

## MARITAL PROPERTY WRAP-UP

1. Common law and community property, some notes on where we are and where we're going. [I gave you some well-drafted statutes; I don't expect you to remember all the details; what's the main point?] Why is marital property important? An answer to the question what are the property consequences of getting married:

- a. Undertaker (death)
- b. Tax collector (taxes)
- c. Angry creditor (liability for debt)
- d. Failed marriage counselor (divorce)
- e. AARP (retirement, both private and public systems, e.g., Social Security)

Obviously, one could devote a whole course to this. The remarkable thing about this list, other than (e), is that they all deal with times of crisis, not with the normal. The lawyer arrives with the undertaker, the tax collector, the angry creditor, the failed marriage counselor, and, to a somewhat lesser extent, the AARP. We've focused on a couple of rather specific problems that give you a flavor of it. *Holbrook* deals with divorce, and on the fact that the lawyers who do it aren't always up-to-speed on setting up airtight transactions. *Beal* raises the question of separating marital property from marriage. That problem was anticipated as early as *Haas* and *Moe*. In all three cases, people tried to do something that they could have done easily if they were married and ended up with a real botch. More recent years have seen the rise of the issue of what is marriage.

2. Explain our marital property system to an intelligent foreigner.

- a. 41 states common-law, i.e., separate marital property; 8 perhaps 9 states community property Louisiana, Texas, Arizona, New Mexico, California, Nevada, Washington, Idaho, perhaps Wisconsin. What's the difference between the two?
- b. The tension between communitarian and separateness ideas remains. Mary Ann Glendon offers a strong point of view. She wrote that piece some time ago; I'm not sure that she would say the same thing today.

The point of this discussion is that the dividing line between so-called 'common-law, separate property' states and community property states is becoming increasingly blurred. One may legitimately ask how different the common-law states are from the separate property states when in the common-law states: (a) the surviving spouse has the right to a substantial unbarrable share of his/her spouse's estate; (b) the couple has the power to file a tax return that includes both of their incomes, and a considerable financial incentive to do so; (c) the couple may be contractually liable for each other's debts; (d) the couple's property will be subject to 'equitable distribution' in the event of a divorce; and (e) neither of them (by public regulation) may make major changes in their private pension plans without the consent of the other.

## LANDLORD AND TENANT

3. LL-T – introduction pp. S233–235.

- a. Over the course of the last 40 years there has been a fundamental restructuring of residential LLT law in the U.S. That it is confined to residential law is worth mentioning.
- b. One point that is perhaps not emphasized enough is how much of the change has been statutory. The new concepts are, by and large, judicial and/or academic

inventions, but it is the legislatures that have seen to it that they were adopted in a substantial majority of the jurisdictions.

- c. The judicial, and to some extent the legislative reforms, have been strongly influenced by a conceptual pairing, contract vs. property. The movement from latter to the former provided a powerful catalyst for change. Whether it really solves the problem is another story.
4. Some basics.
- a. The landlord-tenant relationship involves a grant, normally by a fee owner, called the landlord, to the tenant, of the right to possession of the premises for a period of time, reserving out of the grant an interest in the land expressed in money, the rent.
  - b. The grant may be for a fixed term, called “a term of years,” even if the term is only for a fraction of a year or a year or years plus a fraction. It may be for a specific period renewable automatically unless either the landlord or tenant gives notice that s/he does not want to renew. Week- to-week and month-to-month tenancies are probably the most common. Year-to-year periodic tenancies are common in agricultural leases. Or the tenancy may be at will, but here the legislatures have intervened and have provided that for most teancies at will 30 days’ notice to quit is required.
  - c. The grant is usually accompanied by a contract, both the grant and the contract usually being incorporated in a document called a “lease,” in which the tenant makes a contractual promise to pay the rent.
  - d. The lease will normally give the landlord the right to forfeit the grant if the rent is not paid. If it does not, statutes in almost all, if not all, the states provide the same thing. Most leases also provide for forfeiture if the tenant violates other covenants in the lease, but that issue is not at stake in any of our cases for today.
  - e. The common law and the law of every jurisdiction of which I am aware relieves the tenant of his/her obligation to pay rent if the landlord evicts the tenant. Prior to the recent explosion in landlord-tenant law, the law of most states did not allow the tenant to withhold rent and remain on the premises if the landlord breached any covenant other than the covenant to give the tenant possession of the premises.
  - f. In all states, when the tenant forfeits the lease by non-payment of rent, the landlord is entitled to recover possession of the premises through what is called summary proceedings in a very low-level court. Again, prior to the recent change in the law, the defenses that the tenant could raise in a summary proceedings were quite limited.
5. *Lemle*
- a. What does court hold on the facts?
  - b. What does it say? Why?
    - i. Opportunity to inspect
    - ii. LL = manufacturer
    - iii. Expectations of the parties
  - c. How different from previous doctrine? I.e., independent vs. dependent covenants, not constructive eviction.

