REAL ESTATE PRACTICE-TIPS FOR PROBATE, ESTATE, AND TRUST LAWYERS

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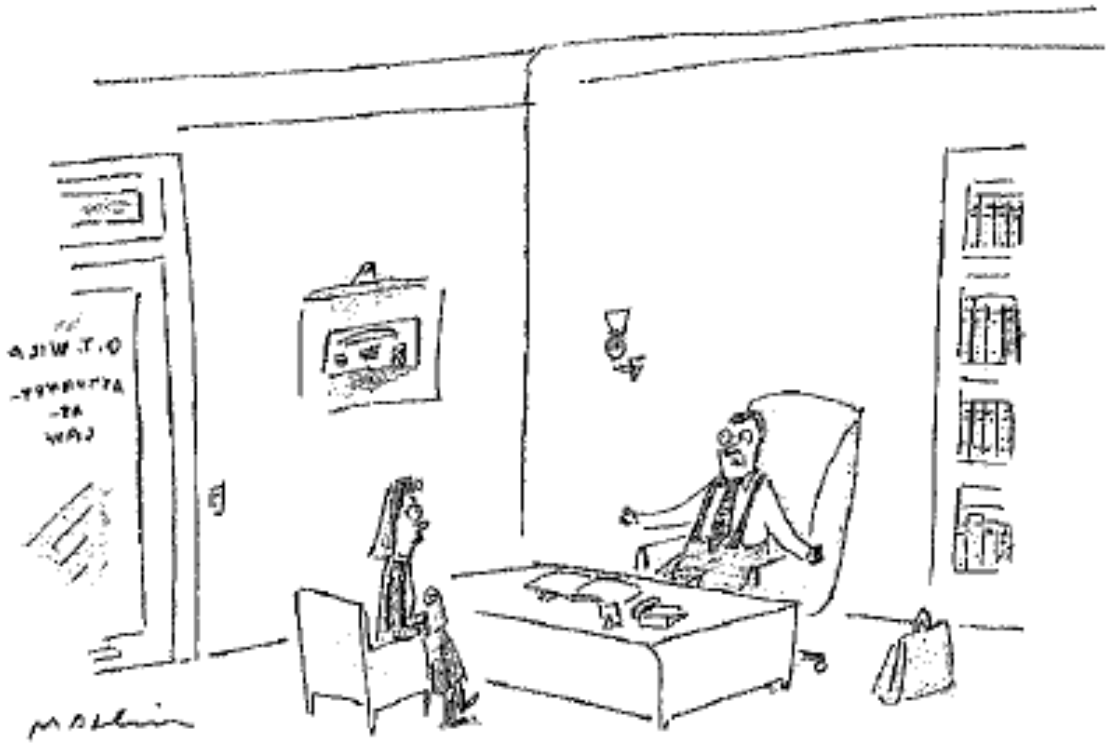


"Hey, don't blame me. I don't make the laws—I just circumvent them."

- Agathering from new legislation, others, experience, and the unknown
- Durable Powers of Attorney
- Trusts
- Transfers on Death Deeds
- Joint Tenancy with Rights of Survivorship
- Reverse Mortgages
- Mental Capacity
- Affidavit of Heirship
- Muniments of Title
- Sales by Representatives
- Decree Confirming Sale
- Involuntary Liens
- Affidavit in Lieu of Inventory
- Bankruptcy
- Foreclosure
- Adverse Possession Amongst Co-Tenant Heirs
- Medical Power of Attorney
- Small Estates
- Real Estate Transactions

DURABLE POWER OF ATTORNEY

- There were many substantive and procedural changes to DPOAs as of September 1, 2017
- Consider the following when drafting a DPOA for a client:
  - Now, multiple agents may act independently of each other (unless the DPOA specifies otherwise)
  - Agent has the power to designate homestead property and create a lien on the homestead property (Estates Code, § 752.102. Real Property Transactions)
  - The statutory form includes language indicating it continues after disability
  - The Estates Code specifies only 11 permitted grounds to reject a DPOA
    - So, what happens when mental capacity issues arise?
  - Will a DPOA be used for a home equity loan in the future?
    - If so, the DPOA must be executed in the office of a lender, an attorney, or a title company (Fin. Com'n of Texas v. Norwood, 418 SW3d 566 (Tex. 2013))
    - Must be recorded within thirty (30) days after transaction utilizing a HEL

DURABLE POWER OF ATTORNEY – AGENT'S CERTIFICATION

- Under the recently passed law implementing changes to the Estates Code regarding durable powers of attorney, before accepting a DPOA, an Agent's Certification may be requested (Estates Code, § 751.203)
- What is an Agent's Certification?
  - A certification, under penalty of perjury, of any factual matter concerning the principal, the
    agent, or the power of attorney
  - The Estates Code has an approved form for the certification for parties to use
  - Using the exact statutory form example is not required, and it may be modified
  - A certification made in compliance with the Code is conclusive proof of the factual matter
    that is the subject of the certification (unless actual knowledge to the contrary)
  - An agent's certification may be relied on without further investigation or liability to another person

DURABLE POWER OF ATTORNEY

- Prior to HB 1974, title companies, other institutions, and persons were not required to accept a DPOA document
  - Additionally, you did not have to provide any reason for rejection
- Persons are generally required to accept DPOAs, unless there is a specific permitted reason to reject it.
- Specifically, Estates Code, § 751.201 provides:

  When presented with a DPOA, you shall either:

  (i) Reject based on a ground set out in § 751.206;

