILCS 5/2-206; mechanism for service when the defendant is out of state or cannot be found or is concealed within the State of Illinois. An affidavit must be filed with the court setting forth the relevant facts. Publication is also had.

28 USC 2410(a); service on USA for liens arising under the internal revenue laws.

28 USC 2410(a); service on USA for matters other than the internal revenue laws.

"Service on Trustee: McArdle as Trustee of Barbara M. McArdle Trust & Christensen as Trustee of Raymond H. Christensen Irrevocable Trust, 2019 IL App (3d) 170858," by Elisha Deen Sanders, *Real Property*, February 2020, regarding *McCardle v. Christensen*, 2019 IL App (3d) 170858.

"Real Estate Litigation: Traps for the Unwary," by Richard Rappold, Real Property, March 2022, regarding *Municipal Trust and Savings Bank v. Moriarty*, 2021 IL 126290 and *PNC Bank v. Kusmierz*, 2022 IL 126606.

Service Members Civil Relief Act of 2003

50 U.S.C. App. §502; (Public Law No. 108-189); formerly Soldiers' and Sailors Civil Relief Act of 1940; see "What You Should Know about the Service Members Civil Relief Act," by William W. Austin, *Real Property*, October 2005.

Signatures (Including Signature by Mark)

5 ILCS 70/1.15; 810 ILCS 5/3-401; these statutes do not require that a signature by mark be accompanied by the signatures of two witnesses; however, title companies usually require two witnesses.

Slander of Title

American National Bank v. Bentley Builders, 241 Ill.Dec. 499, 719 N.E.2d 360 (2nd Dist. 1999); *Ringier America Inc. v. Enviro-tecnics Ltd*., 284 Ill.App.3d 1102, which indicates that the recording of a lis pendens is not slander of title; *Chicago Title and Trust Company, as Trustee under Trust No. 1095507 and Suncoast Investment, Inc. v. Levine*, 333 Ill. App. 3d 420 (3rd Dist 2002); "The Use and Abuse of the Doctrine of Lis Pendens," by David F. Black, *Real Property* (February 1981); Illinois Rule of Professional Conduct 1.2(f)(1), 1.2(f)(2); "Quiet Title (Not the Library, Silly)," by Hal R. Morris, *Real Property*, March 2005.

Special Service Areas

See 35 ILCS 200/27-40; until the special service area ordinance is recorded against the land, there is no lien on the land.

Statutes

5 ILCS 70/1 *et seq.*; Statute on Statutes

5 ILCS 70/1.11; "The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Saturday or Sunday or is a holiday as defined or fixed in any statute now or hereafter in force in this State, and then it shall also be excluded. If the day succeeding such Saturday, Sunday or holiday is also a holiday or a Saturday or Sunday then such succeeding day shall also be excluded."

Parker v. Murdock, 2011 IL App (1st) 101645

"What Can You Count on These Days?" by Joseph R. Marconi, at http://www.isbamutual.com/liability-minute/what-can-you-count-on-these-days.

Solon v. Midwest Medical Records Ass'n, 236 Ill. 2d 433 (2010); In interpreting a statute, the primary objective is to ascertain and give effect to the intent of the legislature.

In re Application of the County Treasurer, 2012 IL App (1st) 101976; In interpreting a statute, the primary objective is to ascertain and give effect to the intent of the legislature.

Statute of Frauds

740 ILCS 80/0.01 *et seq.*

Statutes of Limitations

735 ILCS 5/13-101 *et seq*.

Subrogation

"Lender Leap Frog: Conventional Subrogation in Lien Priority Disputes," by Barbara A. Gimbel and Edward J. Andersen, *Illinois Bar Journal*, September 2006; *Aames Capital Corp. v. Interstate Bank of Oak Forest*, 315 Ill. App. 3d 700, 734 N.E.2d 493 (2nd Dist. 200); *Union Bank v. Thrall*, 374 Ill. App. 3d 785 (2007); "Defining the Contours of Subrogation," by Samuel H. Levine, *Real Property*, June 2009.

Lakeshore Decaro v. M. Felix, Inc., 371 Ill. App. 3d 1103 (1st Dist 2007).

Surveys

68 Ill. Administrative Code, Sec. 1270.56; “Minimum Standards of Practice” for surveys.

68 Ill. Administrative Code, Sec. 1270.56(e)(1); mortgage inspection plat

68 Ill. Administrative Code, Sec. 1270.56(b)(1); boundary survey; note that section 1270.56(b)(6)(L) provides that “if the survey is a parcel in a recorded subdivision, any easements or setback lines shown on the recorded plat that affect the subject property are to be shown.”

Illinois Administrative Code, Title 68, section 1270.56(d)(1); a surveyor may delay putting in lot corner monumentation if the surveyor feels that the monuments would be destroyed by grading or utility installation. The monuments must be in place within twelve months of the recording of the plat.

35 ILCS 200/9-55; when a property is divided into parcels so that it cannot be described without describing it by metes and bounds, it is the duty of the owner to have the land surveyed and platted into lots; a unit of local government can require that this be done before a building permit is issued; plat should include a statement from the county clerk that there are no delinquent taxes against the land.

35 ILCS 200/9-60; If an owner refuses to make a survey of his land, the county clerk shall make it.

220 ILCS 5/8-510; a public utility may enter onto private land in order to do a survey.

735 ILCS 5/8-1301; all testimony taken by commissions of surveyors for the establishing of original corners of land shall be filed with their report in court and may hereafter be read as evidence in all actions in reference to such corners.

765 ILCS 205/11; any unauthorized person who removes a survey marker shall be guilty of a Class A misdemeanor.

765 ILCS 225/1 *et seq.;* State Planes Coordinate System

225 ILCS 330/45; A surveyor can go onto adjoining land; he is not a trespasser, but is liable for any actual damage.

225 ILCS 330/1 *et seq*., Illinois Professional Land Surveyor Act; relates to the practice of land surveying.

735 ILCS 5/13-222; action against land surveyor; 4 years; 10 years

765 ILCS 210/1 *et seq*.; Judicial Plat Act; the Act provides that when a decedent's land is to be partitioned off into parcels and sold, a surveyor must prepare a survey of the land that sets forth the parcels of land.

765 ILCS 220/1 *et seq*., Land Survey Monuments Act, relates to the monumentation, restoration, and preservation of land survey monuments.

765 ILCS 215/1 *et seq*., Permanent Survey Act; the Act provides that when the owner of land or the owners of adjacent tracts of land want to permanently establish the boundary lines and corners of the land, the parties can enter into a written agreement to hire a surveyor to survey the land. Once the plat is recorded (with the agreement of the landowners), the lines and corners become binding on all parties and their heirs, successor, and assigns.

765 ILCS 205/1 *et seq*., Plat Act

765 ILCS 77/25; seller of land is not liable for misrepresentations made pursuant to the Residential Real Property Disclosure Act if the misrepresentation was based on information provided by a licensed surveyor or engineer and the seller had no knowledge of the error.

"The 2011 ALTA/ACSM Land Title Survey Standards," by Richard F. Bales and Gary R. Kent, *Probate and Property*, July/August 2011;

"Viewing an Encroachment Problem through the Dual Lens of the Real Estate Contract and the 2006 ALTA Owner's Title Insurance Policy," by Richard F. Bales, *Real Property*, June 2011.

The 2011 ALTA/ACSM Land Title Survey Standards," by Richard F. Bales, *Real Property*, December 2011

Richard F. Bales, "Public Act 85-0373 or To Know Which Road is Paved with Good Intentions, "Illinois State Bar Association's *Real Property* newsletter, October, 1987;

Richard F. Bales, "Another Amendment to the Conveyancing Act, or, Retrieving the Baby from the Bath Water," Illinois State Bar Association's *Real Property* newsletter, October 1988;

Richard F. Bales, "Dueling Surveyors: Post-Appellate Issues of *Hasselbring v. Lizzio*," Illinois State Bar Association's *Real Property* newsletter, October, 2003.

Richard F. Bales, "A New Minefield for the Real Estate Attorney," Illinois State Bar Association's *Real Property* newsletter, September, 1994;

Richard F. Bales, “Survey Nightmare, Part II,” Illinois State Bar Association's *Real Property* newsletter, September, 1995;

Richard F. Bales, “New Legislation Concerning Utilities and Rights-of-Way,” Illinois State Bar Association’s Real Property newsletter, May 2004.

Richard F. Bales, “Illinois Law Relating to Tree Encroachments,” Chicago Bar Association’s *Real Property Law Communicator*, Winter 1994.

Richard F. Bales, “Land Surveyor Liability to Third Parties in Illinois,” *Illinois Bar Journal*, March 2007.

Richard F. Bales,”The ALTA 2006 Title Insurance Policies and the Issuance of Survey Coverage,” *The Title Insurance Law Newsletter*, November 2006.

Surveys, Encroachments

Tthe general rule is that courts will usually not require the encroaching party to remove an encroachment if the encroachment is unintentional, the cost for removing it is great, the corresponding benefit to the encroached-upon landowner is small, and damages can be had at law. See *Pradelt v. Lewis*, 297 Ill. 374, 130 N.E. 785 (1921); *Stroup v. Codo*, 65 Ill.App.2d 396, 212 N.E.2d 518 (3rd Dist. 1965); *Hill v. Meister*, 133 Ill.App.2d 678, 273 N.E.2d 643 (1st Dist. 1971); *Terwelp v. Sass*, 111 Ill.App.3d 133, 443 N.E.2d 804, 66 Ill.Dec. 878 (4th Dist. 1982); *Mari-Mann Herb Co. Inc. v. Borchers,* 216 Ill.App.3d 1014, 576 N.E.2d 496, 159 Ill.Dec. 827 (4th Dist. 1991); *Cammers v. Marion Cablevision*, 26 Ill. App. 3d 176 (5th Dist 1975); 1 I.L.P., Adjoining Landowners sec. 9.

