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Where Real Estate and Estate Planning Collide

**Kristen Quinney Porter
And
Patricia F. Sitchler**

Author contact information:
Kristen Quinney Porter
Kiesling, Porter, Kiesling & Free, P.C.
New Braunfels, Texas

kdq@sbcglobal.net
830-625-7531

Patricia F. Sitchler
Schoenbaum, Curphy & Scanlan, P.C.
San Antonio, Texas

pfsitchler@scs-law.com
210-224-4491

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WHERE REAL ESTATE AND ESTATE PLANNING COLLIDE

REAL ESTATE PERSPECTIVE

Almost any time a piece of property is bought, sold or mortgaged a title company is involved in the transaction. In most situations, the transactions are easy and end with happy buyers and sellers. However, there are occasions when a title issue or problems with documents arise and the closing becomes troublesome. In these instances it is important to know the parties that are involved in the transaction so that the closing can get back on track. This paper is designed to give an overview of the title companies and the positions of the some of the more common underwriters on issues important to elder law attorneys.

ELDER LAW PERSPECTIVE

When disability strikes, families may determine that it is advisable to transfer ownership of real property in fee simple or reserving some incidence of ownership to the Grantor. In some cases such transfers are accomplished by agents appointed in a power of attorney. And in some instances, transfers of property are required to satisfy government benefit eligibility requirements. This paper is further designed to give an overview of the intersection of Elder Law issues in light of real property law.

DEFINITIONS

Title Company: The definition of a title company is a business firm that examines real property records and issues insurance policies to indemnify the owner and lender against financial loss resulting from unknown title defects or prior claims against the property.

A title company consists of several different departments. Each department has a specific job to do in the closing. These departments include the following:

1. **Escrow Agent** – the person or entity that holds the funds, closes the transaction and acts as a neutral third party.
2. **Title Plant** – the department holding the records of a title company and reviewing the Official Public Records for the purpose of issuing title insurance on real property.
3. **Underwriter** – the insurance company that issues the insurance policy.

Additional definitions that are important include the following:

4. **Title insurance** – a contract to indemnify the insured against loss or damage caused by defects in the title to real property.

5. **Title Insurance commitment** – the document issued prior to closing which sets forth the conditions under which a title insurance company will issue a title policy.
6. **Title Insurance policy** – the document issued after closing which sets forth the contract of indemnity. Can be issued to an Owner and/or a Lender.

A title company can be a privately owned title company (sometimes referred to as an independent title company) or can be owned by an underwriter (sometimes referred to as a direct issue title company). Each of these title companies can write policies on any underwriter with which that Title Company has a license. However, many times a direct issue title company will only be licensed to write policies on its owner/underwriter while an independent title company is licensed with many underwriters. At times this gives the independent title companies more flexibility when determining what is required to insure a transaction.

Medicaid: Medicaid Assistance Program and Medicaid Assistance waiver programs are governmental programs that provide an array of benefits including medical care, housing, rehabilitation as well as durable goods for those persons who meet certain physical and financial guidelines. When an individual has few resources (assets), a small monthly income and a medical need, the individual may be eligible for a specific Medicaid program. The most commonly accessed Long Term Care Medicaid nursing home benefit. Other Medicaid programs are Intermediate Care Facilities for the Mentally Retarded (ICF-MR) and waiver programs such as the Star Plus Waiver, formerly known as the Community Based Alternative program.¹ Medicaid should not be confused with Medicare. Medicare is health insurance that purchased by paying into the Social Security System through wage withholding and includes the spouse of an insured worker. Medicare does not pay for long term care nursing home costs, assisted living and most in-home benefits.

Medicaid Estate Recovery Program: Medicaid Estate Recovery Program also known as MERP was enacted in 2003, effective March 1, 2005. The purpose of MERP is to comply with the federal law requiring states to pass legislation to recover certain Medicaid payments made on behalf of a qualified individual from the individual's probate estate.² Texas was one

¹ Information about the various Medicaid programs can be obtained from www.dads.state.tx.us and then by searching for Handbooks for each of the noted programs.