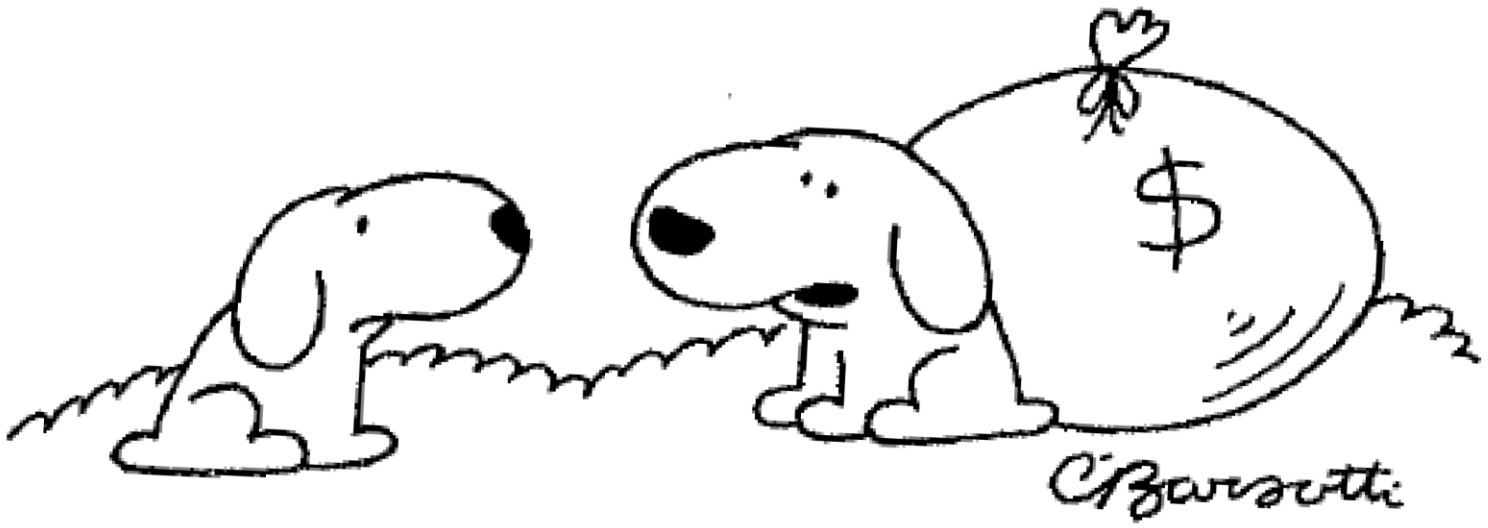
  (ii) Accept the DPOA; or

  (iii) Before accepting the DPOA, you may:

  (a) request an Agent's Certification

  (b) request an Opinion of Counsel

  (c) if applicable, request an English translation



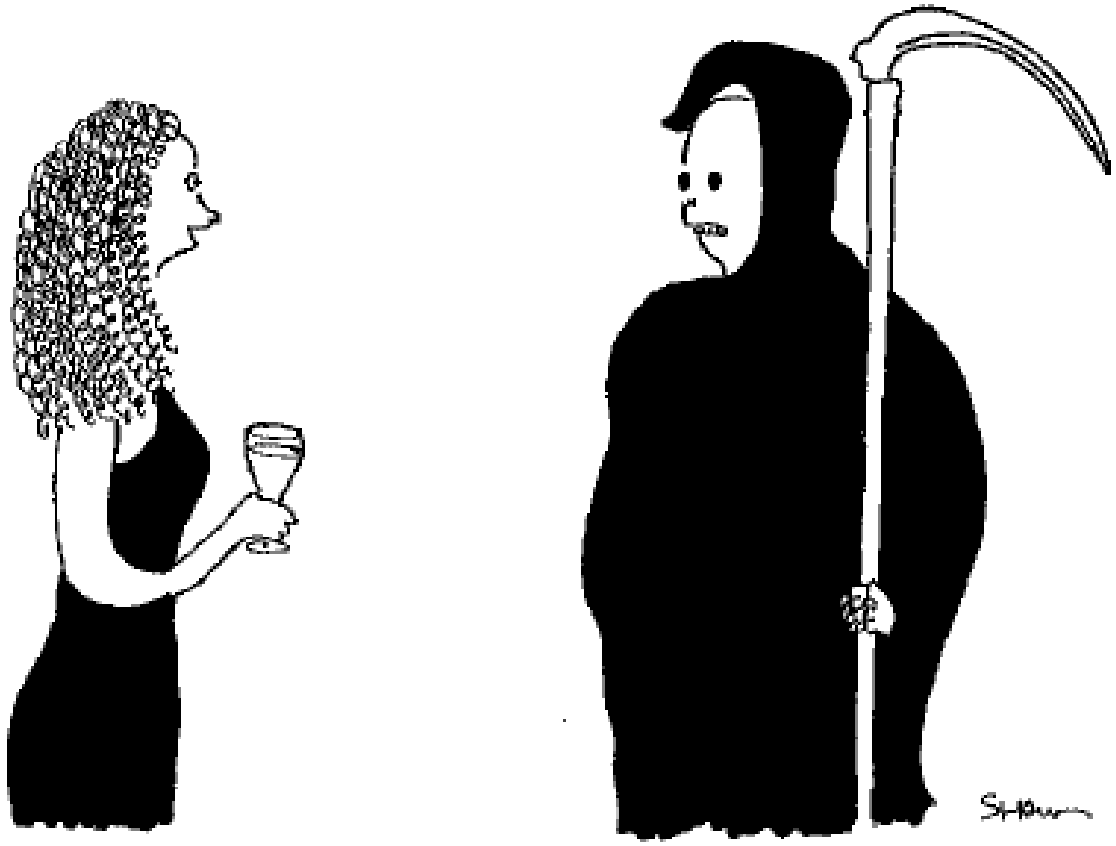
"She was a sweet old lady whose kids never called."

TRUSTS AND GENERAL CONSIDERATIONS

- Pursuant to the Texas Business Organizations Code, a trust is a "person,"
- but not an "entity" (TBOC, §1.002(69-b))
- Trusts may own or manage real property (Trust (Property) Code, § 113.009-.012)
- BUT, any property of the trust should be held of record in the name of the trustee, not the name of the trust
- The beneficiaries of the trust have a superior equitable interest
- Creditors of the trustee do not have a lien against the property of the trust

TRUSTS AND REAL ESTATE TRANSACTIONS

- Trust agreements should explicitly state whether one or more trustees have the power to act independently of each other
- Trust agreements should explicitly state who will assume control of the trust as successor trustee if one or more of the trustees is unable to act due to resignation, death, or is unable to continue the responsibilities
- Trustees may grant an agent the authority to conduct real property transactions with respect to the property of the principal (must be in writing and delegated to the agent) (Property Code, § 113.018(b) – (c))
  - An agent's powers include, but are not limited to, executing legal instruments relating to the sale, accepting notes/DOTs, and approving closing statements
- Why should these points be considered when drafting your trust agreements?
  - Ensures the required signatures for the trust will be obtained and are accurate
  - Lessens the chances of a fraudulent or improvident conveyance



"You simply must meet my husband."