A court may actually compel the removal of an encroaching structure if the encroachment is deliberate or intentional. See *Turney v. Shriver*, 269 Ill. 164, 109 N.E. 708 (1915); *The Fair v. Evergreen Park Shopping Plaza*, 4 Ill.App.2d 454, 124 N.E.2d 649 (1st Dist. 1955); *Ariola v. Nigro*, 16 Ill.2d 46, 156 N.E.2d 536 (1959); *Whitlock v. Hilander Foods, Inc*., 308 Ill.App.3d 456, 720 N.E.2d 302, 241 Ill.Dec. 847 (2d Dist. 1999); *Mahchow v. Tiarks*, 122 Ill. App. 2d 304 (3rd Dist. 1970); *Gerstley v. Globe Wernicke Co*., 340 Ill. 270, 172 N.E. 829 (1930); *Glen View Club v. Becker*, 113 Ill. App. 2d 127, 251 N.E.2d 778 (1969)

For a case concerning an encroachment onto adjoining land, see *Rackouski v. Dobson*, 261 Ill. App. 3d 315, 634 N.E.2d 1229 (1994).

“Viewing an Encroachment Problem through the Dual Lens of the Real Estate Contract and the 2006 ALTA Owner’s Title Insurance Policy,” by Richard F. Bales, *Real Property*, June 2011

“Advanced Survey Examination Issues,” by Richard F. Bales, *Probate and*

Property, September/October 2004

Surveyor Liability

Rozney v. Marnul, 43 Ill. 2d 54, 250 N.E. 2d 656 (1969).

"Land Surveyor Liability to Third Parties in Illinois," by Richard F. Bales, *Illinois Bar Journal*, March 2007.

Survey Standards

Boundary survey standards, see *Illinois Administrative Code*, Title 68, Chapter VII, Part 1270, Section 1270.56(b).

ALTA/NSPS land title survey standards; go to www.alta.org; click "Policies + Standards"; then click "Policy Forms"; then click "Download ALTA/NSPS Land Title Survey Minimum Standard Detail Requirement."

Taxes and Tax Deeds

35 ILCS 200 *et seq.*; real estate taxes; generally

35 ILCS 200/10-25; assessed value of model homes, model townhomes, and model condominium units. The statute provides, among other things, that if the home, townhome, of condominium unit is used as a model home, then the assessed value of the property is the same as the assessed value of the vacant land.

35 ILCS 200/10-30; the platting and subdivision of property will not (under certain circumstances) increase the assessed valuation of the property, but see *Brazas v. PTAB* (2nd Dist., June 11, 2003), where the court determined that in some instances a county assessor can reassess real estate during construction and before the issuance of an occupancy permit.

35 ILCS 200/10-35; assessment of common areas; e.g., common areas that are used for recreational or similar residential purposes and which are assessed to a separate owner and are located on separately identified parcels shall assessed at one dollar per year.

35 ILCS 200/15-176; Alternative General Homestead Exemption

35 ILCS 200/15-185; municipal-owned property used for non-exempt purposes

35 ILCS 200/18-250(c); regarding the voidability of forfeited taxes. This statute states that "on and after January 1, 2001, any taxes for any year remaining due or forfeited against real property in such county not entered on the current

collector's warrant books shall be deemed uncollectible and void. . . ."

35 ILCS 200/21-310; sales in error
This statute lists examples of when the court could declare a sale in error. Examples include payment of taxes prior to sale; a double assessment, or a description that is void for uncertainty.

Certificates of error (35 ILCS 200/14-15)
The certificate of error allows a taxpayer to challenge his tax assessment and tax bill after the taxes come out.

35 ILCS 200/22-5 et seq.; the tax deed process

35 ILCS 200/21-350; period of redemption for tax sales

35 ILCS 200/21-385; extension of redemption period

35 ILCS 200/22-5; 35 ILCS 200/22-10; 35 ILCS 200/22-15; 35 ILCS 200/22-20; 35 ILCS 200/22-25; tax deed notices that must be sent out prior to issuance of a tax deed.

35 ILCS 200/22-40; payment of subsequent taxes after tax sale; lien of delinquent prior taxes merges with the tax deed.

35 ILCS 200/22-35; payment of municipal advances prior to issuance of tax deed

35 ILCS 200/22-55; tax deeds shall convey merchantable title.

35 ILCS 200/21-260 *et seq.*; scavenger sale

35 ILCS 200/9-260 *et seq.*; omitted property; If any property is omitted from the assessment rolls, resulting in taxes not being paid for this property, or if taxes have not been paid for property because of a defective description or assessment, or if a tax exemption is carried forward erroneously, the taxes can later be assessed when this error is discovered.

35 ILCS 200/15-5 *et seq.*; tax exemptions; e.g., schools, government property

35 ILCS 200/10-155 *et seq.*; open space
Golf courses, land used to preserve historic sites, parks, forests, and other such properties, if ten acres or more in size, and not used primarily for residential purposes, may quality for an open space tax assessment, which is less than the normal assessment.

35 ILCS 200/21-95, 21-100, 21-105; the voiding of real estate taxes after a governmental unit acquires the land. Notices have to be sent to the county clerk,

county treasurer, and county assessor, asking that the taxes be voided. In outlying counties, the tax warrant books must be marked. In Cook County, title companies have decided that evidence of service of the request is sufficient. Title companies may also ask that notice be sent to the state's attorney's office.

35 ILCS 200/22-70; a tax buyer at a tax sale cannot extinguish a previously-created easement.

35 ILCS 200/27-5 *et seq*.; Special Service Areas

65 ILCS 5/11-74.4-1 *et seq*.; Tax Increment Allocation Redevelopment Act

taxes; merger; see *Czarobski v. Lata*, 371 Ill. App. 3d 346 (1st Dist., 2007); no merger of real estate taxes due to mutual mistake. *Czarobski v. Lata* has been affirmed by the Illinois Supreme Court; see *Czarobski v. Lata*, 227 Ill. 2d 364 (2008).

"Pay by Legal"; 35 ILCS 200/20-210

35 ILCS 200/18-40; taxes may not be assessed "if the equalized assessed value of any property is less than $150 for an assessment year."

Rhone v. First American Title Ins. Co., 401 Ill. App.3d 802 (1st Dist. 2010); taxes not billed as of the date of policy were not covered by the title policy, even if they were "back taxes" for years prior to the date of the title policy.

Jackson Park Hospital Co. v. Courtney, 364 Ill. 497 (1936), This Illinois Supreme Court case assures that a third party can rely on the county tax warrant books. If these tax records disclose that the taxes are paid, and third parties rely on these records, then any taxes marked paid in the county records cannot later be enforced.

"Second District Appellate Court Holds That Bankruptcy Does Not Extend the Redemption Period to Pay Delinquent Taxes Under the Revenue Code," by James V. Noonan, *Real Property*, March 2023, regarding *In re County Treasurer & ex officio County Collector of Lake County*, 2022 IL App (2d) 210689.

Tax Deeds

Tyler v. Hennepin County, 598 U.S. 631 (2023); the U.S. Supreme Court unanimously ruled that the Minnesota tax foreclosure process was unconstitutional pursuant to the Takings Clause of the Fifth Amendment. Illinois' tax deed statutes are similar to the law in Minnesota.

Because of this case, title companies may raise a title policy exception such as, "Any claim against or attack upon the Title derived through the tax deed issued

pursuant to orders entered in case No. _____."

In re Application of the County Collector (*Apex Tax Investments v. Lowe*), 225 Ill. 2d 208 (2007). In this case the court ruled in favor of the tax purchaser. (The owner of the property was a hospital.)

In Re Application of Ward, 311 Ill.App.3d 314, 724 N.E.2d 1, 243 Ill. Dec. 692 (2nd Dist. 2000); in a tax sale of a park bounded by a subdivision, the court determined that the owners of the adjoining lots should have been named in the tax sale petition.

In re Application of the County Collector (Devon Bank v. Miller), 397 Ill. App. 3d 535 (1st Dist., 2009); lack of service on record owner rendered the tax deed void.

In Re Smith, No. 08-2880 (U.S. Seventh Circuit, 2010); a tax buyer's interest is "perfected" against a "bona fide purchaser" when the tax buyer records a tax deed to the property.

In Re Application of the County Treasurer; Glohry, LLC v. One West Bank; 2011 Ill. App. (1st) 101966. Here the attorney for the tax deed petitioner gave the wrong date for the section 22-10 tax sale notice. Also, the attorney served only MERS and the original lender. The attorney did not attempt to find the holder of the note. As such, the tax deed proceeding was determined to be defective.

"Tax Deed Epilogue," by John C. Robison, Jr., *Real Property*, April 2022.

"*In re Application of the County Treasurer v. DG Enterprises*," by Philip J. Vacco, *Real Property*, August 2023, regarding *In re Application of the County Treasurer v. DG Enterprises*, 2023 IL App 3rd 220226.

"Court Determines Tax Buyer Notice to Limited Liability Company Failed to Strictly Comply with Notice Requirements, Tax Deed Vacated," by Lynette Lockwitz, *Real Property*, October 2023, regarding *In re Application of the County Treasurer (ALW Capital, LLC v. BCL-Peterson Kane, LLC)*, 2023 IL App (1st) 220182.

Tax Deeds, Tax Deed Relief

In *D.G. Enterprises, LLC—Will Tax, LLC v. Cornelius*, 2015 IL 118975, the Illinois Supreme Court stated that after a tax deed has been issued, then pursuant to 35 ILCS 200/22-45, the aggrieved party must seek relief under 735 ILCS 5/2-1401. The grounds for relief under 2-1401 are set forth in 35 ILCS 200/22-45. These grounds are limited to:

One, proof that the taxes were paid prior to sale;

Two, proof that the property was exempt from taxation;

Three, proof by clear and convincing evidence that the tax deed had been procured by fraud or deception by the tax purchaser or his or her assignee; or

Four, proof by a person or party holding a recorded ownership or other recorded interest in the property that he or she was not named as a party in the publication notice as set forth in Section 22-20, and that the tax purchaser or his or her assignee did not make a diligent inquiry and effort to serve that person or party with the notices required by Section 22-20 through 22-30.