² 1 T.A.C. sec. 373.101

of the last three hold-out states resisting estate recovery. When the law and subsequent regulations were crafted, the State had the option of creating a very strict or a very lenient estate recovery program.³ In Texas, **MERP IS NOT A LIEN STATUTE.**⁴ As evident by the state's reluctance to enact and enforce estate recovery, the State fashioned regulations making the State an unsecured creditor⁵ and allowing an individual to avoid estate recovery with adequate planning. Thus, the rules that were enacted limited estate recovery to the probate estate⁶ with full knowledge that an individual could pass assets outside of probate. Typical methods of passing real property outside of probate are with a Deed retaining a Life Estate and ownership as Joint Tenants with Rights of Survivorship.

Ladybird Deed also known as an Enhanced Life Estate Deed or a Deed with a Power of Appointment: A grantor transfers property to a grantee retaining a life estate along with the power to sell the property retaining the proceeds of the sale thus cutting off grantee's right to the property pursuant to Texas Probate Code sec. 450.

TRANSACTIONS

Arm's length transaction: Real property is sold to a bona fide purchaser for its fair market value. In a typical arm's length transaction the buyer and seller deposit the contract and all funds with the Escrow Agent. The escrow agent then contacts their title plant who researches the public records and determines who owns the property and what documents filed of record, such as easements, restrictions and mineral reservations, affect the title to the property. Then the plant, with the consent of the underwriter, issues a title commitment. The title commitment contains the conditions under which a title insurance policy may be issued. For example, in order to issue a title policy on a transaction to mortgage a homestead, the underwriter may require both the husband and wife to sign the deed. The escrow agent sends this title commitment to the parties involved in the transaction. Once all matters are resolved the buyer and the seller meet with

the escrow agent to close the transaction. The escrow agent sends the signed documents to the title plant which then records the documents in the Official Public Records of the county where the property is located and issues a title policy on the underwriting company.

The escrow agent is the face of the transaction and is involved in drafting the settlement statement, contacting the bank, obtaining the pay-off information for any outstanding loans, insuring that the proper parties are the people executing the documents and other similar functions. The title plant examines the public records to determine who owns the property and what encumbrances affect the property. If the property is located in more than one county, more than one title plant may be involved in the transaction. The underwriter issues the policy and has the final decision making authority when questions arise regarding the acceptance of documents and the issuance of the insurance.

An example of a typical title insurance commitment is set forth as Exhibit A to this paper. Schedule A shows the current owner of the property, the buyer, the proposed lender and the property description. Schedule B lists all of the items that affect the property. Schedule C contains the requirements for closing the transaction and Schedule D lists the parties involved in the title company.

While all title companies and closers conduct their business based on their individual risk tolerances, they are all under the rules established by the Texas Department of Insurance. These rules state such things as how much the title policies costs and what the policy must contain.

In 1989, the Council of the Section of the Real Estate, Probate and Trust Law of the State Bar of Texas approved the formation of a committee to study the formulation and development of title examination standards.⁷ These standards are designed to provide guidance for real estate and oil and gas practitioners who examine titles and might be useful when speaking with title companies. However, it must be noted that the standards do not apply to title examination for purposes of title insurance and, as stated in the Disclaimer and Introduction, "these standards do not apply to the exercise of discretion by a title insurance company in determining the insurability of title."⁸

Gift of land: When real property is transferred by gift, title insurance is rarely part of the transaction. However, if the real property is subsequently sold in an arm's length transaction, the Gift Deed or other

³ Texas Department of Aging and Disability Services Reference Guide (2006), p. 19.

⁴ MERP makes the State of Texas an unsecured creditor just like a credit card creditor or retail creditor. The only advantage for the state is that MERP gives the State priority over other unsecured creditors. The State is a Class 7 unsecured creditor whereas a credit card company or retailer is a Class 8 unsecured creditor. Texas Probate Code sec. 322.

⁵ 1 Texas Administrative Code Chap. 373.

⁶ 1 Texas Administrative Code sec. 373.105(6)

⁷ Title 2-appendix to the Texas Property Code Preface

⁸ Title 2-appendix to the Texas Property Code Disclaimer and Introduction

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