Transfer on Death Deeds - Estates Code, Chapter 114

- What is a TODD?
  - Needs the essential elements of a recordable deed
    - No warranties of title are given in a TODD
  - States the conveyance of the property to the beneficiary will occur when the transferor passes away
  - Must be recorded before the transferor's death in the county where the property is located
- You may not use a power of attorney to create a TODD
- Transferor must have sufficient mental capacity at the time of execution
- Title insurers and others will require evidence of the transferor's death to be recorded

TRANSFER ON DEATH DEEDS

- Was the TODD revoked?
  - A transferor's will cannot revoke a TODD, regardless of when a will was executed
  - A TODD will always control, regardless of when the will was executed or the TODD was recorded
  - A new TODD expressly revoking a previous TODD or containing provisions inconsistent with the previous TODD will be the governing TODD
  - A subsequent conveyance of any interest in real property by the transferor (a regular deed) will also revoke a TODD (Estates Code, § 114.102)
  - A divorce between the transferor and the beneficiary will revoke the TODD, but the divorce decree must be recorded prior to the transferor's death in the county in which the TODD was recorded (Estates Code, § 114.057(c))
    - An unrecorded divorce will not be considered sufficient notice!
- Practice consideration: be prepared to have the devisee(s) under a will join the TODD beneficiary in conveyance of the subject property

TRANSFER ON DEATH DEEDS

- "Deathbed" conveyances
  - Obviously, questions are raised when a transaction occurs close to the end of a transferor's life
- What if the TODD is contrary to the transferor's will?
  - Often, it may be required that the devisee(s) under the will join the TODD beneficiary in a conveyance of the property
- What if multiple TODDs exist?
  - Practice consideration: the beneficiary under the previous TODD may be asked to join the beneficiary in the subsequent TODD in the conveyance of the subject property
- What if the beneficiary does not survive the transferor by at least 120 hours? (see generally, Estates Code, § 114.103(a)(2))
  - If the beneficiary was a descendant of the transferor or a descendant of a transferor's parent, the beneficiary's descendants will take the property (Estates Code, § 255.153(a))
  - If the beneficiary is not a descendant of the transferor or the transferor's parents, the beneficiary's share becomes part of the transferor's residuary estate
    - (Estates Code, § 255.152(a))

TRANSFER ON DEATH DEEDS

- What if the beneficiary disclaims the property?
  - A beneficiary is permitted to disclaim the property
  - Must be: (i) in writing, (ii) explicit in its disclaimer about what is disclaimed, (iii) signed by disclaimant, and (iv) acknowledged and recorded in the county where the property is located
  - Disclaimer may be filed at <u>any</u> time
- What interest has been received?
  - If only one beneficiary is listed on the TODD, he or she receives all of the transferor's interest in the property
  - If one or more, they receive equal and undivided shares of the property without a right of survivorship
  - If the transferor was a joint owner <u>without</u> a right of survivorship, then the beneficiary will receive only the transferor's undivided interest in the property
  - If the transferor was a joint owner <u>with</u> a right of survivorship, the transferor must be the last surviving owner in order for the TODD to be effective
    - If the transferor is not the last surviving owner, then the right of survivorship prevails over the TODD

Transfer on Death Deeds

- Even where a valid TODD exists, if the transferor's estate is insolvent, creditors may be able to claw the property back into the probate estate to satisfy the unpaid debts (Texas Estates Code 114.106(a))
  - Creditors have two years from the date of the transferor's death to exercise this "claw-back" right (Texas Estates Code 114.106(e))
- What about title insurance?
  - An underwriter may accept a TODD as a vesting deed if: (a) transferor is deceased; (b) transfer did not revoke the TODD; (c) the beneficiary did not disclaim his/her interest; (d) all debts and taxes of the estate have been provided for
  - Transferor's owner policy will likely continue to provide coverage to the TODD beneficiary
    - T-1 owner policy provides that insured includes "successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors…."
    - T-1R owner policy states "we insure your transferee or assignee only as follows: (a) a person who inherits the original named insured's title on the original named insured's death"
    - Does the TODD beneficiary receives the property by operation of law at transferor's death?

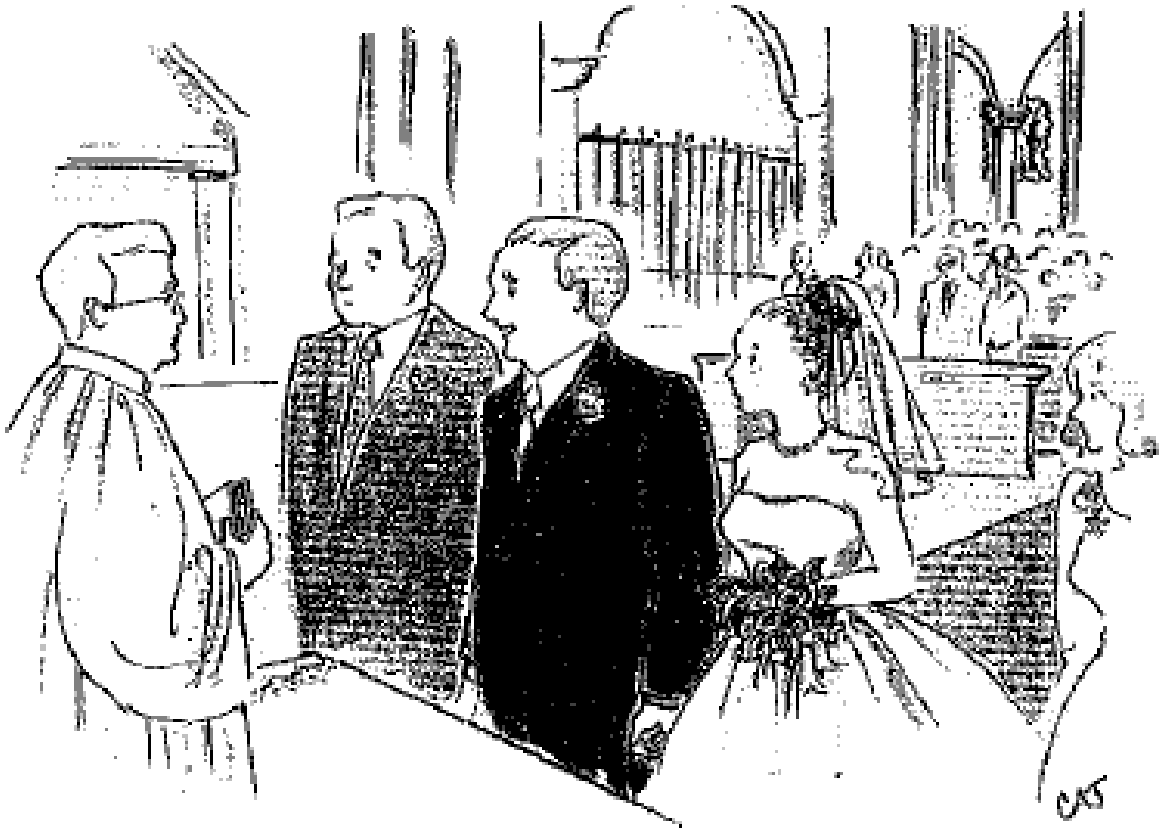
Estates Code, § 114.053 says "a transfer on death deed is a nontestamentary instrument."