Section 22-45 of the Property Tax Code states that the grounds for relief under Section 2-1401 are limited to, among other things, "proof by a person or party holding a recorded ownership or other recorded interest in the property that he or she was not named as a party." In this regard, see *In Re the Application of the Douglas County Treasurer (Ballinger v. Moore)*, 2014 IL App (4th) 130261; *Payne v. Williams*, 91 Ill. App.3d 336, 414 N.E.2d 836 (5th Dist. 1980).

35 ILCS 200/22-45(4) refers to the tax buyer making "a diligent inquiry and effort" to serve "a person or party holding a recorded ownership or other recorded interest in the property." What is this so-called "diligent inquiry and effort?" The Illinois Supreme Court reviewed the answer to this question in *D.G. Enterprises, LLC—Will Tax, LLC v. Cornelius*, 2015 IL 118975.

Tax Sales

"Tax Sale Purchase Deemed Fraudulent Transfer," by Megan G. Heeg, *Real Property*, July 2016, regarding *Smith v. Sipi, LLC*, 811 Fed. 3d 228 (7th Cir. 2016).

Taxes, Title Insurance

Rhone v. First American Title Insurance Co., 401 Ill. App. 3d 802, 928 N.E.2d 1185, 340 Ill. Dec. 588 (1st Dist. 2010); In this case the appellate court ruled in favor of the title company, stating that back taxes do not relate back to the year of the tax. Thus, the title claim was excluded from title policy coverage pursuant to Exclusion 3(d) of the 2006 title policy—it was a matter "attaching or created subsequent to Date of Policy." See also *Menconi v. Stewart Title*, 2015 IL App. (1st) 143043-U.

Jackson Park Hospital Co. v. Courtney, 364 Ill. 497 (1936), This Illinois Supreme Court case assures that a third party can rely on the county tax warrant books. If these tax records disclose that the taxes are paid, and third parties rely on these records, then any taxes marked paid in the county records cannot later be enforced.

Tenancy, in Common

765 ILCS 1005/1; the default tenancy is tenancy in common.

"*Estate of Jezewski v. Jaworski*: A Warning on Joint Tenancy," by Thomas A. Ball, *Real Property*, May 2020, regarding *Estate of Jezewski v. Jaworski*, 2019 IL App (1st) 170100.

Tenancy, Joint

See 765 ILCS 1005/1; 765 ILCS 1005/1b

Generally speaking, when land is held in joint tenancy, and the joint tenancy is not severed, a judgment or other general lien against one joint tenant is not enforceable against the land if that joint tenant dies. (Of course, the lien is enforceable against the personal estate of the decedent.) See *People's Trust & Savings Bank v. Haas*, 328 Ill. 468,160 N.E. 85 (1927).

In other words, provided that the joint tenancy was never severed, the title of the surviving joint tenant(s) is free of the lien of most judgments that were entered solely against the deceased joint tenant.

But what can sever the joint tenancy other than a deed?

See *Van Antwerp v. Horan*, 390 Ill. 449, 61 N.E.2d 358 (1945); a levy on a judgment will not sever the joint tenancy.

See *Jackson v. Lacey*, 408 Ill. 530, 97 N.E.2d 839 (1951); a judgment, levy and sale will not sever the joint tenancy.

See *Kling v. Ghilarducci*, 3 Ill. 2d 454, 121 N.E.2d 752 (1954); *Harmes v. Sprague*, 105 Ill.2d 215, 473 N.E.2d 930, 85 Ill. Dec. 331 (1984). A lien on a joint tenant's interest will not sever the joint tenancy; the joint tenancy will not be severed until there is a conveyance.

Minonk State Bank v. Grassman, 95 Ill.2d 392 (1983); the joint tenancy can be broken by a deed to oneself.

"Voluntary Termination of Joint Tenancies: Illinois Eliminates the Strawman," by Jeffrey W. Jackson, *The John Marshall Law Review*, vol. 17, no. 3 (Summer, 1984)

"*Estate of Jezewski v. Jaworski*: A Warning on Joint Tenancy," by Thomas A. Ball, *Real Property*, May 2020, regarding *Estate of Jezewski v. Jaworski*, 2019 IL App (1st) 170100

Tenancy, Tenancy by the Entirety

735 ILCS 5/12-112; real estate is protected from judgment sale if judgment is against only one party, assuming no fraudulent transfer; see also *Premier Property Management, Inc. v. Chavez*, 191 Ill.2d 101, 728 N.E.2d 476 (2000); *U.S. v. Craft*, 122 S.Ct. 1414 (2002); "The Illusion of Reform: Illinois Statutory Tenancy by the Entirety," by Celeste M. Hammond and Ronald L. Otto, *Illinois Bar Journal*, April 1990; "Until Death Do Us Part--Or We Move to Another Home," by Guerino J. Turano, *Real Property*, January 1990; "Some Unanswered Questions Relating to Estates of Tenancy by the Entirety," by Richard S. Babiarz, *Real Property Law Communicator*, Fall 1990; "Tenancy by the Entirety," by Myles Jacobs, *Real Property*, January 1999; "Post-judgment Reconveyance into Tenancy by the Entirety not a Fraudulent Transfer," by Christopher M. Tietz and Bradley E. Riley, *Real Property*, June 1995; "Transfers into Tenancy by the Entirety and the UFTA," by Timothy J. Howard, *Real Property*, September 1996; Illinois' Tenancy by the Entirety Law in Court: Creditors 1 - Tenants 1," by Arthur Fedder, *Real Property*, December 1996; "Enforcing Judgments Against Property Held in Tenancy by the Entirety," by Ronald R. Peterson and David R. Seligman, *Illinois Bar Journal*, April 1999; "Law Pulse," *Illinois Bar Journal*, April 2002; "Tenancy by the Entirety Now Offers Less Protection from Creditors," by Laura Althardt, *Agricultural Law*, May 2003; "Unresolved Issues Concerning Tenancy by the Entirety," by Richard F. Bales, *Real Property*, February 2005; "Does Size Matter? Homestead and Tenancy by the Entirety," by Richard F. Bales, *Real Property*, August 2007; Random Thoughts on Tenancy by the Entirety, by Richard F. Bales, *Real Property*, July 2008.

750 ILCS 65/22; Rights of Married Persons Act and tenancy by the entirety

765 ILCS 1005/1c; creation of tenancy by the entirety.

Maher v. Harris Trust and Savings Bank, 506 Fed. 3d 560 (Seventh Cir. 2007) wherein the 7th U.S. Circuit Court of Appeals ruled that the shares of stock in a cooperative represented an interest in homestead property that may be held as tenants by the entirety.

Securities and Exchange Commission v. Roger Householder, No. 02 C 4128 (N.D. Ill. 2005); the district court indicated that a judgment recorded while the land is owned as tenants by the entirety would be unenforceable once the land ceased to be owned as tenants by the entirety.

In Re the Estate of Moshe David Aryeh, Deceased, 2021 IL App (1st) 192418; the unsuccessful creation of a tenancy by the entirety in a deed to a married couple becomes a joint tenancy.

"A Failed Tenancy by the Entirety Becomes What?" by Michael J. Rooney, *Real Property*, November 2021, regarding *In Re the Estate of Moshe David Aryeh, Deceased*, 2021 IL App (1st) 192418.

Tenancy by the Entirety, Issues

- 765 ILCS 1005/1c provides that if Adam and Betty, husband and wife, own and live in Blackacre as tenants by the entirety, and both of them move to Whiteacre and live there, but continue to own Blackacre, they own Blackacre in joint tenancy.

- 765 ILCS 1005/1c provides that if Adam and Betty, husband and wife, take title to Blackacre as tenants by the entirety, but then they get divorced, upon a judgment of dissolution, the estate becomes a tenancy in common unless and until the court directs otherwise.

- 765 ILCS 1005/1c provides that if Adam and Betty take title to Blackacre as tenants by the entirety, but they are not married, they own Blackacre as joint tenants.

- *In Re the Estate of Moshe David Aryeh, Deceased*, 2021 IL App (1st) 192418, indicates that when a married couple take title to non-homestead property as tenants by the entirety, a joint tenancy is created.

The Illinois statute as to tenancy by the entirety is silent as to:

- What is the default tenancy for a residence in a situation where a married couple establishes a valid tenancy by the entirety, but later only one spouse moves out of the residence?

- What is the default tenancy for a residence in a situation where a married couple establishes a valid tenancy by the entirety, both spouses move out of the residence, but they no longer live together?

Editor's Notes:

Can a husband and wife purchase a fractional interest in a home and own that fractional interest as tenants by the entirety? For example:

Adam and his wife want to buy a home, together with Adam's mother-in-law, who will also live in the home. They take title to the home as follows:

Adam and Betty, husband and wife, as tenants by the entirety, as to a 50% interest, and Clara, as to a 50% interest.

Is this a valid tenancy by the entirety? This may not be a valid tenancy by the entirety.

765 ILCS 1005/1c states this:

"Whenever a devise, conveyance, assignment, or other transfer of property, including a beneficial interest in a land trust, maintained or intended for maintenance as a homestead by both husband and wife together during coverture shall be made and the instrument of devise, conveyance, assignment, or transfer expressly declares that the devise or conveyance is made to tenants by the entirety, or if the beneficial interest in a land trust is to be held as tenants by the entirety, the estate created shall be deemed to be in tenancy by the entirety."

765 ILCS 1005/1c refers to a conveyance or transfer of property; it does not refer to a conveyance or transfer *of a fractional interest* in property.

But perhaps this is the real issue:

Adam and Betty, husband and wife, as tenants by the entirety, as to a 50% interest, and Clara, as to a 50% interest.

In 2023 a judgment creditor records a memorandum of judgment against Adam for $100,000.

In 2024 the parties decide to sell their home. The attorney for the parties ask the title company to waive the recorded memorandum of judgment because Adam and Betty took title to their fractional interest as tenants by the entirety. Adam and Betty are prepared to give the title company an affidavit that they are still alive, still married, and still occupy their home as their homestead.

Will the title company waive the judgment, or will the title company be unwilling to waive the judgment, concerned that the tenancy by the entirety may be defective because the tenancy affects a fractional interest? What are the chances that the judgment creditor might begin foreclosure proceedings post-closing, arguing that the tenancy is defective? If that were to happen, the title company would have to defend its insured in these proceedings. See Condition Number 5 in the 2021 Owner's Policy.

