WHERE REAL ESTATE AND ESTATE PLANNING COLLIDE
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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 Intellectually Disabled (ICF-ID) 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 is purchased by either paying into the Social Security System through wage withholding and includes the spouse of an insured worker or by paying a premium for the product. 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

[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.

from the individual's probate estate.[2] Texas was one 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 creditor[5] and allowing an individual to avoid estate recovery with adequate planning. Thus, the rules that were enacted limited estate recovery to the probate estate[6] 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, a transfer on death deed 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 Ladybird deed is a deed in which a grantor transfers property to a grantee retaining a life estate along with the power to sell the property, retaining the proceeds. If the grantor does sell the property, then the sale cuts off grantee's right to the property pursuant to Texas Estates Code sec. 111.052.

Transfer on Death Deed. In 2015 the Texas Legislature passed Senate Bill 462 which added a new Chapter 114 to the Texas Estates Code. This chapter created the statutory transfer of death deed. The transfer on death deed is a statutory form under which an individual may transfer that individual's interest in real property to one or more beneficiaries at the transferor's death. According to Chapter 114, the deed must comply with the following:

1. The transfer on death deed must be executed and acknowledged on or after September 1, 2015 by a transferor who dies on or after September 1, 2015. (Section 114.003).
2. The transfer on death deed cannot be executed using a power of attorney (114.054(b)).
3. The transfer on death deed must contain the essential elements and formalities of a recordable deed. (114.055) – be in writing, be signed by the grantor, be notarized, have a property description, contain the address of the Grantee.
4. State that the transfer is to occur on the transferor's death (114.055 (2))
5. Be recorded before the transferor's death in the deed records in the county clerk's office of the county where the real property is located (114.055(3)).
6. A transfer on death deed is effective without notice or delivery to or acceptance by the designated beneficiary during the transferor's life; or consideration (114.056).
7. The transfer on death deed has no warranty of title, regardless of the language in the deed. (114.103(d))

A form of the transfer on death deed is found is Section 114.151 of the Texas Estates Code and attached hereto as exhibit A.

The following are characteristics of a Transfer on Death Deed:

1. A transfer on death deed is revocable regardless of whether the deed or another instrument contains a contrary provision.(114.052)
2. A transfer on death deed is a nontestamentary instrument. (114.053)
3. The capacity required to make or revoke a transfer on death deed is the same as the capacity required to make a contract.(114.054(a))
4. The transfer on deed is revoked by:
    a. A subsequent transfer on death deed that revokes the preceding transfer on death deed or part of the deed expressly or by inconsistency (114.057(a)(1)(A)
    b. An instrument of revocation (114.057(a)(1)(A)).

   Such instruments must be acknowledged by the transferor and recorded before the transferor's death in the deed records in the county clerk's office of the county where the deed being revoked is recorded. (114.057(a) (2) and (3))
5. If a marriage between the transferor and a designated beneficiary is dissolved after the transfer on death deed is recorded, a final judgment of the court dissolving the marriage operates to revoke the transfer on death deed

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[2] 1 T.A.C. sec. 373.101

[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 Estates Code sec. 355.102.

[5] 1 Texas Administrative Code Chap. 373.

[6] 1 Texas Administrative Code sec. 373.105(6)

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Title search: Where Real Estate and Estate Planning Collide

Also available as part of the eCourse
Answer Bar: Dealing with Mineral Rights in Estate Planning and Probate

First appeared as part of the conference materials for the
18th Annual Estate Planning, Guardianship and Elder Law Conference session
"The Collision Between Real Estate and Elder Law"