SUMMARY: At bottom, a contractual analysis fits fairly well with what was going on in this case. Either the Lemles didn't get what they had bargained for, in which case Mrs. Breeden breached her contract with them, or the Lemles thought that they were getting one thing and Mrs. Breeden thought that she was selling them something else, in which case there was no meeting of the minds. I'm inclined to think that it was the second. If that's right, then the only thing that is puzzling is the court's attitude to the presence of rats. This may be the Hawaii court promoting the tourist trade: "I am shocked, shocked, that there are rats on the beach in a subtropical area." In either case, the remedy, at least in this case, is the classic contractual one of rescission and restitution. The Lemles move out. Mrs. Breeden gets her house back, and the Lemles get back their deposit.

6. *Javins*

<https://www.google.com/maps/place/Clifton+Terrace+Apartments/@38.922067,-77.0312943,15z/data=!4m5!3m4!1s0x0:0xa925454ef20b3a41!8m2!3d38.922067!4d-77.0312943>

- a. how different from *Lemle*
  - i. repair covenant vs. warranty
  - ii. non-waivable
  - iii. calculation of rent owing
- b. what arguments for extending covenant?
  - i. jack-of-all-trades
  - ii. consumer protection cases
  - iii. nature of the market—the housing shortage, inequality of bargaining power, etc.
  - iv. required by the code
- c. what argument for making it unwaivable?
  - i. inequality of bargaining power
  - ii. the codes
- d. the remedy — what is it?
  - i. rescission and restitution?
  - ii. damages for breach of contract?
  - iii. a kind of specific performance?

7. *Javins* questioned

- a. the problematic nature of the arguments
- b. it's not contract
  - i. non-waivable
  - ii. remedy
- c. the problem of damages—contract standard is value of what you bargained for less the value of what you got deducted from the contract price, i.e., price minus (value1-value2)
  - i. rent minus (rent [as surrogate of what you bargained for] minus value2)

- ii. rent minus (value1 minus value2) with value1 being calculated on the basis of the rental value of middle-class housing
  - iii. rent minus % of abatement
- 8. Now what the above analysis suggests is not that *Javins* is wrong, but that *Javins* isn't contract, at least it's not contract as that term is traditionally understood. This is important, however, because if it's not contract, then we are deprived of the justification that we traditionally give for enforcing contracts: this is what the parties agreed to. This is not what the parties agreed to; they agreed to something else, but we're going to treat them as if they agreed to this.
  - a. There is no justification, some would argue, for imposing contractual terms on people
  - b. Courts should not make changes like *Javins*
- 9. Why should we upset the conclusions that the market has reached? To bring the premises "up to code." This is a policy argument in the technical sense of the word 'policy'. The classic argument is if you raise the costs of supplying any good by regulation, those costs will get passed on to the consumer if the market is even vaguely competitive. This will cause some consumers to drop out of the market. It has, however, been argued that such is not the case in the case of low-income housing.
- 10. The conditions under which it is not the case:
  - a. Inelastic supply of housing at the margin
  - b. Elastic demand at the margin
  - c. There are a significant number of marginal tenants
  - d. All units are earning rents
  - e. Code enforcement does not improve landlords' ability to price discriminate
  - f. Code enforcement will not shift the demand curve
  - g. Transactions costs are relatively low
- 11. Results and some thoughts
  - a. the empirical evidence is mixed—largely ineffective, probably because most low-income tenants don't know about it. There are also cases where it has been too effective. The revamping of Clifton Terrace. Key language: "Of the building's original 289 apartments, 23 households that receive Section 8 housing vouchers remain."
  - b. the moral point—one can favor this approach even if it's not effective.
  - c. the racial point—a substantial number of tenants of slum housing are racial minorities.
  - d. poor people are poor.