Tenancies

"Liens, Tenancies, and Death," by Richard F. Bales, *Real Property*, September 2018.

Timeshares

765 ILCS 101/1-1 *et seq.* Compare the definitions of "timeshare estate" and "timeshare use" in 765 ILCS 101/1-15. A timeshare estate is an interest in land; in that regard, see 765 ILCS 101/1-20. A timeshare use, on the other hand, is

merely the right to occupy land.

Title

720 ILCS 5/32-13; penalties for unlawful clouding of title

Title Insurance

215 ILCS 155/1 *et seq*.; Title Insurance Act

215 ILCS 155/18.1; parties who are obligated to pay for title insurance have the right to choose the title company.

215 ILCS 155/26; Good Funds

815 ILCS 505/2T; A lender cannot demand that title insurance for an owner-occupied residence be issued by a particular title insurance company.

First Midwest Bank v. Stewart Title Guaranty Co., 218 Ill.2d 326 (2006). See also "Law Pulse," *ISBA Bar Journal*, March 2006.

This case makes it clear that a title policy is not a guaranty of title. Rather, the title policy is a contract of indemnification. That is, the title policy insures against loss. The court in this case states:

> ALTA [The American Land Title Association] further explains, however, that it is not the purpose of a title commitment to provide a listing of all defects, liens and encumbrances affecting the property. A title commitment is simply a promise to insure a particular state of title. To the extent that the title commitment contains information concerning the title, such information is provided to give notice of the limitations to the risk that the title insurer is willing to insure. . . .

Midwest Bank v. Abney, 365 Ill. App. 3d 636, 850 N.E.2d 373 (2nd Dist. 2006)

In *Midfirst v. Abney*, the defendant bought property at a foreclosure sale, not realizing that there was a first mortgage that was not extinguished by this foreclosure of the second mortgage. The defendant later conveyed the property with a general warranty deed. The defendant was successfully sued on the warranties he made in a warranty deed for a title issue *that arose prior to the time he owned the property*. Because of this court case, some commentators have suggested that attorneys should use special warranty deeds and not general warranty deeds. See "A Promise of Clear Title," by Philip J. Vacco, *Illinois Bar Journal*, March 2021.

Yesilevich and Weinberger v. Republic Title Company 407 Ill. App. 3rd 1190 (2011); the title policy does not include consequential damages (water damage; looting of fixtures and appliances) caused by the failure of the plaintiffs to have access to the property.

United Community Bank and James T. McDonough v. Prairie State Bank & Trust and Santarelli and Sons, Inc., 2012 IL App (4th) 110973.

This case, like *First Midwest Bank v. Stewart Title Guaranty Co*., which is noted above, discusses the nature of tile insurance. In this case the court writes:

> The buyer was not entitled to rely on the title commitment for information regarding the title, because the purpose of the title commitment was not to provide information regarding the title; rather, the title commitment had a wholly different, contractual purpose, namely, specifying the losses the title insurer was excluding from coverage in its offer to provide insurance.

This case is similar to the *First Midwest Bank v. Stewart Title* case; it deals with title company subrogation. See also "Law Pulse," *ISBA Bar Journal*, p. 462, September, 2012.

Gondeck and O'Malley v. A Clear Title, No. 11 C 6341 (N.D. Ill. 2012); The title company was held vicariously liable under the doctrine of *respondent superior* for the acts of a title company agent; the agent took money deposited into an escrow.

All American Title Agency, LLC v. The Department of Financial and Professional Regulation, 2013 IL App (1st) 113400; concerns the DFI revoking the registration of a title agent for (among other things) changing settlement statements at closing and making undisclosed disbursements to third parties.

Chultem v. Ticor Title, 2015 IL App (1st) 140808, 46 N.E.3d 340, 399 Ill. Dec. 302 (2015) This case was a class action lawsuit involving the agency programs of title insurance companies.

Rhone v. First American Title Ins. Co., 401 Ill. App.3d 802 (1st Dist. 2010); taxes not billed as of the date of policy were not covered by the title policy, even if they were "back taxes" for years prior to the date of the title policy.

Jackson Park Hospital Co. v. Courtney, 364 Ill. 497 (1936), This Illinois Supreme Court case assures that a third party can rely on the county tax warrant books. If these tax records disclose that the taxes are paid, and third parties rely on these records, then any taxes marked paid in the county records cannot later be enforced.

"Waiving Special Exceptions 2(a) and 2(b) is Not Always Appropriate," by Christine Sparks, *Real Property*, April 2013.

"The Nature of Title Insurance and the 'Law of Unintended Consequences' in Real Estate Transactions," by Joseph R. Fortunato, Jr., *Real Property*, July 2014, regarding *United Community Bank and James T. McDonough v. Prairie State Bank & Trust and Santarelli and Sons, Inc*., 2012 IL App (4th) 110973.

"Title Insurance Fees O.K.," by Philip J. Vacco, *Real Property*, August 2017, regarding *Chultem v. Ticor Title*, 2015 IL App (1st) 140808, 46 N.E.3d 340, 399 Ill. Dec. 302 (2015).

"The Dangers of Bifurcated Title Policies in Residential Real Estate Transactions," by Joseph W. Rogul, *Real Property*, April 2018.

"The 'New' 2016 ALTA Title Insurance Commitment," by Terry S. Prillaman, Jr., *Real Property,* March 2018.

Kevin Camden and Richard W. Rappold, "Case Summary: *Findlay v. Chicago Title Insurance Company*," *Real Property*, November 2022, regarding *Findlay v. Chicago Title Insurance Company*, 2022 IL App (1st) 210889 and *Katsoyannis v. Findlay*, 2016 IL App (1st) 150036.

"Here's a Thought: A Conversation about Title Insurance Legislation," by Joseph W. Rogul and Michael J. Rooney, *Real Property*, March 2022.

"How Does This Work? And if You Were Examining Title, What Would Your Opinion Say?" by Michael J. Rooney, *Real Property*, February 2022.

"Settlement Agreement Signed in the *IRELA v. IDFPR* Case," by Michael J. Rooney, Real Property, June 2022, regarding *Illinois Real Estate Lawyers Association v. Illinois Department of Financial and Professional Regulation, et al*., 2022 CH 1658, Circuit Court of Cook County, Illinois.

"Key Changes with the 2021 ALTA Owner's Policy," by Paul Peterson, *Real Property*, January 2023.

Title Insurance; Agent Liability

Two-year statute of limitations on title agent liability; see *United General Title Insurance Company v. Ameritite*, 365 Ill. App. 3d 142, 847 N.E.2d 848 (2006); 735 ILCS 5/13-204, 735 ILCS 5/13-214.4.

Chultem v. Ticor Title, 2015 IL App (1st) 140808, 46 N.E.3d 340, 399 Ill. Dec. 302 (2015) This case was a class action lawsuit involving the agency programs of title

insurance companies.

Title Insurance; Endorsements

Editor's Notes:

At one time title companies wrote endorsements as representations of fact. For example: "The Company hereby insures the insured that the land is zoned as single family residential." But this type of wording is inconsistent with the traditional interpretation of a title policy as a contract of indemnity, that is, insurance against loss or damage. As set forth in *Alliance Mortgage Co. v. Rothwell*, 10 Cal.4th 1226, 44 Cal.Rptr.2d 352 (1995), the title company issued a location endorsement that stated that there was a multi-family dwelling on the property. In fact, the land was improved with a single family residence. The court held that this language might be considered to be a representation and not merely a contract for indemnity. Because of the holding of this case, title companies have rewritten many of their endorsements so that the wording of the endorsements is consistent with the wording of the policy.

Title Insurance; Endorsements, Owner's Policy

Editor's Notes:

There are many American Land Title Association (ALTA) endorsements that can be added to an owner's title insurance policy. For example:

ALTA 3.1 Endorsement (Zoning–Completed Structure)
ALTA 3 Endorsement (Zoning)
ALTA Endorsement 34-06 (Identified Risk Coverage)
ALTA Endorsement 17-06 (Access and Entry)
ALTA Endorsement 17.1-06 (Indirect Access and Entry)
ALTA Endorsement 17.2-06 (Utility Access)
ALTA Endorsement 18-06 (Single Tax Parcel)
ALTA Endorsement 18.1-06 (Multiple Tax Parcel–Easements)
ALTA Endorsement 18.2-06 (Multiple Tax Parcel)
ALTA Endorsement 18.3-06 (Single Tax Parcel and ID)
ALTA Endorsement 19-06 (Contiguity–Multiple Parcels)
ALTA Endorsement 19.1-06 (Contiguity–Single Parcel)
ALTA Endorsement 19.2-06 (Contiguity–Specified Parcels)
ALTA Endorsement 25-06 (Same as Survey)
ALTA Endorsement 25.1-06 (Same as Portion of Survey)
ALTA Endorsement 26 (Subdivision)
ALTA Endorsement 9.2-06 (Covenants, Conditions and Restrictions–Improved Land)
ALTA Endorsement 9.9-06 (Private Rights - Owner's Policy)
ALTA Endorsement 4.1 (Condominium - Current Assessments)

ALTA Endorsement 8.2-06 (Commercial Environmental Protection Lien)

There is also the title company encroachment endorsement and the title company building line violation endorsement. And of course there is “extended coverage,” the deletion of the standard exceptions from the owner’s policy.

What endorsements should the attorney consider for his client’s owner’s title insurance policy?

The attorney should certainly get extended coverage. If the property is not a single-family residence, the attorney might consider the ALTA 3.1 zoning endorsement.

After that, whether any other endorsements are necessary or appropriate depends on the nature of the property and the nature of the Schedule B title commitment exceptions.

Are there several permanent index numbers? The attorney might consider the ALTA 18.2-06 endorsement.

Even if the land is taxed pursuant to only one permanent index number, the attorney might consider the ALTA 18-06 endorsement or the ALTA 18.3-06 endorsement.

Are there recorded covenants? The attorney might consider the ALTA 9.2-06 endorsement.

Does the legal description indicate that the land is not subdivided? The attorney might consider the ALTA 26 subdivision endorsement and perhaps even the ALTA 17-06 access endorsement.

