REAL ESTATE

LAW

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A well respected Winter Park attorney, Frank Pohl practices in the area of real estate law.

His column covers a wide range of topics that can help you better understand and avoid potential legal issues related to buying, selling, and owning a home.

If you have topics or questions pertaining to the legal aspects of residential real estate that you would like to see addressed in this column, send them to Frank c/o:

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THE UNEXPECTED HEIR

I recently met with a client for whom our law firm had previously prepared a will. Jeremy, who owns a home and two investment properties, told me he had remarried, and asked that we revise his will to provide for his new wife, Emily. Fortunately he remembered our firm's earlier advice that certain events, including remarriage, can impact the provisions of an existing will. He and I discussed what he hoped to achieve in revising the will. Our firm then prepared a codicil *(amendment)* to his will, adding the new provisions. He signed the codicil in front of the requisite witnesses and notary public.

Jeremy is now confident that he has made all the appropriate provisions for his new family, and will contact me again if certain events should occur in his life, or if he otherwise wishes to change any of the dispositions in his will.

A will, with certain limitations, can be amended whenever the intentions of the Testator change. *(The Testator or Testatrix is the person making/signing the will.)* Amendments can be in the form of a new will *(automatically revoking any prior existing will)* or by codicil to a will. Once finalized, certain events – such as the birth of a child, adoption of a child, divorce, and subsequent marriage – can trigger changes to the dispositions made in that will. Under Florida law, these triggering events do not by definition revoke the existing will. Instead, they impact the manner in which certain or all of the assets of the Testator's estate are distributed.

If Jeremy had not amended his existing will, and Emily outlived Jeremy, then Emily would be entitled to inherit Jeremy's property under the provisions of the Florida intestacy statutes *(i.e. as if Jeremy had no will)*, potentially defeating Jeremy's intentions at the time of his death. For example, Jeremy had previously devised one of his investment properties to his church. If he had not amended his will after he remarried, the church most likely would be unable to enforce that bequest.

As I explained in my earlier column, *("Should Will Be Done–Issue 1, 2007")* Emily would inherit Jeremy's entire estate if there are no lineal descendants, or a substantial portion of his estate if there are lineal descendants. Jeremy wisely opted to define his goals by amending his will, rather than relying on the provisions of the Florida intestacy statutes. *(Under Florida law, these intestacy provisions might not apply if Jeremy had already provided for Emily in his will, or if his will had clearly disclosed an intention not to make provision for Emily.)* These statutes are technical and subject to interpretation. You should always consult with a qualified estate attorney to determine that these issues have been properly addressed. Planning, as always, is critical.

A similar result may occur in the event of a subsequent birth or adoption of a child, by which the after-born or adopted child would be entitled to inherit his/her proportionate share under the intestacy statutes. Although the statutes provide a different formula for a child born or adopted after the creation of the will *(pretermitted)* than for the subsequent spouse, the failure of the Testator to provide for either may have an unintended impact. However, Including certain language in a will may preclude imposing the provisions of the pretermitted child statute. For example, if a Testator's will states that the omission was intentional, these provisions do not apply. Also, if the Testator had one or more children at the time the will was executed, and devised

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substantially all of the assets to the other parent of those children, and that other parent not only survived the Testator but is also entitled to take under the will, then these pretermitted child provisions don't apply. Once again, proper planning and draftsmanship are essential.

Dissolution of marriage is a triggering event that not only can impact the current ownership of real property, but can also impact certain provisions of a will. Whenever property is owned by two individuals as husband and wife–tenants by the entirety, and they subsequently divorce, the form of tenancy automatically shifts from tenancy by the entireties, with its survivorship features, to tenants in common. As tenants in common, they usually will each own a one-half interest outright, with no survivorship rights.

Divorce may void any provisions made in a will for the other *(ex-)* spouse, unless the will or the divorce decree expressly provides otherwise. Jeremy, for example, was first married to Marilyn. They never had any children, and prior to his divorce Jeremy drafted a will leaving everything to Marilyn. Jeremy's will never provided for the possibility of divorce, and the divorce decree never addressed ownership of any of Jeremy's real property or the provisions of Jeremy's or Marilyn's wills. Once the divorce decree was entered, Marilyn was effectively eliminated as a beneficiary under Jeremy's will. Jeremy then had his attorney prepare a new will, devising his assets to his local church and to other beneficiaries.

Two additional events impact and alter provisions of a will. The first relates to the intentional killing of the Testator. Popularly referred to as the Slayer statute, this provides that any person who unlawfully or intentionally kills or participates in procuring the death of an individual cannot be an heir of that individual – either as a beneficiary under the deceased's will or under the Florida intestacy statutes. The second event is the simultaneous death of both the Testator and the beneficiary under a will. It is also governed by Florida law, which provides that "unless a contrary intention appears in the governing instrument," the property shall be distributed under the prescribed statutory formula. These issues can and should be addressed by competent legal counsel to assure that an individual's wishes concerning his/her real and personal property, at death, are followed, and are not frustrated by these "unexpected" heirs. ▲