- A title insurer is unlikely to deny coverage where title has been conveyed by a TODD, especially since the Act was passed after the effective date of the current owner policy forms (January 2014)

"You can't leave Alice—you're the only thing keeping me from quitting my job, taking up golf, and living off the equity in the house."

"LADY BIRD" DEEDS

- Also known as an "Enhanced Life Estate Deed" or "Deed with a Power of Appointment"
- Used to transfer real property outside of the probate estate
- 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
- No Medicaid Estate Recovery because the property passes outside of probate
- No Medicaid transfer penalty because the grantor retains the right to sell the property and keep the proceeds



"We'll be single again in Heaven, right?"

JOINT TENANCY WITH RIGHT OF SURVIVORSHIP

- Requires a written agreement between the joint owners
  - Applies to spouses and other parties
  - For spouses – comply with Estates Code, Chapter 112
    - The agreement must include any of the following specific language – "with right of survivorship"; "will become the property of the survivor"; "will vest in and belong to the surviving spouse"; "shall pass to the surviving spouse"
    - Upon death of a spouse, the surviving spouse must apply to the court for an order stating that a community property survivorship agreement satisfies the requirements of Chapter 112
    - Surviving spouse must prove certain things to the court, including: the spouse is deceased, agreement was not revoked and was executed property
    - If the court is satisfied, the court shall enter an order adjudging the agreement valid
  - Other parties – comply with Estates Code, Chapter 111
    - Requires the agreement to be in writing; the agreement may not be inferred from the mere fact that the property is held in joint ownership

JOINT TENANCY WITH RIGHT OF SURVIVORSHIP

- In addition to the written agreement, the deed will need to include certain language for a joint tenancy with right of survivorship
  - "John and Jane Smith, as joint tenants with rights of survivorship"
- Survivorship agreement and deed are recorded in the official public records
- Typically, upon the death of one of the joint owners, the following will be required for a subsequent conveyance
  - Death certificate
  - Affidavit of fact regarding the death and payment of all debts of the decedent's estate

"Throw in one of those brochures about refinancing my home."

REVERSE MORTGAGES

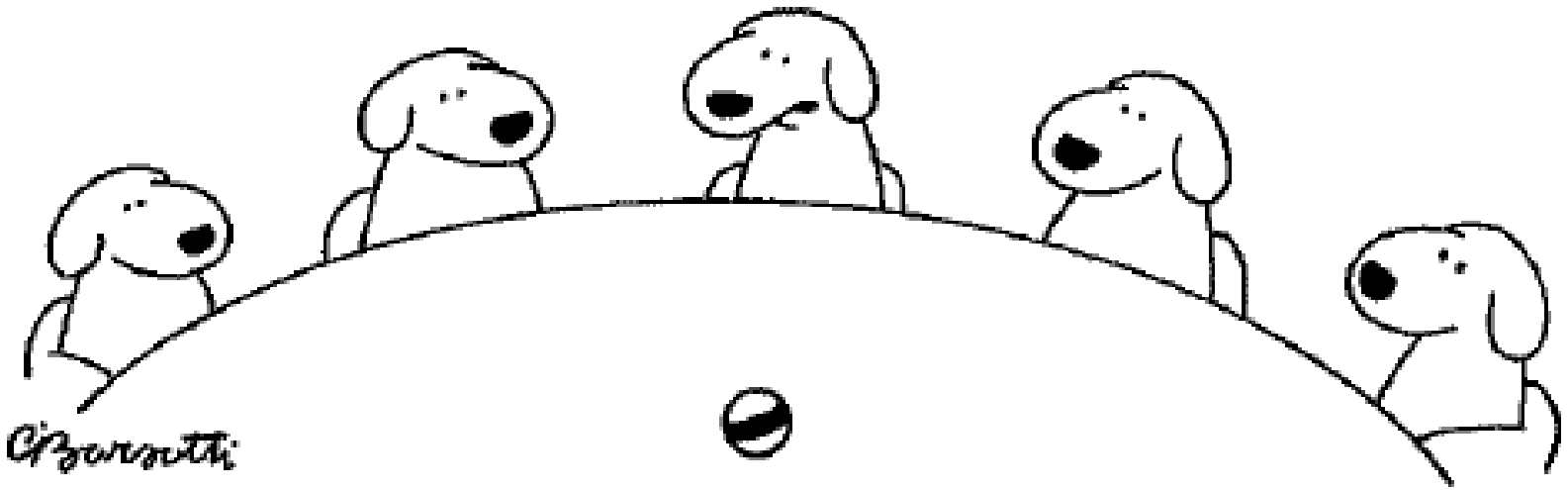
- At least one owner must be at least 62 years of age as of the date of closing the reverse mortgage transaction
- Title is not vested with the lender, but the lender does have a secured lien against the homestead property
- Spousal joinder is required for reverse mortgage liens against homestead property
  - It does not matter if the property is characterized as separate or community
- Borrower must attest and certify they received loan counseling prior to closing the transaction
- Liens for association dues:
  - Confirm whether the association's dues lien is subordinate to a reverse mortgage
  - Many older restrictive covenants do not take into account the possibility of a reverse mortgage

REVERSE MORTGAGES

- Texas Reverse Mortgage Endorsement T-43
  - Borrowers may claim full disclosure or counseling were not provided, or that the provisions in the Texas constitution were not met
  - As a result, T-43 endorsement will not cover:
    - Acts of lender, failure to comply with federal laws, or compliance with Texas constitutional conditions
- The transaction needs to close in a Texas office of a title company to be fully insured
- Note – if a DPOA is presented, please make sure it was signed in the office of a lender, title company, or attorney. The use of DPOAs in these types of transactions are limited.

