

# **Common Title Insurance Pitfalls For The General Practitioner To Avoid**

By: John T. MacMillan

Title insurers are frequently faced with reviewing and interpreting conflicting or confusing documents affecting real property or confronting omissions in legal proceedings that create ambiguities in the public records affecting real property. Some of the title issues created by these documents or omissions occur as a result of inexperienced attorneys or individuals acting without benefit of legal counsel. This paper will examine some of the more frequently encountered issues faced by title underwriters that can create problems with real property closings. Inattention to the detailed requirements of some important code provisions frequently results in needless delays and additional costs to the client.

## **I. Probate Code Section 13100, et seq.**

### **◆ Affidavit Procedure for Collection or Transfer of Personal Property**

The legislature has created various provisions in the Probate Code generically referred to as "summary administration procedures." Division 8 of the Probate Code is entitled "Disposition of Estate Without Administration." §13000<sup>1</sup>, et seq., allows for the disposition of real property, under specified conditions, without the requirement of a full-blown probate proceeding. All of these provisions, however, require at a minimum, a court order directing the disposition of *real property*.

Some attorneys unfamiliar with these provisions mistakenly believe that §13100 allows for the disposition of *real property* through an affidavit that, when recorded, has the effect of transferring real property to the affiant or designated recipient.

Careful attention to the provisions of §13100 reveal that:

- (1) only *personal property* may be transferred via an affidavit when;
- (2) the gross value of the decedent's real and personal property in this state does not exceed one hundred thousand dollars (\$100,000); and
- (3) if 40 days have elapsed since the death of the decedent.

§13100 specifies the requirements of the affidavit, signed under penalty of perjury, to be presented to the holder of the personal property.

§13106.5 provides that, if the particular item of property transferred under the chapter is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the

---

<sup>1</sup> Future references are to the *Probate Code*.

county where the real property is located, the affidavit or declaration shall be recorded in the same county recorder's office.

The affidavit should specify, in addition to all of the requirements of §13101, the recording information of the original deed of trust that secures the promissory note, including dated date of the note, name of trustor, trustee and beneficiary and the recording date and instrument number of the document.

When the affidavit is properly recorded and indexed, the chain of title for the real property will correctly reflect the transfer of the deed of trust securing performance of the promissory note to the affiant.

If the decedent leaves *real property* of limited value, consider the availability of §6600, et seq., §13150, et seq. or §13200, et seq. Each of these code sections provides for summary proceedings for the transfer of real property within specified values of the decedent's estate. *All* require a court order.

#### ◆ **Husband and Wife as Community Property & Joint Tenancy**

The manner of holding title to real property by married persons and the manner of passing title upon the death of a record titleholder can sometimes create confusion. Joint tenancy is a common form of holding title to real property by married persons and non-married persons. The creation of joint tenancy require the interests to be created at the same time, the right of each tenant to possession, unity of interest in the property (equal shares) and the unity of title (*i.e.*, creation by a single transfer) (See Civil Code §683).

Sometimes a married person will hold title to real property as a joint tenant with someone other than his or her spouse. This manner of holding title has been held to not create a valid joint tenancy because the required unity of interest does not exist (*Yeoman v. Sawyer* [1950] 99 CA2d 43, 221 P2d 225). Title companies will require the omitted spouse to join in any conveyance or encumbrance of the property or require the written consent to the joint tenancy in the document creating the joint tenancy at the time of its creation.

§13500 provides for the transfer of a decedent's community real property interest to a surviving spouse via an affidavit under specified conditions. Title companies will require that title be held, of record, by the decedent and his/her spouse as "community property." Most title companies print and distribute forms to counsel that provide the necessary information to pass title to real property to a surviving spouse. The affidavit, when recorded with a certified copy of the death certificate of the decedent, will effectively establish the death of the spouse and pass title to the surviving spouse.

In some instances, an affidavit for the death of a *joint tenant* will be erroneously completed and recorded when record title was *not* held in joint tenancy. The effect of

such an erroneously recorded document will not serve to pass title to the affiant and will delay any subsequent proceeding dealing with the real property.