Is access only by an easement? The attorney might consider the ALTA 17.1-06 endorsement.

Is the property being insured a commercial condominium unit? The attorney might review ALTA endorsement 4.1, which gives coverage relating to violations of covenants that restrict the use of the unit and that are contained in the condominium documents. (The ALTA endorsement 4.1 is also appropriate for a residential condominium unit.)

Does the land consist of various parcels that are not just contiguous lots in a platted subdivision? If so, the attorney might consider the ALTA 19-06 endorsement.

Townhomes

765 ILCS 160/1-1 *et seq*., the Common Interest Community Association Act

765 ILCS 605/18.5(g-1); the purchaser of a unit of a common interest community (see 765 ILCS 160/1-1 *et seq*.) at a judicial foreclosure sale has to pay a "proportionate share" of the common expenses for the unit.

Transfer on Death Instruments

Editor's Notes: A Transfer on Death Instrument, or TODI, is a probate-avoidance tool. Although the Act states that a TODI is a nontestamentary instrument, a TODI should, as a practical matter, be deemed the equivalent of a will for the disposition of real property—i.e., a "will-equivalent" that does not require prove-up and admission in a probate proceeding.

A TODI, in proper form, properly executed and timely recorded, transfers title to the subject property to the designated beneficiary, but the transfer is effective only upon the death of the owner, who is the party who executed the TODI. (A "designated beneficiary" is "a person designated to receive real property under a transfer on death instrument.")

755 ILCS 27/1 *et seq*.; Real Property Transfer on Death Instrument Act

755 ILCS 27/5, definitions

755 ILCS 27/40, requirements of a Transfer on Death Instrument (TODI)

755 ILCS 27/45, execution of a TODI

755 ILCS 27/55, revocation of a TODI

755 ILCS 27/60, effect of a TODI during an owner's life

755 ILCS 27/65, effect of a TODI at an owner's death

755 ILCS 27/66, spousal renunciation of a TODI

755 ILCS 27/70, joint owners of land

755 ILCS 27/75, notice of death affidavit

755 ILCS 27/80, disclaimer of a TODI

755 ILCS 27/85; rights of creditors

755 ILCS 27/90, right to set aside or contest the TODI; bona fide purchasers and lenders

755 ILCS 27/95, preparation of a TODI

“A Means to Avoid Probate When Real Estate is Involved?,” by Emily R. Vivian, *Real Property,* April 2011.

“The Transfer on Death Instrument: A New Estate Planning Tool for Illinois Attorneys,” by George L. Schoenbeck, *Real Property*, April 2012.

“Transfer on Death Instruments and Title Insurance: Two Significant Problems,” by Douglas M. Karlen, *Real Property*, January 2012.

“Transfer on Death Instruments: Pitfalls and Pending Legislation,” by Michael J. Fleck, *Real Property*, May 2021.

“Public Act 102-0068: New Changes to the Real Property Transfer on Death Instrument Act (755 ILCS 27/1 *et seq*.)—Part I,” by Richard F. Bales, *Real Property*, March 2022.

“Public Act 102-0068: New Changes to the Real Property Transfer on Death Instrument Act (755 ILCS 27/1 *et seq*.)—Part II,” by Richard F. Bales, *Real Property*, April 2022.

In re estate of Dennis A. Bermudez v. Joshua Bermudez, 2023 IL App. (1st) 220543-U.

Editor’s Notes:

What if the owner of the land records a transfer on death instrument in favor of a beneficiary, the owner files for bankruptcy protection a year later, and a year after that the owner dies? Does the beneficiary acquire the land free and clear of the bankruptcy because the transfer on death instrument was executed and recorded before the owner filed bankruptcy?

No, the beneficiary does not take title free and clear of the owner’s bankruptcy. See 755 ILCS 27/65(b), which provides that “a beneficiary takes the real property subject to all conveyances, encumbrances, assignments, contracts, options, mortgages, liens, and other interests to which the real property is subject at the owner's death.”

Transfer Tax

35 ILCS 200/31-1 et seq., Illinois Real Estate Transfer Tax Law; the law now defines certain off-record transactions, such as the transfer of partnership interests or the sale of corporate stock, as taxable events.

35 ILCS 200/31-45; exemptions from the payment of transfer tax

Tree Encroachments

Merriam v. McConnell, 31 Ill. App.2d 241, 175 N.E.2d 293 (1st Dist., 1961); *Bandy v. Bosie*, 132 Ill. App.3d 832, 477 N.E.2d 840 (4th Dist., 1985); *Ridge v. Blaha*, 166 Ill. App.3d 662, 520 N.E.2d 980 (2nd Dist., 1988); *Simpson v. City of Gibson*, 164 Ill. App. 147 (3rd Dist., 1911); *Chandler v. Larson*, 148 Ill. App.3d 1032, 500 N.E.2d 584 (1st Dist., 1986); *Mahurin v. Lockhart*, 71 Ill. App.3d 691, 390 N.E.2d 523 (5th Dist., 1979); *Kimber v. Burns*, 253 Ill. 343, 97 N.E. 671 (1912);2 *Corpus Juris Secundum*, Adjoining Landowners, sec. 54; Wrongful Tree Cutting Act, 740 ILCS 185/2.

See also:

Mark D. Jamison v. The City of Zion, 359 Ill. App. 3d 268, 834 N.E.2d 499, 295 Ill. Dec. 918 (2nd Dist. 2005); *Hammond v. SBC Communications*, 302 Ill. Dec. 828, 850 N.E.2d 265 (1st Dist., 2006); *Eckburg v. Presbytery of Blackhawk of the Presbyterian Church*, 396 Ill. App. 3d 164, 918 N.E.2d 1184 (2nd Dist. 2009); *Eckburg v. Presbytery of Blackhawk of the Presbyterian Church*, 396 Ill. App. 3d 164, 918 N.E.2d 1184 (2nd Dist. 2009); *Ortiz v. Jesus People USA*, 405 Ill. App. 3d 967, 939 N.E.2d 555, 345 Ill. Dec. 712 (1st Dist. 2010). *Belton v. Forest Preserve Dist. of Cook County*, 407 Ill. App. 3d 409 (1st Dist. 2011)

“Illinois Law Relating to Tree Encroachments,” by Richard F. Bales, *Real Property Law Communicator*, Winter 1994.

“Illinois Law Relating to Tree Encroachments,” by Richard F. Bales, *Real Property*, November 1999.

Editor’s Notes:

- Question: If a tree is on the boundary line of two lots, can one lot owner cut the tree down without the other lot owner’s consent?

Answer: No, he cannot. See *Ridge v. Blaha*, 166 Ill. App.3d 662, 520 N.E.2d 980 (2nd Dist., 1988). A tree growing on the boundary line between two parcels of land is the common property of the adjoining owners as tenants in common.

- Question: Adam owns lot 1 and Ben owns lot 2. The branches of a tree located solely on lot 2 encroach onto lot 1. Can Adam cut the branches of the tree at the boundary line between both lots if he does not trespass onto lot 2?

Answer: The answer seems to be unsettled in Illinois.

2 *Corpus Juris Secundum*, Adjoining Landowners, sec. 54. recognizes the doctrine of self-help, even if there is no injury to the landowner:

> Even though a landowner has sustained no injury by the intrusion on or over his land of the branches or roots of a tree or plant on adjoining land, he may cut off the offending branches at the boundary line.

But this is a national encyclopedia. Illinois has two legal encyclopedias, *Illinois Law and Practice* and *Illinois Jurisprudence*. Unfortunately, neither encyclopedia refers to self-help and tree encroachments.

But what about Illinois case law? Case law seems to suggest that a landowner can cut the tree branches only if the encroaching branches cause damage to the landowner's property. See *Ridge v. Blaha*, 166 Ill. App.3d 662, 520 N.E.2d 980 (2nd Dist., 1988) and *Simpson v. City of Gibson*, 164 Ill. App. 147 (3rd Dist., 1911).

But see *Geller v. Brownstone Condominium Association*, 82 Ill. App. 3d 334, 402 N.E.2d 807, 37 Ill. Dec. 805 (1st Dist. 1980). The appellate court stated:

> [A] property owner owns only as much air space above his property as he can practicably use. And to constitute an actionable trespass, an intrusion has to be such as to subtract from the owner's use of the property.

This statement is similar to what the court said in *Simpson v. City of Gibson*. In *Simpson* the court stated that if a tree were on private property, and the tree branches encroached into the street, the city would have the right to remove the tree branches if the branches "were an inconvenience to the public in the use of the street."

Question: Is a tree branch that is ten feet in the air that encroaches one foot into the homeowner's airspace an encroachment that (to quote *Geller*) "subtracts from the owner's use of the property?" Would this one-foot encroachment into the adjoining airspace be (to quote *Simpson*) an "inconvenience" to the adjoining lot owner in the use of his property?

If the answer to either of these questions is "Yes," would Adam then be able to cut off the tree branch at his lot line?

- Question: Adam and Ben live in a suburban Chicago neighborhood. Adam owns lot 1 and Ben owns lot 2. A tree is located solely on lot 1. A dead tree branch encroaches onto lot 2. Ben tells Adam that the tree branch may fall on his house and tells Adam that he should have the branch removed. Adam tells Ben that that is not his responsibility. Is Adam

correct?

Answer: In *Mahurin v. Lockhart*, 71 Ill. App.3d 691, 390 N.E.2d 523 (5th Dist., 1979), the plaintiff sought to recover damages for personal injuries sustained when a dead branch extending over his property fell and struck him. The court discussed the traditional rule of nonliability for dangerous conditions arising out of purely natural causes. This rule developed at a time when land was mostly unsettled and uncultivated. As the landowner was unable to remedy all the dangerous conditions arising out of purely natural causes, he was thus shielded from liability out of necessity.