MENTAL CAPACITY

- One recurring issue real estate attorneys come across is whether or not the property owner lacked mental capacity to close the transaction
- Below are a few situational examples that may raise mental capacity red flags:
  - Differing signatures
  - Distribution of proceeds to an out of state relative
  - Little or no communication with the property owner
- How can you prevent a delay in closing?
  - Provide a doctor's letter certifying the property owner was mentally capable to sign the estate documents
  - Videotape the execution of the estate documents (many question this approach)



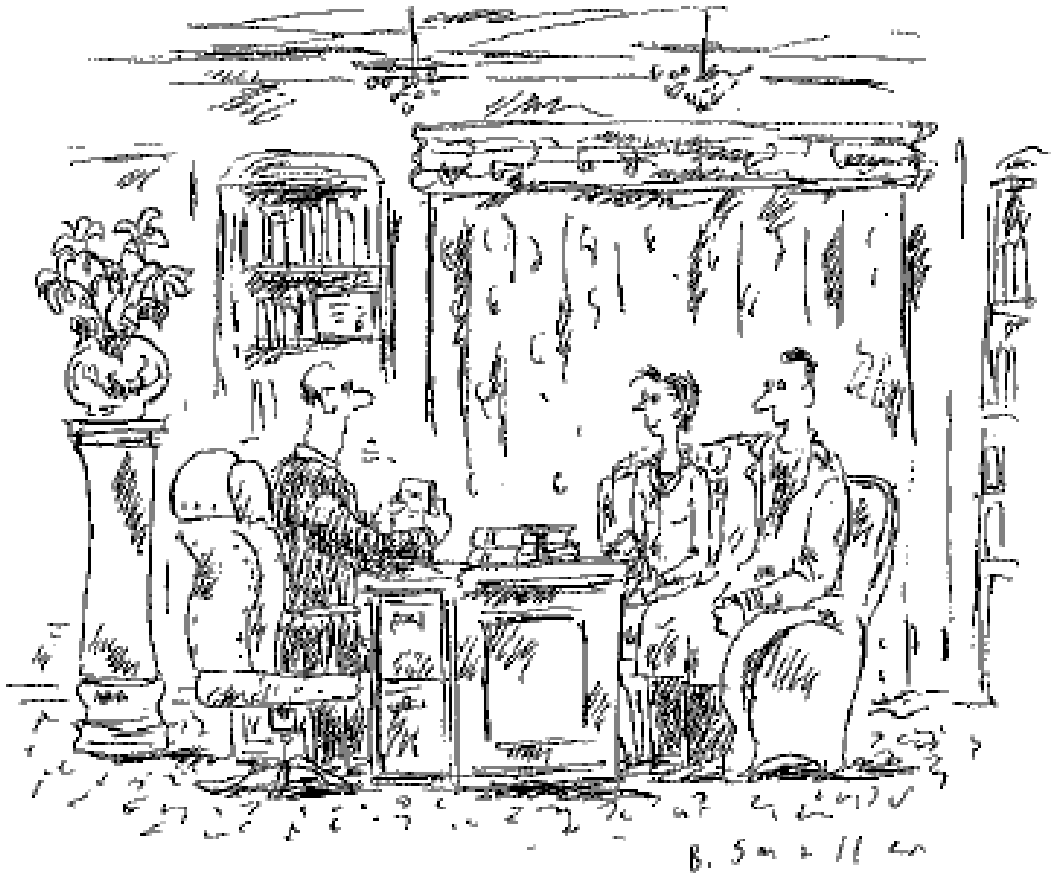
"Perhaps we're overthinking the situation."

AFFIDAVIT OF HEIRSHIP

- Drafting consideration: consider making these affidavits more akin to small estate affidavits (Estates Code, § 203.001 vs. Estates Code, § 205.002)
- Following the Estates Code may not be sufficient to obtain title insurance or rely on the affidavit before five (5) years have passed
- An affidavit of heirship will potentially be relied upon by title companies, and these companies may have different requirements
  - First American Title Insurance Company → requires the person be deceased for at least six (6) months; two disinterested persons are required to be the affiants, these two disinterested persons must have knowledge of the family history and must have personally known the decedent for at least ten years, and the affidavit must have been executed by all adult heirs, and the affidavit must include a penalty of perjury clause
  - North American Title Insurance Company → same standards as First American, but does not
    require the affidavit to include a penalty of perjury clause
  - Title Resources Guaranty Company → requires the person be deceased for at least three (3) months; relationship between witness and deceased must be stated; statement of the names of heirs is also preferred
- Communicate with your title company and/or lender and confirm its guidelines prior to a closing

MUNIMENTS OF TITLE – ESTATES CODE, CHAPTER 257

- You may probate a will as a muniment of title within four years after the decedent's death
  - Court may consider probating a will as a muniment of title more than four years if the proponent was "not in default" for not probating earlier
- Typically, probating a will as a muniment of title needs good cause
  - Valid will; no debts owed (except those like a mortgage); no administration is required
- Common errors we see when reviewing muniments of title:
  - No legal description
  - Does not state the property address
- A muniment of title really should have a legal description!
- Practice consideration: In order to avoid this type of mistake and incurring additional fees, confirm the legal description via the vesting deed or online (such as through the appraisal district, but not the tax records) prior to filing a muniment of title



"We'd like you to leave out the poorer, sickness, and death parts—they're a little dark."