If title is held of record by two or more joint tenants and one joint tenant dies, an affidavit establishing the death of the decedent, together with a certified copy of the death certificate, may be executed and recorded. §210 provides for the establishment of death when title to real property is affected by the death of a person. The affidavit may be signed by anyone who can establish the death of the decedent and identify the decedent as one of the joint tenants owning the described real property. The county recorder will index the document pursuant to §211 showing the decedent to be the grantor.

In the event record title is *not* held in joint tenancy or as "community property," consider the availability of a §13650 petition that provides for the determination or confirmation of property passing or belonging to a surviving spouse.

## **II. Creation of a Revocable Trust**

### **◆ Failure to Convey Real Property Into the Trust**

With the increasing popularity of revocable trusts in estate planning, individuals are including real property in their trusts. Unfortunately, after the death of the surviving settlor, many times the trust beneficiaries realize that real property assets were never conveyed of record into the trust. That omission can create delays and additional costs to clients and sometimes result in contentious litigation.

§15200, et seq., provides the methods for the creation and validity of trusts. §15206 specifies that a trust relating to real property is not valid unless it is (a) by a written instrument signed by the trustee, or by the trustee's agent; or (b) by a written instrument conveying the trust property signed by the settlor, or by the settlor's agent.

In *Estate of Heggstad, Deceased* (1993) 16 Cal.App.4<sup>th</sup> 943, 20 Cal.Rptr.2d 433, the First District Court of Appeal held that it was unnecessary for the decedent to have executed a *grant deed* transferring real property to himself as trustee, since a written declaration of trust by the owner of real property, naming himself or herself as trustee, was sufficient to create a trust in that property.

Title insurers search and examine *record* title, i.e., the chain of title for real property created by documents recorded in the official records of the county recorder where the real property is located. The preferred method for title insurers (and easiest for clients) is a recorded trust transfer deed executed by the settlors that conveys title to the trustees. As an alternative, the trust instrument itself may be recorded, if properly acknowledged and notarized, and if it provides a description of the real property. Counsel may wish to consider having the signatures of the settlors acknowledged by a notary public on every trust in order to preserve the right to record the trust in the future.

Occasionally, after creation of the trust and an effective transfer of the real property into the trust, the settlors will seek to refinance an existing loan or obtain a new loan against the property. Some lenders require the owners to deed the property out of the trust for purposes of the refinance or new loan. In those instances, it is important for the owners to deed the property *back* into the trust to ensure compliance with their estate planning intent. An oversight to this important fact can create problems in the future.

When searching title vested in the name of trustees of a *revocable* family trust the title company will generally rely on a certification of trust provided for in §18100.5 to establish the authority of the trustees to act. If one or more settlors are deceased, or if the trust is an *irrevocable* trust, the title company may make further inquiry of the trustee or counsel before proceeding.

Most title companies have pre-printed trust transfer deeds available free of charge to attorneys. Careful attention to ensure that real property is conveyed, of record, to the trustees of the trust is essential to avoiding problems later.

### **III. Power of Attorney Issues**

- ◆ **Failure To Provide Authority To Trustee To Appoint An Agent To Act On Behalf of Trustee of Revocable Trust**
- ◆ **Issues Concerning Competency of Principal and Powers Granted to Agent**

#### **A. Trust Issues**

After creation of a revocable trust, counsel should not just ensure that real property is conveyed into the newly created trust. If a Power of Attorney is created as part of the client's estate planning, or the client already has executed a Power of Attorney, the trust should provide the settlor/trustee with the authority to delegate his/her authority to an agent under a power of attorney. The principal should execute the Power of Attorney individually and as trustee of the revocable trust.

Title insurers are frequently asked to rely on the authority of an agent under a power of attorney executed by an individual when in fact, title to the real property is held by the principal in their capacity as trustee of a trust. §16012 provides that, "... a trustee has a duty not to delegate to others the performance of acts that the trustee can reasonably be required personally to perform and may not transfer the office of trustee to another person nor delegate the entire administration of the trust to a cotrustee or other person."