The court stated that although there may be reasons to continue this traditional rule in rural areas, there is little or no reason to apply it in urban or suburban areas, as it would not be unduly burdensome for the property owner to inspect his property and take reasonable precautions against dangerous natural conditions. Thus, the court held:

> [A] landowner in a residential or urban area has a duty to others outside of his land to exercise reasonable care to prevent an unreasonable risk of harm arising from defective or unsound trees on the premises, including trees of purely natural origin.[4]

Trespass

735 ILCS 5/6-101

Trusts (including land trusts)

205 ILCS 620/3-33; provisions for successor corporate trustee

765 ILCS 425/1 *et seq*.; Land trustee must disclose names of trust beneficiaries when there is a violation of an ordinance relating to health or safety or if it is suspected that the property in the land trust was damaged or destroyed by arson.

50 ILCS 105/3.1; The names of trust beneficiaries must be disclosed when entering into contracts with the state or unit of local government.

735 ILCS 5/2-1402; Supreme Court Rule 277; the judgment creditor has to serve 0the citation to discover assets on the land trustee.

735 ILCS 5/2-1402(c); the creditor can ask the court to enter what is called a *turnover order*, ordering the debtor to “turn over” the beneficial interest in the land trust to the sheriff. Note that the real estate is owned by the land trustee and not by the beneficiary of the trust. The beneficial owner’s interest in the land trust is

[4] See also Section 363 of the Restatement (Second) of Torts, which is discussed in this case.

a personal property interest, not real property. See *Chicago Federal Savings and Loan Association v. Cacciatore*, 25 Ill.2d 535, 185 N.E. 2d 670 (1962).

765 ILCS 420/1 *et seq*.; recording the assignment of beneficial interest
In Cook County, with a regular assignment of beneficial interest, you record the assignment or a facsimile thereof, unless the consideration is $100.00 or less. If the consideration is $100.00 or less, you do not have to record the assignment or facsimile thereof. With a collateral assignment of beneficial interest, you also have to record the facsimile.

In all counties except for Cook County, with a regular assignment of beneficial interest, you record the assignment or a facsimile thereof, unless the consideration is $100.00 or less. If the consideration is $100.00 or less, you do not have to record the assignment or facsimile thereof. With a collateral assignment of beneficial interest, you do not have to record the facsimile.

760 ILCS 5/13; personal trusts; in the event of the death, resignation, refusal, or inability to act of any trustee, the remaining trustee can act, and if there is no remaining trustee, then a successor trustee may be appointed by a majority in interest (or number) of the beneficiaries.

765 ILCS 410/1; land trusts; "where the land trust agreement is silent as to the appointment of a successor trustee in the event of the death, resignation or termination due to dissolution, of a land trustee, the beneficiary or beneficiaries having the power of direction of the land trust agreement may appoint a successor or successors to the trust property by filing a declaration of appointment of a successor in trust, in the office of the recorder in the county in which the trust property is located."

755 ILCS 5/8-1(f); actions to set aside or contest the validity of a revocable inter vivos trust agreement

735 ILCS 5/15-1501(b)(3); a permissible party in a mortgage foreclosure is "a trustee holding an interest in the mortgaged real estate or a beneficiary of such trust."

735 5/15-1106(3); under certain conditions collateral assignments of the beneficial interest of a land trust must be foreclosed under the Illinois Mortgage Foreclosure Law see also *Quinn v. Pullman Trust*, 98 Ill.App.2d 402, 240 N.E.2d 791 (1968), *Landino v. American National Bank of South Chicago Heights*, 120 Ill.App.3d 740, 458 N.E.2d 1070 (1983).

765 ILCS 407/1 *et seq*.; Land Trust Beneficiary Rights Act

Liens against an individual may attach to property held in personal trust; *Murnan v. Stewart Title Guaranty Co*., 585 F. Supp. 2d 825 (Virginia, 2008); *Murnan v.*

Stewart Title Guaranty Co., 607 F. Supp. 2d 745 (Virginia, 2009);*Murnan Spring Hill Trust v. Stewart Title Guaranty Co*. 374 Fed. App. 459 (4th Cir. 2010).

765 ILCS 5/3; Statute of Uses

"Land Trusts, Deeds, and Chain of Title Issues," by Richard W. Rappold, *Real Property*, November 2019, regarding *Alward v. Jacob Holding of Ontario, LLC, et al*., 2019 IL App (5th)189332

"Lost Trust Agreement," by John Maville, *Real Property*, February 2021.

"Opening a Pandora's Box for Illinois Land Trust Practice," by Donald Hyun Kiolbassa, *Real Property*, July 2022, regarding *Corcoran v. Rotheimer*, 2022 IL App (1st) 201374.

Trust Code

See Illinois Trust Code

Trusts and Trustees Act

The Trusts and Trustees Act has been repealed; see Illinois Trust Code

Truth in Lending Act

Obi v. Chase Home Finance, No. 10 C 5747 (2011), a borrower may rescind a transaction either through a letter to a creditor within three years of the transaction or by a lawsuit filed within three years of the transaction.

Uniform Commercial Code

810 5/1-101 *et seq.*

A financing statement executed by a borrower is a lien on fixtures or other pledged collateral. It is effective for five years from the date of filing, but it may be extended for additional five-year periods by the recording of continuation statements that are recorded within six months of the expiration of the then current five-year period. (See 810 ILCS 5/9-515)

Utilities

735 ILCS 5/7-102; An entity cannot condemn the property belonging to a public utility without the approval of the Illinois Commerce Commission.

220 ILCS 5/7-102; The Illinois Commerce Commission must, generally speaking, approve the sale of any property owned by a public utility, but see 220 ILCS 5/7-

102(D) for exceptions.

605 ILCS 5/9-113; A public utility has the right to install underground utilities in a statutory dedicated road. Such underground installations are regarded as being within the easement for highway purposes, in favor of the public. But this statute provides limitations on this right. This statute indicates that the consent of the underlying fee owner of the land is a necessary prerequisite to the installation of any utilities. Note that Public Act 93-357, effective January 1, 2004, adds new subsection (h-1) to 605 ILCS 5/9-113 and drastically amends subsection (l).

65 ILCS 5/11-135-7 allows for the construction of water mains under and across highways and street.

Richard F. Bales, "New Legislation Concerning Utilities and Rights-of-Way," Illinois State Bar Association's *Real Property* newsletter, May 2004.

Howard Samson, "Road Conveyancing after Benno," Illinois State Bar Association's *Real Property* newsletter, May 2004.

Vacations

55 ILCS 5/5-1036; vacation of town plats; a county board may authorize the vacation of any town plat when the plat is not within any incorporated town, village or city, on the petition of two-thirds of the owners thereof, provided that any such order of vacation shall be passed by the affirmative vote of at least two-thirds of the members of the county board. See also 55 ILCS 5/5-1037; a county board may also change the name of any town plat.

65 ILCS 5/11-91-2; 65 ILCS 5/11-91-3; Generally speaking, when a street or road is vacated, ownership of the vacated parcel splits equally to the adjoining landowners. See *Piper v. Reder*, 44 Ill. App.2d 431 (1963); *Prall v. Burckhartt*, 299 Ill. 19 (1921). But in 1997 Public Act 90-179 amended 65 ILCS 5/11-91-1. It provided that with a vacation of a street or alley, if only one abutting landowner makes payment, then the *entire width* of the street or alley could inure to the benefit of that one landowner. In 1999 the Illinois Supreme Court in *Chavda v. Wolak*, 188 Ill.2d 394, 721 N.E.2d 1137 (1999), ruled that the statute was constitutional. 65 ILCS 5/11-91-1 also provides for the reservation of utility facilities in the vacated street or alley.

765 ILCS 5/7a; Since October 3, 1969, when a street or alley is vacated, and when the lot adjacent to this vacated parcel is conveyed, the vacated parcel does not have to be specifically included in the deed in order for it to be conveyed. As long as the deed does not specifically *exclude* the vacated parcel, the deed conveys the vacated parcel as well.

605 ILCS 5/6-302; some people have argued that this statute stands for the

proposition that if a subdivided lot is on one side of a street, and on the other side there is no subdivision, but instead there is a creek, river, or railroad tracks, then upon vacation, the entire street automatically vacates in favor of the subdivision; none of the street goes to the creek, the river, or the railroad tracks. However, this is not the case. The statute provides as follows:

> *The highway commissioner of any road district may in his discretion reduce the width of any existing township or district road to a width of 40 feet, if the reduction is petitioned for by a majority of the landowners along the line of such road within the district. When possible the land vacated by reducing the width of the road shall be taken equally from each side of the road. In cases of natural obstruction on one side of the road or where the road extends along the right-of-way of any railroad, river or canal, the commissioner is authorized to reduce the width of road on one side only.*

765 ILCS 205/6; Any plat may be vacated by the owner of the premises at any time before the sale of any lot therein, by a written instrument to which a copy of the plat is attached, declaring it to be vacated.

65 ILCS 5/11-61-2; 65 ILCS 5/11-91-1; 65 ILCS 5-11-91-2; These statutes relate to a municipal (Chavda) vacation

65 ILCS 5/11-61-2; 65 ILCS 5/11-91-1; 65 ILCS 5/11-91-2 ;These statutes relate to a municipal (non-Chavda) vacation

605 ILCS 5/5-109; 605 ILCS 5/5-110; These statutes relate to a county right-of-way vacation.

70 ILCS 805/6; This statute relates to a forest preserve vacation.

65 ILCS 5/11-91-1 and 605 ILCS 5/5-109 indicate that a vacation ordinance may reserve utility facilities in a vacated municipal or county right-of-way.

765 ILCS 205/6 provides: "Any plat may be vacated by the owner of the premises at any time before the sale of any lot therein, by a written instrument to which a copy of the plat is attached, declaring it to be vacated." The statute also provides that if the plat contained easements, the vacation instrument shall reserve, in favor of the easement holder, these easements in order to provide utility service to the land. See *Ruble v. Sturhahn*, 348 Ill.App.3d 667, 810 N.E.2d 278, 284 Ill. Dec. 625 (4th Dist. 2004)

765 ILCS 205/7; any part of a plat may be vacated as provided in 765 ILCS 205/6, but such vacation shall not destroy the rights of the other lot owners. See *Ruble v. Sturhahn*, 348 Ill.App.3d 667, 810 N.E.2d 278, 284 Ill. Dec. 625 (4th

Dist. 2004)

65 ILCS 5/11-61-2: "The corporate authorities of each municipality may vacate, lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds. . . ."