SALES BY REPRESENTATIVES

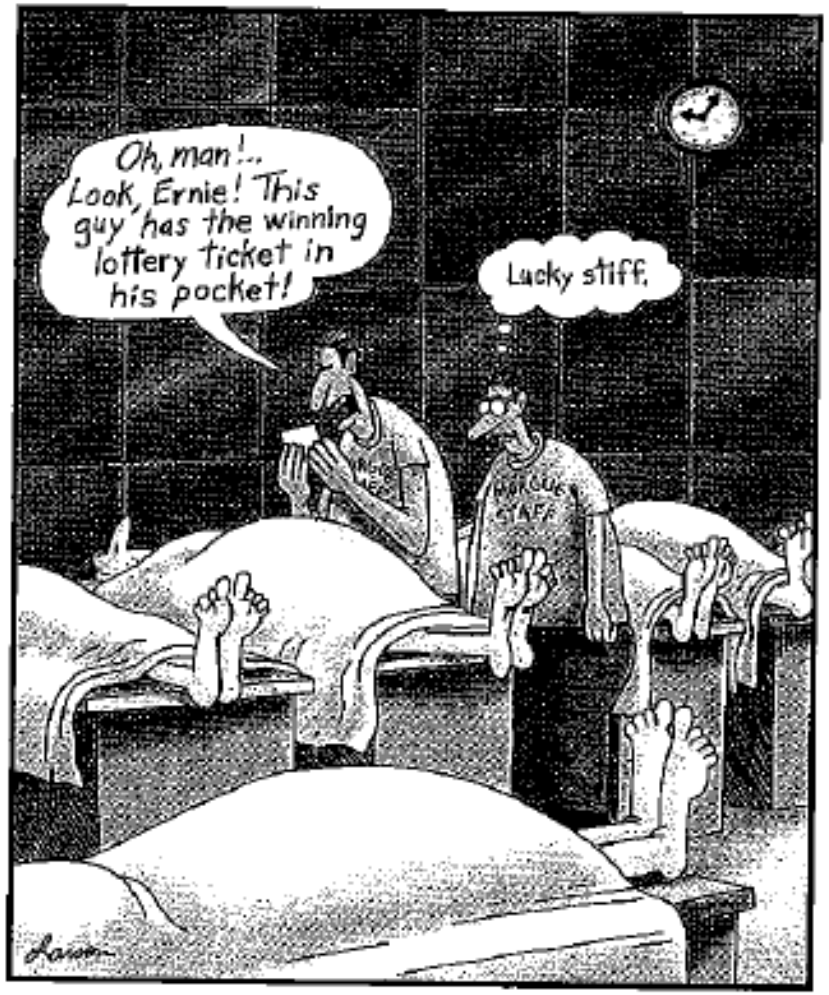
- Independent Executors:
  - An independent executor may have an implied power of sale when certain types of debts exist and the proceeds from the sale will pay off the debts
    - Funeral, administration expenses, illnesses, allowances, claims against the estate
  - The Estates Code provides a process by which real property may be sold with a court order. Consider carefully when the best approach may be the court order
  - Practice consideration – "appear necessary"?: have the devisee(s) join in the deed or execute a ratification of the sale; obtain an affidavit from the independent executor explaining which debts will be paid
- Independent Administrators:
  - A consent to the appointment of an administrator does not give the administrator the power to sell the property unless the consent specifically states so. See Estates Code, Chapter 401
  - Practice consideration: include the power to sell the property in both the order and the consent
    - This clears up any confusion and could potentially save your client money!

DECREE CONFIRMING SALE

- For purposes of the four step process in a dependent administration, the Decree Confirming Sale is required prior to signing and recording the deed
- A transaction may not fund until the Decree is obtained
- This requirement also applies to guardianships

INVOLUNTARY LIENS

- Title to a decedent's interest in secured real property is immediately vested in the decedent's heirs-at-law. See Estates Code, § 101.001
  - Heirs are not personally liable for the debts of the decedent
- Common liens that survive a property owner's death:
  - Tax liens
  - Mechanic's liens
  - Abstract of Judgment liens


Oh, man!.. Look, Ernie! This guy has the winning lottery ticket in his pocket!
Lucky stiff.
MORGUE STAFF

Affidavit in Lieu of Inventory - Estates Code, § 309.056

- Affidavits in Lieu of Inventory have streamlined the probate process, but may make closing a real property transaction a little harder because they often do not provide detail about the financials of the estate
  - We can no longer judge the size of the estate!
- In order to properly insure around an estate tax, there are a few things a title company would want to know:
  - Confirm the value of the estate
  - The estate has sufficient assets
  - The estate taxes have been paid
- Estate taxes are based on the entire estate, not just the probate estate
- Practice consideration: offer to provide a letter confirming the taxable value of the estate

Affidavit in Lieu of Inventory

- Insuring around - P-11
  - If there are estate taxes due, a title company cannot insure around unless it abides by P-11(b)(9)
    - Examine a balance sheet of the estate and take an indemnity from responsible persons protecting against loss due to unpaid taxes, or
    - Sufficient funds to pay the taxes be left in escrow
    - Examines a balance sheet of the estate and obtain a letter from a responsible person agreeing to see that the taxes are paid out of the assets of the estate
  - Who is a "Responsible Person?" – CPA!

BANKRUPTCY

- If a bankruptcy is pending upon the death of the decedent, the only assets that will go into the probate estate are the property claimed as exempt in the bankruptcy case
  - Any property acquired after the filing of the bankruptcy petition will also go into the probate estate
  - Practice considerations: know whether federal or state exemptions apply in your client's case
- If the death of the decedent occurs before filing of the bankruptcy petition, the property received from the estate will become property of the bankruptcy estate
- If the death of the decedent occurs within 180 days after the debtor files for bankruptcy, the property to be received by the heir(s)/devisee(s) will also go into the bankruptcy estate
- What if the property was disclaimed? See Estates Code, Chapter 240
  - If the disclaimant properly disclaimed the property prior to filing of the bankruptcy petition, the property is not part of the bankruptcy estate of the disclaiming party
  - Distinguish the IRS approach which focuses on the right to receive

"I'm not huffing and puffing. I'm foreclosing."