The trust document should specifically provide that the settlor/trustee has the specific authority to delegate to an agent under a power of attorney the authority to act on behalf of the trustee.

Title underwriters will generally accept the authority of an agent to act on behalf of the trustee when the trust document provides for such delegation and when the power of attorney is signed by the principal individually and in their capacity as trustee of their revocable trust.

## **B. Establishment of Competency And Powers Granted to Agent**

Title companies routinely encounter the use of powers of attorney to sell or encumber real property. Use of these documents to complete real property transactions are convenient and useful as part of estate planning and safe to all parties when careful consideration is given at the time the agent acts on behalf of the principal.

Title companies will frequently inquire of the agent why the agent is using the power and whether or not the principal is aware of the proposed transaction. These questions are intended to create a dialogue with the agent and for the title officer to know the circumstances surrounding the proposed use of the power and become comfortable with the structure and purpose of the transaction.

The title officer will need to establish that there were no issues concerning the capacity of the principal when the power of attorney was executed. If the principal is now incapacitated and the powers granted are durable, establishment of the capacity of the principal at the time the powers were created can frequently be established by a letter or declaration from counsel for the principal or an attending physician.

Use of the Uniform Statutory Forms of a power of attorney will ensure compliance with required verbiage, notice and interpretation of the powers granted and whether the authority provided the agent survives the subsequent incapacity of the principal. The original document, properly executed and acknowledged, will be required to be recorded concurrently with the sale or mortgage transaction establishing of record the authority of the agent to act on behalf of the principal.

A key to a quick and uneventful closing is an early dialogue between the agent and title officer with some assistance from counsel familiar with the parties and the facts giving rise to the power of attorney.

## **IV. Independent Administration of Estates Act**

### **◆ Failure to Provide Notice of Sale of Real Property**

Title companies routinely process requests for title insurance without ever speaking to the principals to the transaction. Unless advised in advance by the real estate agent, broker or escrow, the title company may not be aware that the record title owner is deceased. Frequently, this information is shared with the title company just before the expected close of escrow.

Title insurers are seeing an increase in the authority of an estate representative to act under the provisions of the Independent Administration of Estates Act (§10400, et seq.) ("the Act") that allows representatives to act without court supervision. Unfortunately, some representatives and some counsel are unfamiliar with the requirements imposed by §10510, et seq., that require advanced notice to specified individuals before exercising certain powers.

The selling or exchanging of real property or the borrowing and encumbering of estate property, are some of the powers that may be exercised by the personal representative under the Act *only* after giving notice of the proposed action (§10511 & 10514) in accordance with §10580, et seq.

The notice of proposed action must be given, prior to the consummation of the transaction, to the following:

- All legatees whose interest in the estate is affected by the proposed action;
- All devisees whose interest in the estate is affected by the proposed action;
- Heirs of the decedent (if an intestate estate);
- The State of California if any portion of the estate is to escheat to it;
- All persons who have filed a request for special notice pursuant to §1250.

Careful attention should be paid to the requirements of §10580 to ensure: (a) notice to all parties entitled to receive notice of the proposed action; (b) the correct form and content of the notice; and (c) the proper mailing or delivery of the notice. The preferred form of notice is the form prescribed by the Judicial Council. In lieu of notice, any person entitled to receive notice may give consent to the proposed action (§10582).

The title officer will usually request from the counsel for the representative before closing:

- (1) that no objection has been made by any party to whom notice was given;
- (2) a certified copy of the letters testamentary certified by the court within six months (to be recorded concurrently with the transaction);
- (3) a written representation that the representative's authority has not been revoked or amended; and,
- (4) a written representation that the decedent's estate is not subject to any federal estate tax liability. If the estate is subject to federal estate tax, this fact should be brought to the attention of the title company early in the transaction.

Addressing these issues early in the transaction will mean a smooth and timely closing of the transaction.

## **V. Real Property Issues Before and During Marriage and Following a Dissolution of Marriage**

### **A. Separate/Community Property Issues**

Title insurers deal with community property and dissolution of marriage issues affecting real property almost on a daily basis. Frequently, some of these issues are not considered by counsel when a sale or refinance of real property occurs. When not considered and not properly dealt with, these issues can result in delays in the closing of the sale or refinance.