65 ILCS 5/11-91-2: "Except in cases where the deed, or other instrument, dedicating a street or alley, or part thereof, has expressly provided for a specific devolution of the title thereto upon the abandonment or vacation thereof, whenever any street or alley, or any part thereof, is vacated under or by virtue of any ordinance of any municipality, the title to the land included within the street or alley, or part thereof, so vacated, vests in the then owners of the land abutting thereon, in the same proportions and to the same extent, as though the street or alley has been dedicated by a common law plat (as distinguished from a statutory plat) and as though the fee of the street or alley had been acquired by the owners as a part of the land abutting on the street or alley."

605 ILCS 5/5-109; a county board may vacate a county highway or part of a county highway. This statute also provides for the reservation of utility facilities in the vacated county highway or part of a county highway.

605 ILCS 5/5-110; when the county board vacates a county highway or part of a county highway, the county board shall have a legal description of the vacated land recorded. The recorder shall mark any recorded plat of the highway in a manner that shows the vacation.

605 ILCS 5/6-301 *et. seq*.; the "laying out, widening, altering or vacating township and district roads."

605 ILCS 5/9-127(a): "Except as provided in subsections (b), (c), and (d) and in cases where the deed, or other instrument, dedicating a highway or part thereof, has expressly provided for a specific devolution of the title thereto upon the abandonment or vacation thereof, whenever any highway or any highway or any parts thereof is vacated under or by virtue of any Act of this State or by the highway authority authorized to vacate the highway, the title to the land included within the highway or part thereof so vacated, vests in the then owners of the land abutting thereon, in the same proportions and to the same extent, as though the highway had been dedicated by a common law plat (as distinguished from a statutory plat) and as though the fee of the highway had been acquired by the owners as a part of the land abutting on the highway except, however, such vacation shall reserve to any public utility with facilities located in, under, over or upon the land an easement for the continued use, if any, by such public utility."

Court case: *Chavda v. Wolak*, 188 Ill.2d 394, 721 N.E.2d 1137 (1999)

Editor's Notes:

In 1997 Public Act 90-179 amended the Illinois Municipal Code (65 ILCS 5/11-91-1). As amended, it provided that with a vacation of a street or alley, if only one abutting landowner makes payment, then the *entire width* of the street or alley could inure to the benefit of that one landowner.

This is contrary to years of common law and statutory law, which provided that in the event of such a vacation, title would, generally speaking, split down the middle between abutting landowners.

When this amendment became law, title companies refused to follow it, arguing that it was probably unconstitutional under the 5th and 14th amendments, in that it amounted to a taking of land without just compensation and without due process.

But in 1999 the Illinois Supreme Court in *Chavda v. Wolak*, 188 Ill.2d 394, 721 N.E.2d 1137 (1999), ruled that the statute was constitutional.

Thus, under *Chavda v. Wolak*, one may have a right-of-way vacation when the entire width of the vacated right-of-way vests in only one adjoining landowner. Or, the vacation may result in title vesting in two or more landowners, but said owners own lots next to each other, on only one side of the road. In other words, one can have a right-of-way vacation where there is no “50-50 split” down the middle of the road.

Important: When insuring a *Chavda* vacation, the title examiner must read the ordinance carefully! The title examiner should review the statute. The attorney and the title examiner should study the guidelines that are set forth below. Note especially the terms of compensation; as shown below, who pays compensation for the vacation to the municipality has a direct bearing on how title is vested.

Remember that the title examiner can still insure a right-of-way vacation the “old” way, wherein title to the vacated right-of-way splits down the middle. A *Chavda* vacation is a vacation wherein the title company is asked to insure the entire width of the right-of-way so that the right-of-way inures to only one (or less than all) of the adjoining landowners.

If a road ran between two different subdivisions, but the road was created pursuant to only one subdivision, then if there were a vacation of that road, the entire width of the road would normally vacate to the benefit of only those adjoining lot owners who owed the lots in the subdivision that created the road. But under *Chavda*, it would still be possible for the other adjoining landowners to get the entire right-of-way.

Here are the *Chavda v. Wolak* guidelines:

- If the vacation ordinance provides that compensation is to be paid by only one abutting owner to the municipality, then title to the vacated street or alley must vest fully in that one abutting owner who pays the compensation.

- If the vacation ordinance provides that compensation is to be paid by more than one but less than all abutting owners to the municipality, then title to the vacated street or alley must vest fully in these abutting owners who pay the compensation.

- If the vacation ordinance provides that compensation is to be paid by *all* abutting owners to the municipality, then title to the vacated street or alley must vest fully in *all* these adjoining owners who all pay the compensation.

- If the vacation ordinance provides that *no* compensation is required, then title to the vacated street or alley must vest fully in *all* abutting owners.

Warranties

765 ILCS 20/1, the Covenants of Warranty Act; No covenant of warranty shall be considered as broken by the existence of a highway on the land conveyed, unless otherwise particularly specified in the deed.

Waters, In General, Statutes

55 ILCS 5/1-1003; each county bounded by either the Mississippi, Ohio, or Wabash rivers shall have jurisdiction over such river to the extent it is so bounded.

55 ILCS 5/1-1004; each of the counties bordering on Lake Michigan shall have jurisdiction over the lake eastwardly, to the east line of the state.

65 ILLCS 5/7-5-1; washing away of riverbanks

65 ILCS 5/11-92-1; Harbors for Recreational Use; mentions “public water” and defines “artificially made or reclaimed land.”

615 ILCS 5/4.9 et seq.; Rivers, Lakes, and Streams Act. See, e.g., 615 ILCS 5/24, which provides that ownership of the land beneath the waters of Lake Michigan is owned by the State of Illinois for the use of the public. (Note that chapter 615 of the Illinois Compiled Statutes is entitled “Waterways.”)

70 ILCS 605/1-1 *et seq.;* The Illinois Drainage Code
Section 2-12 states that a landowner cannot willfully and intentionally interfere with any ditches or natural drains that cross his land so that the flow of water is impeded, unless the ditch or drain is entirely on the landowner’s land. In this

regard, see *Van Meter v. Darien Park District*, 207 Ill. 2d 359 (2003);

70 ILCS 805/5a et seq.; waters adjacent to forest preserve property

70 ILCS 1205/11-1 et seq.; park districts abutting public waters

70 ILCS 1230/1 et seq.; Park Commissioners Water Control Act

605 ILCS 5/6-302; If a subdivided lot is on one side of a street, and on the other side there is no subdivision, but instead there is a creek, river, or railroad tracks, then upon vacation, the entire street vacates in favor of the subdivision; none of the street goes to the creek, the river, or the railroad tracks.

Waters, Navigable

A lake or river is navigable if the body of water, in its natural state, is used or is capable of being used as a highway for commerce over which trade and travel may be conducted in the customary modes of travel on water. The *Code of Federal Regulations*, or *CFR*, states at 33 CFR 329.4 that navigable waters of the United States are those waters that "are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." See Margit Livingston, "Public Recreational Rights in Illinois Rivers and Streams," 29 DePaul Law Review 353 (Winter 1980); Margit Livingston, "Open Space Preservation and Acquisition Along Illinois Waterways," *Chicago-Kent Law Review*, 56, No. 3 (October 1980).

The Federal government has the right to enact legislation and thereby regulate commerce over navigable waters. See *Bofman v. Material Service Corp*., 125 Ill.App.3d 1053, 466 N.E.2d 1064, 81 Ill.Dec. 262 (1st Dist. 1984); *Du Pont v. Miller*, 310 Ill. 140, 141 N.E. 423 (1923), error dismissed 269 U.S. 528, 46 S.Ct. 17, 70 L.Ed. 395 (1925).

Regardless of who owns the bed of a navigable body of water, the public has an easement for navigation over these waters. See *Du Pont v. Miller*, 310 Ill. 140, 141 N.E. 423 (1923), error dismissed 269 U.S. 528, 46 S.Ct. 17, 70 L.Ed. 395 (1925);*Schulte v. Warren*, 218 Ill. 108, 75 N.E. 783 (1905).

See the Illinois Administrative Code, Title 17, Section 3704, Appendix A, found at https://casetext.com/regulation/illinois-administrative-code/title-17-conservation/part-3704-regulation-of-public-waters/appendix-a-public-bodies-of-water. This appendix is a list of so-called "public bodies of water" in Illinois. See also https://dnr.illinois.gov/waterresources/publicwaters.html.

Waters, Nonnavigable

The public has no easement for navigation over a nonnavigable stream. Otherwise, riparian rights and servitudes along navigable and nonnavigable waters are similar. See *Holm v. Kodat*, 2022 IL 127511. For example, the owners along both navigable and nonnavigable waters cannot obstruct or divert the water flow to the injury of other riparian owners. 36 *Illinois Law and Practice*, "Waters," § 1, *et seq*.; Fitch, *Real Estate Titles in Illinois*, § 372.

When a tract of land is bounded by a creek, stream, or river (hereafter generically called "stream"), a conveyance of that tract will convey the land under the water to the center of the stream (assuming the grantor owns to the center), unless the deed indicates an intent to convey only to the edge of the stream. This is the case, regardless of whether or not the body of water is navigable. See *Helmer v. Castle*, 109 Ill. 664 (1884); *Kinsella v. Stephenson*, 265 Ill. 369, 106 N.E. 950 (1914); *Carter Oil v. Delworth*, 120 F.2d 589 (1941).

Waters, Lakes and Ponds

A lake is a large inland body of water that has little or no current, which is fed by surface waters or springs, and occupies a natural depression in the surface of the earth. A pond is similar to a lake, except that it may be natural or artificial and is much smaller in size. The primary difference between a creek, stream, or river and a lake or pond is that creeks, streams, and rivers have a natural motion or current in the water. Lakes and ponds in their natural state have no such motion or current. See *Trustees of Schools v. Schroll*, 120 Ill. 509, 12 N.E. 243 (1887); 36 *Illinois Law and Practice*, "Waters," § 28; *Corpus Juris Secundum*, Waters § 236.

