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Real Property for Family Law Attorneys

Hearing a term like “race notice” could cause you to flash back to Property 101, when you may have thought, “When am I ever going to need to know this?”

By Katherine Wahlberg

That question gets answered years later when you are assisting a client with a divorce who is asking if she needs to do anything about a prior judgment against a spouse that showed up on a title report. Or explaining to a client separated from his spouse why he’s being asked for his spouse’s signature on a refinance mortgage. So while your practice may not involve the regular use of the Rule in Shelley’s Case, having an understanding of the recording systems in Minnesota and the importance of properly recording interests in real estate is critical when assisting clients with real estate transactions.

Stroll or Sprint to the County Recorder?

Recording acts are statutes that establish the keeping of official county records to track ownership and the priority of interests in real property. The Minnesota Recording Act provides that a “conveyance not so recorded shall be void as against any subsequent purchaser in good faith.” Minnesota is a race-notice state, meaning that a bona fide purchaser who records first without knowledge of a prior interest obtains rights to the property which are superior to the rights of a prior purchaser who failed to record.¹ However, any purchaser (or mortgagee) with knowledge of a superior interest is not entitled to the protection of the Minnesota Recording Act. There are circumstances where late filing consequences can be avoided because priority, as established by the order of recording, is

defeated by actual notice or knowledge of a superior mortgage or encumbrance. Litigating notice issues can be costly, so even though you can win a lawsuit involving who knew what when, it is better to record first and save your client the time and trouble of litigation. The recording of documents in the county land records is what provides notice, so it is imperative that documents (whether by the attorney, the title company, or otherwise) get recorded promptly (and in the right county) to protect your clients’ interest.

Avoid the Pain of Rejection

A common scenario highlighting the importance of recording priority arises when a deed or mortgage is rejected or delayed in recording. Both the Recording Act under Minn. Stat. Ch. 507 and the County Recorder Act under Minn. Stat. Ch. 386 detail requirements for recording documents. Recorders’ offices also provide valuable information on the county’s website that, while not an exhaustive list, can be used as a checklist before submitting a document for recording. Use of Uniform Conveyancing Blanks (UCBs) is also helpful to efficiently prepare documents and reduce the potential of getting a rejection notice from the county recorder. The forms themselves can act as a checklist of what information you need from your client. In the context of a conveyance, for example: Is there

a well on the property and what disclosures are required? The Minnesota Department of Health website provides a link for searching for previously filed Well Disclosure Certificates from previous property transfers. Are the name and address of the drafter identified on the deed?² Is the future taxpayer identified?³ What information do I need in order to submit an eCRV (Certificate of Real Estate Value)?⁴ What’s the purpose of the transfer and what consideration is being paid in order to calculate the deed tax due?⁵ Does the deed qualify for minimum deed tax and what statement needs to be on the deed to avoid rejection by the county? Understanding the requirements of recording real estate title transactions and the risks associated with delayed recording can help avoid problems in what is oftentimes already a highly stressful experience for your client.

The Minnesota Title Standards and White Pages is a comprehensive guide, available through the MSBA, to assist attorneys in the examination of real estate titles and the documentation of real estate transactions. For example, do you need to record an affidavit of identity with a conveyance deed when your client took title by one name but has since married and changed last names? Or will recital of the former name in the deed itself

be sufficient? While the standards are not laws or court rules, they can provide answers to specific title questions that practitioners regularly face.

In addition to the general requirements of document recordation, a number of requirements are specific to conveyances by spouses and conveyance of homesteaded property. Under Minn. Stat. § 507.02, no conveyance of the homestead is valid without the signature of both spouses (with the limited exception of signing a purchase money mortgage where only one spouse takes title). There is a statutory presumption that homesteaded property can be overcome by adjudication to the contrary.⁶ The spousal signature requirement for homesteaded property remains in effect during the pendency of divorce proceedings, thus requiring both spouses' signatures in the context of a sale or refinance of property.

There are also a number of considerations to effectively record the award of property through divorce proceedings. Where a decree of dissolution of marriage sufficiently evidences the award of real property (including a complete legal description) and expresses clear intent to pass title from one spouse to another, a certified copy of the decree can be submitted for recording. The downside of recording the decree is that all of the other details, including maintenance and child support, become part of public records. The filing of a certificate of dissolution pursuant to Minn. Stat. § 518.148 can be recorded to prove divorce (and eliminate the title company's requirement that a now ex-spouse sign the new mortgage, for example) but does not alone affect the status of title.

