



To Sign or Not to Sign...

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Filmore Gilmore received title to his fantastic property by a properly recorded deed showing him as the sole grantee. When this deed was recorded, Filmore was ecstatic as this was the first property he ever purchased on his own. It was a perfect 3 bedroom, 2 bath house with a great yard and on a quiet street close to town and the night life. The roller coaster of life has many dips, twists and turns and oh, how things have changed over the years for Filmore. He is selling his home and someone has to sign the deed. Who will it be??? Let's evaluate this one through several scenarios.

First scenario:

Filmore is still unmarried and he shows up to closing with his picture ID. He signs the deed and other seller documents, waits for recording, takes his proceeds and sets off on a new adventure. Easy enough. Filmore was the grantee coming in so he is the sole grantor going out.

Second scenario:

Filmore decided along the way that his perfect house was a little lonely. Fortunately, he found someone special, fell in love, and got married. As with any relationship, they aren't easy, so we'll also throw in some twists with this scenario for thrill.

If Filmore is still married at closing, then someone is bound to say, "I always heard it takes one to buy and two to sell." While that is likely the correct approach, there are some exceptions (because aren't there always?). NCGS 30-3.1 defines the spousal elective share as it applies in North Carolina. Effectively, this statute provides a way for a surviving spouse to acquire a percentage interest in all of the predeceasing spouse's property. This elective share is vested in the non-grantee spouse on the date of marriage. Period. It's automatic under the statute. Therefore, the cleanest approach is to have Filmore's spouse join in the conveyance to the new purchasers.

Waiver of Elective Share

If including the spouse is not an option, then the elective share can be waived. Caution though - if this process is not done correctly, then the interest survives the closing. To thicken our plot, let's assume that Filmore's spouse refuses to sign the deed to sell the house to the new purchasers. Filmore is still married to the same spouse when he dies 50 years later, at which time said spouse exercises the elective share. Surprise! Regardless of the number of transfers since the original sale from Filmore, the current title owner and Filmore's surviving spouse are now tenants in common.

Now, for illustration purposes, let's assume that Filmore's spouse properly waived the elective share through an acceptable means. This process would then require only Filmore's signature on the deed. The following are some common waiver examples for the spousal elective share: a premarital or prenuptial agreement; a free trader agreement; a separation agreement; and/or a valid deed into the

grantee spouse. When dealing with a purported waiver, begin your analysis with NCGS 30-3.6. No two situations are the same, so please talk with your title insurer if you have any questions.

FURTHER SEVERING THE TIES THAT BIND

Now, we will assume that Filmore and his new spouse purchased this same perfect home together. If they are still married at closing, then both parties must sign the deed. Wait for it though, here come the what if's: What if they are separated? Or divorced? Or a same sex couple? I could likely write an entire article with just the answers to these questions, but the general answer is that if the parties are still married, absent an actual conveyance to one spouse from the other (which includes a proper waiver of the elective share), then ultimately both spouses must execute the deed to the new purchaser. If the couple calls it quits and a subsequent divorce is granted, it will sever the elective share, but each spouse holds a fee interest and must convey that individual's interest.

Be very cautious when dealing with a recital in a separation agreement along the lines of "the husband will receive the family home located at 123 Watch Out Street." Absent very specific granting language (which may still require a recording with the Register of Deeds), this is likely a directive to the other spouse to convey his or her interest to the named party. The safest approach is to record a deed with the proper waiver language, but if that is not possible, then you should consult with your title insurer for options.

At the time of this article, our state laws regarding same sex couples and real property rights are still in flux. Therefore, follow the same analysis described in this section of the article, and when in doubt, have both parties sign. Again, consult with your title insurer with any questions.

Third scenario:

Filmore loved the single life and hanging out with his buddies whenever he chose. Along the way, he befriended an attorney who not only created a trust for him, but also deeded his perfect house into the trustee of his new, perfect trust. And since the trust is "perfect," you may assume that the trust agreement authorizes the trustee to hold and convey the real property, etc.

The first question is whether Filmore was married at the time he conveyed his interest in the property to the trustee of his trust. If he was married, then you need to make sure that his spouse also joined in the transfer for the purpose of conveying his/her spousal interest. If he was unmarried, then it is sufficient for only Filmore to execute the deed.

In executing a new deed from the trust, the trustee is acting in his/her official, fiduciary capacity. The acting trustee (or trustees if that is the case), is the only party required to execute the deed conveying the property out of the trust. If title is properly vested in the trustee, then Filmore's marital status at the time of the conveyance from the trust is irrelevant because he has no individual interest in the property. Likewise, the beneficiaries of the trust hold no interest in the real property and are not required to execute the deed (absent a contrary provision in the trust agreement).

Fourth scenario:

Filmore needed a change of venue, but he wasn't sure he wanted to make it permanent. So, he packed up and moved to some exotic island (without Zika) for a couple of years. He rented his home to his favorite nephew. Filmore had some other rental properties by this point in time that were held

in his company's name, so he figured it was a good idea to add another asset to the company's holdings. As such, he promptly transferred the property into his company name. He was unmarried at the time of this conveyance.

The grantee named in this new vesting deed was the infamous ABC Corporation, a North Carolina Corporation; and for our purposes, you can assume that it was a properly formed NC corporation. NCGS Chapter 55 is the North Carolina Business Corporation Act (Chapter 55A addresses Nonprofit Corporations & 55B deals with Professional Corporations). In this scenario, the closing attorney must determine who is required to sign the deed on behalf of ABC Corporation to effectuate a valid transfer of title.