The boundary line of a lake is the line at which water usually stands in its natural state, unaffected by storms or other causes. See *Smith v. City of Greenville*, 115 Ill.App.3d 39, 450 N.E.2d 389, 70 Ill. Dec. 916 (5th Dist. 1983); *Seaman v. Smith*, 24 Ill. 521 (1860); *Brundage v. Knox*, 279 Ill. 450, 117 N.E. 123 (1917).

Title to the bed of navigable lakes within the boundary of Illinois is vested in the State of Illinois in trust for all the people of the state. The owners of land adjoining a navigable lake own only to the water's edge. These navigable lakes include Lake Michigan. See *Dupue Rod & Gun Club v. Marliere*, 332 Ill. 322, 163 N.E. 683 (1928); Fitch, *Real Estate Titles in Illinois*, § 373.

The title of a riparian owner on a nonnavigable lake extends to the center of the lake. *Hardin v. Jordan*, 140 U.S. 371, 11 S.Ct. 808, 35 L.Ed. 428 (1891); 36 *Illinois Law and Practice*, "Waters," § 30.

Multiple riparian owners of the bed of a private nonnavigable lake have the right to the reasonable use and enjoyment of the surface waters of the entire lake, (not just the portion they own), provided they do not unduly interfere with the adjoining

owners' reasonable use and enjoyment of the lake. See *Beacham v. Lake Zurich Property Owners Ass'n*, 123 Ill.2d 227, 526 N.E.2d 154, 122 Ill.Dec. 14 (1988);

Waters, Statutes

615 ILCS 5/24 provides that "it shall be the duty of the Department of Natural Resources to carefully examine the shore lines of Lake Michigan, all other meandered lakes in Illinois and the Chicago River each year for the purpose of seeing that encroachments are not made upon or other unauthorized uses made of these bodies of water. . . ." See also 615 ILCS 5/26.

615 ILCS 5/7: "It shall be the duty of the Department of Natural Resources to have a general supervision of every body of water within the State of Illinois, wherein the State or the people of the State have any rights or interests, whether the same be lakes or rivers, and all all times to exercise vigilant care to see that none of said bodies of water are encroached upon. . . ."

615 ILCS 5/26: "The Department of Natural Resources shall, for the purpose of protecting the rights and interests of the State of Illinois, or the citizens of the State of Illinois, have full and complete jurisdiction of every public body of water in the State of Illinois, subject only to the paramount authority of the Government of the United States with reference to the navigation of such stream or streams, and the laws of Illinois. . . ."

735 ILCS 5/13-120(6); Adverse possession is not appropriate for an encroachment into "public waters."

Waters, Encroachments

Illinois Administrative Code, Title 17, Section 3704.50, indicates that a landowner would need to have a permit to construct a dock in a "public water." Section 3704.125 indicates that any such permit would not be transferable to a new purchaser of the property. See in general Illinois Administrative Code, Title 17, Section 3704.120.

735 ILCS 5/13-120(6); Adverse possession is not appropriate for an encroachment into "public waters."

"Statewide Permit Number 5." This permit authorizes the construction of minor non-commercial recreational boat docking facilities into public waters. https://dnr.illinois.gov/content/dam/soi/en/web/dnr/waterresources/documents/resmanstatewidepermit5.pdf

Waters, Definitions

Accretion is the gradual and imperceptible addition to riparian lands that results from water washing up sand, earth, gravel, or other materials.

Alluvion is the land formed as the result of accretion.

Avulsion is the sudden addition or loss of land caused by the action of water or the sudden change in the bed or course of a stream.

Erosion is the gradual and imperceptible loss of riparian land by currents or tides.

Reliction is the process by which land is created by the gradual receding of water from one side of a stream, lake, or pond.

Submergence is the disappearance of land under rising water. Submergence should not be confused with erosion.

Waters, Meandering

As a stream flows, the water on the inside of a curve moves more slowly than the water on the outside of the curve. Alluvium tends to be deposited along the banks on the inside of the curve, while the bank along the outside of the curve tends to wear away because of erosion. This action, though gradual, can cause a stream to change its course over time.

The riparian owner on the inside of the curve owns the land formed by the deposit of alluvion. The riparian owner on the outside of the curve loses title to land worn away by erosion. (See; *Lovingston v. St. Clair County*, 64 Ill. 56 (1872), appeal dismissed 85 U.S. 628, 21 L.Ed. 813 (1873); *St. Clair County v. Lovingston*, 90 U.S. 46, 23 L.Ed. 59 (1874); *McCue v. Carlton*, 399 Ill. 11, 76 N.E.2d 435 (1947).

The riparian owner owns the alluvion, even if it is the result of natural or artificial causes or the acts of third parties, as long as the riparian owner does not create the conditions that cause the deposit of the alluvion. See *St. Clair County v. Lovingston*, 90 U.S. 46, 23 L.Ed. 59 (1874); *Brundage v. Knox*, 279 Ill. 450, 117 N.E. 123 (1917); *Revell v. People*, 177 Ill. 468, 52 N.E. 1052 (1898).

A prolonged drought may cause the waters of a lake or pond to gradually recede from its banks. A stream may slowly diminish in size. Any land exposed by this reliction becomes the property of the adjoining riparian owner. See *Linn Farms, Inc. v. Edlen*, 111 Ill.App.2d 294, 250 N.E.2d 681 (4th Dist. 1969); *City of Peoria v. Central Nat. Bank*, 224 Ill. 43, 79 N.E. 296 (1906);

Similarly, a riparian owner loses title to land that is submerged gradually and imperceptibly. See *Chicago Real Estate Board v. Mullenbach*, 184 Ill.App. 437 (1st Dist. 1913); *Schulte v. Warren*, 218 Ill. 108, 75 N.E. 783 (1905).

Unless otherwise qualified, a description of land bounded by water will include any accretions. See *Rutz v. Kehr*, 143 Ill. 558, 29 N.E. 553 (1891); *Chicago Dock & Canal Co. v. Kinzie*, 93 Ill. 415 (1879); *McCue v. Carlton*, 399 Ill. 11, 76 N.E.2d 435 (1947); *Cobb v. Lavalle*, 89 Ill. 331 (1878).

Waters, Articles

"On the Waterfront: An Illinois Water Law Trilogy," by Richard F. Bales, *Real Property*, May 2008.

"*Alderson v. Fatlan*: The Illinois Supreme Court's Riparian Rights Case," by Richard F. Bales, *Real Property*, February 2009, regarding *Alderson v. Fatlan*, 231 Ill. 2d 311, 898 N.E.2d 595 (2008)

"Quarries, Lakes, and Riparian Rights: The 2nd District Applies the 'Artificial-Becomes-Natural Rule," by Richard F. Bales, *Real Property*, May 2010, regarding *Bohne v. LaSalle National Bank*, 399 Ill. App. 3d 485, 926 N.E.2d 976, 339 Ill. Dec. 501 (2nd Dist. 2010).

"Public Use of Nonnavigable Rivers: An Illinois Dilemma," by Richard F. Bales, *DCBA Brief* (DuPage County Bar Association), November-December 2021, regarding *Holm v. Kodat*, 2021 IL App (3d) 200164. See also *Holm v. Kodat*, 2022 IL 127511.

"Rollin' on the River: WWJD?," by Michael J. Rooney, *Real Property*, December 2021, regarding *Holm v. Kodat*, 2021 IL App (3d) 200164. See also *Holm v. Kodat*, 2022 IL 127511.

Nonnavigable Rivers and Streams in Illinois: Illinois Supreme Court Punts," by Michael J. Rooney, *Real Property*, August 2022, regarding *Holm v. Kodat*, 2022 IL 127511.

Waters, Recent Illinois Court Cases

Beacham v. Lake Zurich Property Owners Association, 123 Ill.2d 227, 526 N.E.2d 154, 122 Ill. Dec. 14 (1988)

Statler v. Catalano, 293 Ill. App. 3d 483, 691 N.E. 2d 384, 229 Ill. Dec. 274 (5th Dist. 1997)

Hasselbring v. Lizzio, 332 Ill. App. 3d 700, 773 N.E.2d 1026 (5th Dist. 2002)

Roketa v. Hoyer, 327 Ill. App. 3d 374, 763 N.E.2d 417, 261 Ill. Dec. 447 (5th Dist. 2002).

Nottolini v. LaSalle National Bank, 335 Ill. App. 3d 1015, 782 N.E. 2d 980, 270 Ill. Dec. 421 (2nd Dist. 2003)

Alderson v. Fatlan, 231 Ill. 2d 311, 898 N.E.2d 595 (2008)

Bohne v. LaSalle National Bank, 399 Ill. App. 3d 485, 926 N.E.2d 976, 339 Ill. Dec. 501 (2nd Dist. 2010)

Fassnacht v. Baldwin, 2011 IL App (2nd) 101223-U

Katsoyannis v. Findlay, 2016 IL App (1st) 150036

Holm v. Kodat, 2022 IL 127511

Wills

755 ILCS 5/4-1(b); legal capacity of testator

Probating copy of will, see *Illinois Bar Journal*, "Law Pulse," October 2006; "Yes, You Can Probate a Copy of a Lost Will," by Janet L. Grove, *Trusts & Estates* ISBA Section newsletter, October 2005; *In re Estate of Koziol*, 366 Ill. App. 3d 171, 851 N.E.2d 198 (1st Dist. 2006).

Wind Farms

505 ILCS 147/1 *et seq.*, Wind Energy Facilities Agricultural Impact Mitigation Act

Zombie Liens and Zombie Properties

"Zombie Condo Liens: What are They, and What Do We Do About Them," by Adam B. Whiteman, *Real Property*, September 2014.

"'Zombie Properties' Are on the Rise—But Here's How to Kill the Trend," by Dory Rand, *Real Property*, June 2014.

Zoning

Passalino v. City of Zion, 237 Ill. 2d 118, 928 N.E.2d 814 (2009); citing *Jones v. Flowers,* 547 U.S. 220 (2006), the court held that notice by publication of a proposed zoning change is not sufficient notice.

65 ILCS 5/11-13-7; applicants for a special use must send notice to all adjacent landowners within 250 feet of the land in question.