§760 of the Family Code<sup>2</sup> provides that: "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." Some of the more common exceptions include all property owned by the person before marriage and all property acquired by a married person after marriage by gift, bequest, devise, or descent (§770). Title insurers generally will decline to "trace" funds in a transaction and will generally conclude, for title insurance purposes, that property acquired by a married person during the marriage is community property.

In 1991 the California Supreme Court decided the case of *Droeger v. Friedman, Sloan & Ross*, 54 Cal.3d 30, 283 Cal.Rptr.584, involving the encumbrance of real property by one spouse to secure attorney's fees in a dissolution proceeding, and interpreted §1102 (formerly known as Civil Code §5127) to allow a non-consenting spouse to void an encumbrance of real property in its entirety. Before the *Droeger* decision, title insurers were usually comfortable in defending the validity of a mortgage on community real property when executed by only one spouse. Title insurers generally believed the lien of the deed of trust would at least attach to the community property interest of the consenting spouse. All that changed with *Droeger*.

In response to the *Droeger* decision, the legislature enacted §2033 to allow either party to encumber his or her interest in community property to pay reasonable attorney's fees in order to retain or maintain legal counsel in a dissolution proceeding under specified conditions.

§850 provides the authority of married persons to transmute community property to separate property of either spouse or to transmute separate property of either spouse to community property or to transmute separate property of one spouse to separate property of the other spouse. Title insurers generally now require an inter-spousal deed from a non-record spouse if title to the real property was acquired during marriage or where there has been a transmutation of real property from sole and separate to community.

---

<sup>2</sup> Future code references are to the *Family Code*.

It is not safe to rely on the record status of the vestee ("married person as sole and separate property") absent a deed from the non-record spouse to the record spouse confirming title as the sole and separate property of the vestee.

## **B. Court Ordered Division of Community Real Property**

Another area that title insurers frequently confront involve court orders arising from a dissolution proceeding. It is not uncommon to see an order drafted by counsel that requires one spouse to convey his/her interest in the real property to the other as part of the division of community property assets. Unfortunately, on occasion, the party ordered to convey fails to abide by the court's order and record title remains in the names of both parties.

Counsel should consider drafting proposed court orders that are self-executing and do not require the performance of a former spouse to convey his/her interest to the other. A self-executing order that contains a complete legal description of the affected real property may negate the need for a deed. A certified copy of the court order can be recorded in the county recorder's indices to effectuate the transfer of the real property.

## **VI. Incomplete Information On An Abstract of Judgment**

Title insurers search a variety of indices when processing an application for title insurance. One of these indices is the county recorder's General Index, which is a compilation of recorded documents including abstracts of judgments recorded pursuant to §674 of the Code of Civil Procedure.

Frequently, little thought is given by counsel preparing the abstract to the strict requirements specified in §674. Failure to provide the information dictated by the code may result in a nullification of the abstract with the result that no lien was created despite its recordation (see *Keele v. Reich*, 169 Cal.App.3d 1129 (1985)).

These requirements include:

- (1) The title of the court where the judgment or decree is entered and cause and number of the action;
- (2) The date of entry of the judgment or decree and of any renewals of the judgment or decree and where entered in the records of the court;
- (3) The name and last known address of the judgment debtor and the address at which the summons was either personally served or mailed to the judgment debtor or the judgment debtor's attorney of record;
- (4) The name and address of the judgment creditor;
- (5) The amount of the judgment or decree as entered or as last renewed;
- (6) The social security number and driver's license number of the judgment debtor if they are known to the judgment creditor; and, if either or both of such numbers are not known to the judgment creditor, that fact shall be indicated on the abstract of judgment;

- (7) Whether a stay of enforcement has been ordered by the court and, if so, the date the stay ends;
- (8) The date of issuance of the abstract;
- (9) An abstract of a judgment or decree which orders payment of (a) spousal, (b) child or (c) family support must contain in addition to all of the above requirements:
  - the birth date of the party ordered to pay support
  - any other information deemed reasonable and appropriate by the Judicial Council

In addition to the aforementioned items, the abstract must contain the correct spelling of the name of the judgment debtor, including all names by which the debtor may be known, in order to have the name(s) properly indexed. Constructive notice may not be imparted in a recorded abstract with an incorrect spelling of the debtor's name with a resulting failure to impose a lien on real property.