NCGS 55-2-05 requires that if no initial directors or board of directors is identified in the incorporation documents, then the corporation “shall” elect them. NCGS 55-2-06 provides that the corporation “shall” adopt bylaws to govern the dealings and operations of the corporation. Further, NCGS 55-8-40 addresses how officers are named. In a perfect scenario, ABC Corporation will provide you with a set of current Bylaws, a list of its acting directors, board of directors, and/or acting officers, as well as the proper incorporation documents. In the alternative, you may be able to glean all of the needed information from the North Carolina Secretary of State's (NCSOS) corporate website. By this point, you should have an idea of who will be signing the documents on behalf of the corporation and in what official capacity. The action of signing the deed and conveying the property on the terms provided must be an approved action of the corporation and you must confirm that the person(s) signing on behalf of the corporation is duly authorized to do so. It is always advisable to obtain a written resolution or an equivalent document evidencing these matters. However, please see NCGS 47-18.3 which provides guidance for when third parties may rely upon the validity of recorded instruments when executed by certain officers. Always consult with your title insurer if you have any questions regarding who should sign the deed or whether a resolution document is sufficient.

Now, assume that the grantee in the new vesting deed was the infamous ABC Company, a North Carolina limited liability company, and that it was properly formed in North Carolina. The recently updated North Carolina Limited Liability Company Act can be found in NCGS 57D. The analysis is similar to the one you follow for a conveyance from a corporation. NCGS 57D-10-01(b) states that “the purpose of this Chapter is to provide a flexible framework under which one or more persons may organize and manage one or more businesses as they determine to be appropriate with minimum prescribed formalities or constraints.” In fact, 57D-1-03(23) now provides that operating agreements should control and that they may be written, oral, or implied. If there truly is no operating agreement, then the company's articles of organization become the default governing documents. Additionally, NCGS 57D-2-30(d) authorizes third parties to rely on the Secretary of State's public records even if they are in conflict with the operating agreement. This is a change from the prior statutes and evidences North Carolina's clear intent to provide a flexible environment in which LLC's can conduct business in this state.

The closing attorney will still need to determine in what capacity the signer will execute the deed (e.g. member, manager, or as a named officer); however, the key questions are now whether the action to be taken is approved by the LLC, on the terms provided, and whether the person(s) signing the deed is authorized to do so on behalf of the LLC.

Another important question for the closing attorney to include in his/her analysis is whether the entity remains in good standing in its state of formation. NCGS 55-14 addresses the dissolution of corporations and NCGS 57D-6 addresses the dissolution and winding up of LLC's. If the entity is formed in another state, the statutes of that state may govern. A business entity can still convey good title even after being dissolved if certain conditions are met. It is always advisable to consult with your title insurer when dealing with one of these fact patterns.

Fifth scenario:

Filmore had a hard time deciding where to settle down and purchase a home. By this point, he has reached the ripe old age of 125. Filmore passes away peacefully while taking a nap after completing the last of 350 items on his bucket list.

As a preliminary matter, if Filmore dies while he is a party to a valid offer to purchase or contract for sale, then NCGS 28A-17-9 provides the details on how the personal representative can complete the terms of the contract on behalf of the estate. This allows for an expedited transfer process.

NCGS Chapter 28A is entitled Administration of Decedents' Estates and should be your first point of reference when dealing with a deceased owner. NCGS 28A-15-2(b) provides that "the title to real property of a decedent is vested in the decedent's heirs as of the time of the decedent's death; but the title to real property of a decedent devised under a valid probated will becomes vested in the devisees and shall relate back to the decedent's death, subject to the provisions of G.S. 31-39." However, NCGS 28A-17-12(a)(2) states that if the notice to creditors occurs within two years of the decedent's date of death, then "all sales...by heirs or devisees of any resident or nonresident decedent made after such first publication or posting and before the approval of the final account shall be void as to creditors and personal representatives unless the personal representative joins in the sale...."

This brings about the general rule that if a decedent's property is to be transferred within the first two years from the date of death, without the joinder of the rights of creditors and other debts of the decedent's estate, then the personal representative and all of the heirs/beneficiaries of the decedent, and their spouses (see the second scenario), must join in the execution of the deed. The personal representative should sign in his/her official capacity, as well as individually, if s/he is also an heir or beneficiary of the decedent.

This is a very complex area of law and there are numerous exceptions to this "general rule." For example, if the property is left directly to the personal representative through a valid probated will or said will has a clear directive to sell (outside of the standard statutory powers applying to the personal representative), then the personal representative (PR) is likely the only party required to sign the deed. A PR may also be the sole executing party on the deed if the PR is successful in obtaining a valid order to sell the property to pay debts and follows the proper statutory procedure for conveying the property in this manner (see NCGS 28A-15-1, et al). If the property is conveyed to a trust in a properly probated will, then it is likely that the deed need only be executed by the trustee. If the decedent died in another state, then an ancillary proceeding may be required to transfer good title for a North Carolina property owned by the decedent.

These are just a few of the common issues we see resulting from property conveyances with estates in the chain of title. In short, if you encounter a deceased property owner in your transaction (whether

it is the current owner or a few links back with unresolved issues), consult with your title insurer sooner rather than later. These matters are far from black and white and the solutions are never one size fits all.

The End

At the end of the day, everyone involved in a purchase transaction shares the common goal of making sure that everything goes smoothly with the proper parties executing the deed. At Attorney's Title, it is our goal to work with you to find a solution. So, if you find yourself with more questions than answers, give us a call or send us an email. We're here to help!