FORECLOSURE

- It is possible to default on a home loan when payments are not continued after the passing of a borrower
- A mortgage lender may not proceed with foreclosure immediately upon the death of the borrower
  - Questions to consider:
    - Has a Dependent Administration been opened? Dependent probate administration may be opened within four years of the borrower's death – if opened, any exercise of a power of sale is void
    - Is it necessary to petition the court for foreclosure approval?
- A power of sale pursuant to a deed of trust is suspended during the pendency of a Dependent Administration
- Within four years of a borrower's death, a foreclosure may be canceled, annulled, and declared void if
  a dependent administration is opened
- What if a foreclosure takes places within four years of a borrower's death, but a probate administration
  was never opened?
  - Because a probate administration was not opened within the time allowed by law, the trustee's deed is absolute four years after the borrower's death

FORECLOSURE

- What if the heirs are not themselves probating the estate?
  - Lender may petition the court to open a Dependent Administration
  - If this happens, some probate courts require the lender to start an heirship determination alongside its application
- What happens once an Independent Administrator is appointed?
  - Lender may not hold a non-judicial foreclosure until at least six months following the date of the appointment (Estates Code, § 403.054)
- Why should we encourage the heirs to probate the estate of a deceased borrower?
  - Clears any uncertainty that may exist if the estate is left un-probated
  - If a lender forecloses prematurely, it may lead to a contest by the heirs in probate court
- Communication between the heirs and the lender is beneficial to all parties involved

ADVERSE POSSESSION AMONGST CO-TENANT HEIRS

- Texas Civil Practice and Remedies Code, § 16.0265
- Provides additional rights to cotenant heirs, specifically those who live and pay taxes on the land, who collectively inherited real estate from an ancestor through intestate succession
- Cotenant heirs may acquire interests of other heirs by adverse possession if the possessing cotenant heir:
  - Adversely possesses property for ten years
  - Pays property taxes
  - Files Affidavit of Heirship and Affidavit of Adverse Possession (these may be combined into one instrument)
  - Publishes notice of their claim in a newspaper for four weeks
  - Provide written notice by certified mail, RRR, to the other non-possessing cotenant heirs
- Non-possessing cotenant heirs have five years to file a controverting affidavit or take other action to recover their interests
- No other cotenant can have contributed to the property or asserted a claim to title

OTHER CONSIDERATIONS

- Medical Power of Attorney is revoked by a "dissolved, annulled, or declared void" marriage between the principal and the agent (Health and Safety Code, § 166.144(a-1))
  - Practice Consideration: when drafting a MPOA, take into account whether your client is married and who will act as successor-agent if the marriage between the principal and the agent is dissolved
- Small estate affidavit proceedings limit increased from $50,000 to $75,000 (Estates Code, § 205.001)
  - Creates a more efficient, faster administration process
- Medicaid recovery is not supported by a lien in Texas
  - There are also many exceptions, waivers, and allowable deductions to the potential unsecured claim

Definitional Change – Estate Planning Vehicle

P-57 – Additional Insured Endorsement

Expands availability to additional estate planning vehicles such as family-owned limited partnerships and limited liability companies. The coverage may be obtained up to 90 days after transfer of the property to an approved estate planning vehicle.

P-57 ADDITIONAL INSURED ENDORSEMENT

P-57. ADDITIONAL INSURED ENDORSEMENT (Form T-26)

A. **~~Living Trust,~~ Acquisition of Interest under Existing Agreement or Estate Planning Vehicle ~~Family Partnership or Family Corporation~~**

1. An "Estate Planning Vehicle" is a legal entity, a trust, or a trustee of a trust, if the entity or trust is established by the insured for the purpose of planning the disposition of the Insured's estate.

P-57 ADDITIONAL INSURED ENDORSEMENT

- 2. a.
- 2. b. the additional insured is:
  - i. an Estate Planning Vehicle to which the insured conveys the title after Policy Date; or
  - ii. A distributee who has acquired an interest according to the terms of an Estate Planning Vehicle; or
  - iii. A partnership, limited liability company, or corporation solely composed of or owned by members of the Insured's family and the Insured; or
  - iv. any partner, member or stockholder that acquires the interests of other owners of the Insured in accordance with the terms and provisions of a written agreement in effect at Date of Policy.

P-57 ADDITIONAL INSURED ENDORSEMENT

- 3. The endorsement is requested by the additional insured; and
- 4. In the case of paragraphs 2.b.i-iii above,
  - a. the request for the endorsement is made within 90 days after the document conveying title to the additional insured is recorded; and
  - B. the document conveying title to the additional insured contains a warranty of title.
- Any matter covered in the Additional Insured Endorsement (Form T-26) may be insured only by this endorsement.

REAL ESTATE TRANSACTIONS – LEGAL AND EQUITABLE TITLE

- What does the term "sale" mean to you?
- In real estate transactions, "sale" means the earnest money contract has been executed, not that a deed has been executed
- The execution and delivery of a deed is a "conveyance" and not a "sale"
- For example: a realtor's sign indicating a home has been "sold" actually means there is a signed contract and closing pending
- The deed is a part of the closing, signifying the delivery of title
- But – a party may have an equitable interest in the property, even in the absence of a deed

Choosing a Deed

Can you draw up a simple deed for part of my property to my new LLC I set up?

- Not really simple. The form of deed may matter.
  - Do you currently have title insurance? Upon a transfer, the policy becomes a warrantor policy. A special warranty deed only warrants that you have not allowed an encumbrance. This is all post policy and your LLC will not have coverage.
- Are there multiple owners in the LLC? The ownership/interests may not only want continuing title insurance coverage (converted to warranty coverage by reason of a general warranty deed), but may desire the comfort of a general warranty.
- Another form of deed is a Deed Without Warranty – it is a no warranty deed, but it will support a chain of title, protect a bona fide purchaser or creditor, and allow for after acquired interests.
- A quit claim is not a deed. It only transfers the “right, title and interest” of the grantor, subject to all the unknown equitable interests, claims, and right of others. It carries no rights to property interests subsequently acquired by your grantor, and it cannot protect your subsequent bona fide purchaser. She is deemed to know of other claims and equitable interests. See Orca Assets, G.P.V. Burlington Res. Oil & Gas Co., L.P., 464 S.W.3d 403 (Tex. App. – Corpus Christi 2015; Section Report of The Oil, Gas & Energy Resources Law Section of the State Bar of Texas, Vol. 4, Number 2, Winter 2017.

