LEGAL MOJO

The Two Most Common Title Issues I See and How I Cure Them

By Kim Lowe

All new orders with a title company go through underwriting. The first step the title company takes is searching public records (deeds, mortgages, liens, wills, divorces, judgments, etc.) for documents that may affect the property's title.

The second step is the title examination. The title examiner determines what documents affect the property. The end product of this process is the title commitment. A title commitment is the title company's promise to issue title insurance policy(ies) after closing as long as the conditions and requirements contained in the commitment are satisfied. Note: Title examiners do not evaluate the legitimacy of the claims or issues they find. Schedules B and C (discussed below) are simply a recitation of what the examiner has found in the public record.

Title commitments in Texas consist of four parts: Schedules A, B, C, and D. For our purposes, Schedules B and C are the most important.

Schedule B is a list of exceptions/exclusions to the title policy. An exception/exclusion will not be insured under the insurance policy.

Schedule C issues must be cured at or before closing—for example, probate, bankruptcy, and tax issues. No matter how big or small, every transaction must pass through a Schedule C review by the title company's closing team and escrow officer before closing.

The following are the two most common issues I see with my office's closings.

1. Probate Issues: Deceased on Title

It is a fact: most people die without a will. Deceased persons remain in title to real estate until action is taken to clear the issue. In my experience, most families ignore this issue as long as possible. The good news is that most probate issues can be solved with cooperative heirs and beneficiaries without a formal probate.

When the title commitment has a deceased person on title and requires curative work (the requirements will be on Schedule C of the commitment), an Affidavit of Heirship ("AOH") can be your best friend. An AOH is a sworn statement of the decedent's family history that includes dates of birth, marriages, children, and cause(s) of death. An heir or any person with actual knowledge of the family can sign as the affiant. The AOH must also be signed by two disinterested witnesses who have personal knowledge of the deceased and their family history and who have known the family for at least ten years. In addition to the affiant's and disinterested witnesses' signatures, the best practice is to get all of the heirs' signatures on the AOH as well.

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If you are representing a seller, check with the title company about its preferred form of AOH. The title company's underwriting counsel will have a checklist of mandatory inclusions for the company's form. If you do not comply with the requirements on the title company's checklist, it may reject your AOH.

You can also use an AOH if the deceased's will was never probated. The title company will require signatures from the following: (1) the affiant (usually a family member); (2) two disinterested witnesses with knowledge of the deceased and deceased's family for at least ten years; (3) all heirs-at-law; and (4) all will beneficiaries. The list of people to sign may be long, so I recommend getting a running head start as it may take a while to get signatures. The degree to which the family cooperates will determine if you can successfully cure this issue using this informal method.

Intestate succession can be confusing. Modern family trees often have multiple marriages and stepchildren. Different rules can apply to surviving spouses, and to biological and adopted children, and they can vary depending on whether the decedent died before or after September 1, 1994. The Travis County Probate Court has a fantastic flow chart readily available on the court's website. It is what I use every time I have an intestate succession question.

2. Divorces

If your client is going through a divorce, never let him or her purchase the property until the divorce is final. It can create a title problem later on.

Once the divorce is finalized and one spouse "gets the house," never use a quitclaim deed to transfer the interest of the exiting spouse. In Texas, the term "quitclaim deed" is a misnomer -- it is not a deed at all. The difference between a quitclaim and a deed is "grant, sell, and convey" language. A quitclaim does not grant, sell, or convey – it is merely a surrender of any claim the existing spouse has to the property. A quitclaim deed is analogous to a release. Texas title companies will not accept a quitclaim as a conveyance document. The title company (on Schedule C) will require the filing of a curative deed to correct the problem. I see this issue all the time. This kind of vesting issue can prevent a closing. If you have a client who does not want to warrant (i.e., guarantee) title, you can use a "deed with no warranty." A title company will accept a deed with no warranty.

Suppose a divorced couple is still listed jointly on title post-divorce and the exiting spouse is uncooperative in signing a deed. There is a simple solution if the real estate ownership is addressed in the divorce decree. You can file a certified copy of the final divorce decree in the county's real property records. The recording will clear the exiting spouse from the title to the satisfaction of the title insurer without the need for the ex-spouse's signature.

As an aside, removing a party from title does not remove him or her as a debtor on the mortgage debt. Only a sale, refinance, or assumption of loan by the ex-spouse can remove the exiting spouse from the debt.

** Kim Lowe is the owner of the Law Office of Kim Lowe, PC in Austin. She is board-certified in commercial real estate and residential real estate. Kim can be reached at kimloweattorney@gmail.com.*