In the interest of protecting your client's privacy, consider the use of a Summary Real Estate Disposition Judgment pursuant to Minn. Stat. § 518.191 to transfer title. There are specific statutory requirements for the judgment to effectively transfer title, including the provision of a complete legal description.⁷ The award of real property to one spouse doesn't eliminate a properly recorded mortgage or judgment lien against the title. Any previously recorded liens against the property are deemed to be prior and senior to the interest of the awarded spouse pursuant to the Minnesota Recording Act. Nor does a dissolution relieve a borrower of the mortgage debt though the other spouse is awarded the home and required to pay the mortgage. A release from the mortgage or a refinance would be required.

Torrens? Title Insurance?

Two simple, but critical, questions to ask at the outset when advising a client on a real estate

matter: Do you know if the property is abstract or Torrens? Do you know if you have a title insurance policy? If your client doesn't know or isn't sure, find out.

Whether property is abstract, Torrens, or both will affect your recommendation to the client on how to resolve the real estate issue involved. Under the abstract system, conveyances and other transactions concerning real property are recorded by the county recorder. The county exercises limited judgment in the acceptance of documents for recording on abstract property. Under the Torrens system, the owner of property is issued a certificate of title that identifies existing encumbrances on title. The Examiner of Titles and deputy examiners act as advisors to the Registrar of Titles, who is responsible for recording title documents for registered property. Whether the property at issue is abstract or Torrens will impact the steps to complete a given transaction and how you advise your client on the time and expense involved. Transactions involving Torrens title often require a hearing—for example, through the proceedings subsequent process set forth in Minnesota Chapter 508—and it is important to understand the requirements specific to transactions involving registered property.

In addition to knowing whether your client will have the aid of an examiner of title, you will want to know if he or she will have the aid of title insurance in addressing an adverse title matter. If your client purchased an owner title insurance policy and is faced with a title defect or adverse claim against his or her interest, review the covered risks to determine whether the matter falls within coverage under the title insurance policy and review the exceptions and exclusions listed in the title insurance policy to determine any limitations on coverage. Title policies vary in form and should be reviewed in the context of any real estate dispute or transaction contemplated by your client. And, being aware of the difference between an owner policy and a lender policy will allow you to advise your client on the importance of having his or her own policy. When in reasonable doubt as to coverage, report a claim to the insurer that issued the policy.

Where your client seeks to change who holds title while keeping property "in the family," your client will also want assurance that he or she will have continuing coverage under an existing policy. Keep in mind the limitations that may come into play in the event your client decides to hold title in some manner other than as held when the insurance policy was issued. Asking the "Any title policy?" question can lead to a pleasant call to let your client know of available

insurance. It will also and avoid the unpleasant call that coverage has terminated because of a conveyance out of the named insured without first seeking an endorsement from the title company to maintain the policy coverage.

Protecting the Privilege

Despite all efforts you take on behalf of your clients to achieve clear marketable title, such as by resolving mechanic's liens or establishing legal access to the family cabin, disputes and litigation may be inevitable. When working with unmarried partners or the seven adult children in resolving a parent's estate, for example, think about the potential conflicts that may exist between the various parties and determine whether a conflict waiver is necessary. Ask yourself, who is the client? Who else am I communicating with, and what concerns are there in terms of preserving the privilege? Are there members of a common interest group whose interests would be protected by use of a joint defense agreement including a confidentiality provision? At the outset of representation, remind your client what communications may be privileged and how a colorful email to another relative detailing the unfortunate backstory of an ugly partition action may be a topic at a later deposition, for example.

While counseling through disputes and litigation is a large part of advising clients, understanding the recording system and effectively transferring real estate can reduce problems down the road and is vital to counseling clients in the context of marriage, divorce, or other life events.

¹ Chergosky v. Crosstown Bell, Inc., 463 NW2d 522, 524 (Minn. 1990).

² Minn. Stat. § 507.091.

³ Minn. Stat. § 507.092.

⁴ Minn. Stat. § 272.115.

⁵ Minn. Stat. Ch. 287.

⁶ See Minn. Stat. § 518.003.

⁷ See Minn. Stat. § 518.191; Title Standard No. 84, Minnesota Title Standards: Minnesota Uniform Conveyancing Blanks, Form 801.2 (2008).



Katherine Wahlberg

katiew@olson-law.com

Ms. Wahlberg is an attorney and shareholder at Olson, Lucas, Redford & Wahlberg, where she focuses her practice on commercial and residential real estate transactions and litigation. Her practice includes representing the interests of buyers, sellers, lenders, title companies, and their insureds.