Choosing a Deed Continued…

- And while you are at it – be sure the legal description is adequate to find the property. In particular, many times map or plat references are missing. The TREC contract omits this from the legal description.
- If a trust is a party, in Texas the record title holder needs to be a trustee. See Texas Business Organizations Code Section 1.002 (69-b). See also Texas Property Code Title 9 (Chapters 101-116) (unless it is a REIT). Remember in Texas, a trust is a fiduciary relationship, not an entity.
- Deeds need to be delivered, but recording is a presumption of delivery.
- If you make a mistake, see Texas Property Code sections 5.027 to 5.031. Err on the side of a material correction and have all parties sign the correction. If it is a non-material mistake, follow the statute. Be sure to send notice to any non-signing party.
- And remember – you cannot reserve a right to a third party in a deed. It will be ineffective. The best practice is to transfer that right to the third party, and then prepare and deliver the deed and record – in the correct order, and before each step.

Choosing a Deed Continued…

- And while you are at it – be sure the legal description is adequate to find the property. In particular, many times map or plat references are missing. The TREC contract omits this from the legal description.
- If a trust is a party, in Texas the record title holder needs to be a trustee. See Texas Business Organizations Code Section 1.002 (69-b). See also Texas Property Code Title 9 (Chapters 101-116) (unless it is a REIT). Remember in Texas, a trust is a fiduciary relationship, not an entity.
- Deeds need to be delivered, but recording is a presumption of delivery.
- If you make a mistake, see Texas Property Code sections 5.027 to 5.031. Err on the side of a material correction and have all parties sign the correction. If it is a non-material mistake, follow the statute. Be sure to send notice to any non-signing party.
- And remember – you cannot reserve a right to a third party in a deed. It will be ineffective. The best practice is to transfer that right to the third party, and then prepare and deliver the deed and record – in the correct order, and before each step.

Speaking of Gifting

We want to give our daughter the lake house – we are moving to Florida – can you draft me a simple cash deed?

- Time out! A cash deed is likely not a gift. A gift can create separate property – or not. Do you want your daughter to have the property as her separate property? While the cash deed would have been presumed to create community property, a gift deed to your daughter alone would make it her separate property. Of course you could always gift it to her and her delightful worthless husband if you choose. Texas Family Code Section 3.001.

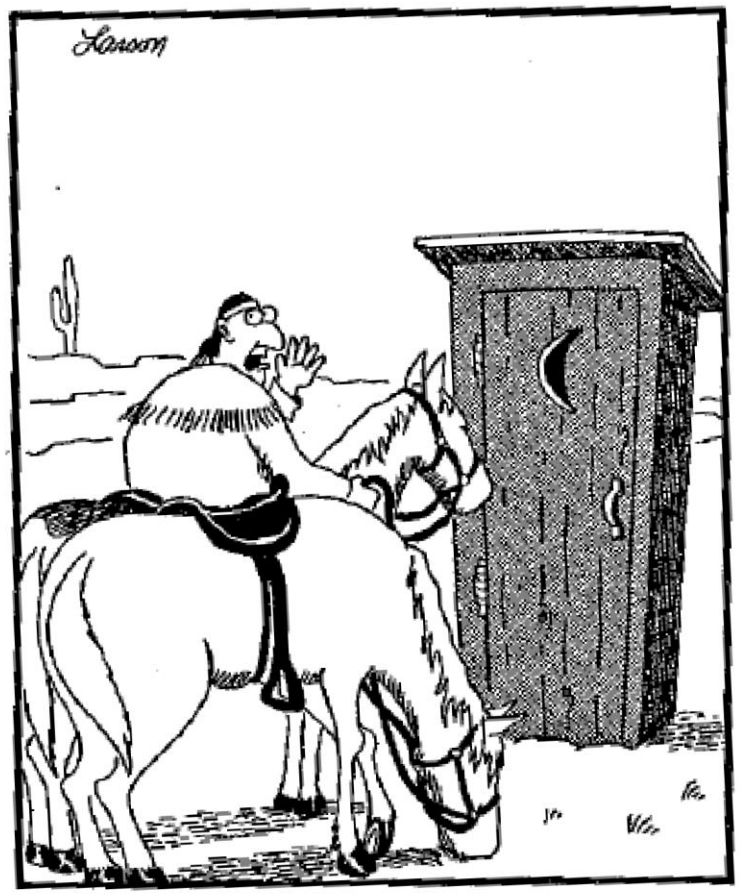
"Now wait just a minute here. … How are we supposed to know you're the *real* Angel of Death?"

BONA FIDE PURCHASER

- According to the Texas Recording Act, found in Section 13.001 of the Texas Property Code, a conveyance of real property or interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser with valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law
- What does this mean?
  - A deed delivered, but not recorded is not sufficient notice to a later subsequent bona fide purchaser
  - A bona fide purchaser's title is superior to title held by an earlier purchaser holding an unrecorded deed
  - Party claiming title has burden to establish the BFP was not in good faith, for valuable consideration, and without notice

BONA FIDE PURCHASER

- Example:
  - Grantor A delivered a signed deed conveying Blackacre to Grantee B on January 1
  - Grantee B paid Grantor A, and recorded the deed in Dallas County, Texas on January 31
  - Grantor A delivered a signed deed conveying Blackacre to Grantee C on January 20
  - Grantee C paid Grantor A, and recorded the deed in Dallas County, Texas on January 22
  - Grantee C had no knowledge of the previous deed conveying Blackacre to Grantee B
  - Grantee C has superior title
- Constructive Notice versus Actual Notice
- If a bona fide purchaser acquired real property from the heirs of a decedent more than four years from the date of death of the decedent, the BFP has good title
- RECORD!



"Kemosabe! ...The music's starting! The music's starting!"

CONCLUSION

- Comply with current requirements for DPOA's
- Be careful with TODD's
- Plan ahead for real estate transfer requirements and desires
- Record

Some Good References

- What Every Estate Planner and Executor Needs to Know About Real Estate, Barton Bentley, State Bar of Texas, Intermediate Estate Planning & Probate, June 21, 2016

- Where Real Estate And Estate Planning Collide, Kristen Porter and Partria Sitchler, Texas Land Title Institute, December, 2012.