Providing complete information on the abstract will result in a greater likelihood that the abstract will not be "missed" by a title company searching the public records and avoid the argument that the abstract is void for failure to comply with statutory requirements. Remember, complete information on an abstract will result in a greater likelihood that your client will realize payment of the judgment when the debtor attempts to sell or finance real property.

## **VII. Authority of Conservators and Guardians to Sell or Encumber Real Property**

Title companies are asked on occasion to insure mortgages or conveyances of real property by a court appointed guardian or conservator. Unfortunately, sometimes the conservator or guardian is unaware that specific authority to sell or encumber real property must be provided by the court.

Probate Code §1400<sup>3</sup>, et seq., govern conservatorship and guardianship proceedings. The title company may be unaware until closing that the seller or borrower for the contemplated transaction is the subject of a conservatorship or guardianship proceeding. Often, the guardian or conservator is acting with the belief that the power to sell or encumber real property is part of the authority granted by the court at the time that letters were issued. On closer examination, however, many times the letters provide authority to act on behalf of the *person* and not the *estate*.

The rights and duties of a guardian or conservator of the *person* include the responsibility for providing for the basic and special needs of the child or conservatee. Those rights and responsibilities do *not* include, without specific court authority, responsibility for care of the *estate*. This distinction is often overlooked and can be an impediment to closing a sale or mortgage of the real property belonging to the person.

---

<sup>3</sup> All further references are to the Probate Code.

§2590 provides that the court may, in its discretion:

"...make an order granting the guardian or conservator any one or more or all of the powers specified in §2591... Subject only to such requirements, conditions, or limitations as are specifically and expressly provided...in the order granting the power or powers, the guardian or conservator may exercise the granted power or powers without notice, hearing, or court authorization, instructions, approval, or confirmation in the same manner as the ward or conservatee could do if possessed of legal capacity."

Items (d) and (g) of §2591 specify the power to sell at public or private sale real or personal property of the estate and the power to borrow money and give security for the repayment thereof. Absent this specific authority at the time of appointment, the conservator or guardian will need to seek the appropriate authority in the form of a specific court order authorizing the sale or mortgage transaction.

If the court has granted the aforementioned authority to the conservator or guardian, the title company will either examine the court file or request from counsel for the guardian or conservator a written representation:

- (1) That the conservator or guardian continues to act in their capacity as conservator or guardian and the conservatorship or guardianship has not been terminated; and
- (2) That the authority granted in the letters of conservatorship or guardianship have not been revoked, amended or superseded by a subsequent court order.

A certified copy of the letters of conservatorship or guardianship together with a certified copy of the specific court order authorizing the transaction will be required to record with the closing of the transaction to establish of record the authority of the conservator or guardian to act in their fiduciary capacity for the specific transaction.

### **VIII. Getting To Know Your Local Title Company Counsel**

Title companies provide a very useful service in helping to preserve the integrity of public records relating to real property. This service assists in the free transfer of real property in the market place. Complex or confusing issues to the general practitioner are often issues that have already been addressed by your local title company professionals.

When confronting any of these issues do not hesitate to contact your local title company to request assistance or to obtain their perspective. Title companies employ experienced title and escrow officers and counsel that regularly read and interpret documents in the public records. Asking your title company for its requirements

concerning a real property issue will frequently avoid additional costs and delays in subsequent real property transactions. These title professionals offer advice and observations to counsel without charge.

Remember that you may have information not readily available to the title company that will provide answers to the issues the title officer is reviewing. Title counsel frequently rely on representations by outside counsel that address some title concerns.

Creating a dialogue with your local title officer or counsel is a wise move that will serve the interests of your client and the title company.

© John T. MacMillan,  
2000