

TOPICS

- Real estate titles for a decedent
- Transfer on Death Deed
- Affidavits that Transfer Title
- Correct identifications of titleholder
- Trust real estate

IC 29-1-7-23, Devolution of Estate (Real Estate Interest) at Death

- Transfer title at death by Affidavit
- Specific contents in the Affidavit prescribed
- Present Affidavit to Auditor, Sales Disclosure Form exemption, must stamp and endorse transfer of title

IC 29-1-7-23 (continued)

- Recorder “must record the Affidavit”
- Recorder “must index the Affidavit” for transfer of the real property
- Affidavit constitutes prima facie evidence of transfer of decedent's title to the real property

IC 29-1-7-23 (continued)

- Limitation:
 - Affidavit procedure to transfer title if:
 - At least seven (7) months have elapsed since Decedent's death;
 - Letters Testamentary or Letters of Administration have not been issued; and
 - Court has not issued an Order barring the Affidavit process.

Title Underwriter Issues

- Properly prepared and recorded Affidavit meeting the requirements of §23 is insurable title
- Caveat: Title insurance underwriters are not the Wizard of Oz, but they are all powerful

Tenancy of Grantee

IC 32-17-2-1

- Devise to two or more persons is estate in common, not a joint tenancy
- If no joint tenancy language, no joint tenancy classification shown for Grantee, but language in the deed otherwise clearly expresses an intent for joint tenancy that will control
- Statutory phrase: “manifestly appear in the tenor of the instrument.”

Underwriter Comments re: Same Sex Marriage Titles

- Statute refers to husband and wife with regard to tenants by the entirety.
- Statute has not been revised to remove explicit reference to husband and wife subsequent to recognizing same sex marriages in Indiana

Obergefell v. Hodges, 135 S.Ct 2584 (2015)

- 14th Amendment (equal protection) prohibits state statutes that ban same sex marriages
- No stated requirement that the parties to a same sex marriage must identify as husband or as wife
- Same sex married couple may acquire property as tenants by the entirety

TENANTS BY THE ENTIRETIES

- The hallmark feature for tenants by the entirety is death of one spouse automatically leaves title vested in the surviving spouse.
- Protections against liens and encumbrances attaching to property during the entirety
- IC 32-17-3-1

Tenants by the Entireties (continued)

- Classifying ownership on title insurance
- On the title work, do not indicate the marital status nor the tenancy of the insured owner
- This is a title underwriter issue, not necessarily deed preparation issue
- Underwriter does not want to appear to insure that the parties are duly married by identifying the tenancy as tenants by the entireties or making reference to marital status without independent corroborating evidence of the marital relationship.

Tenants by the Entireties (continued)

- If the Grantees are a married couple, conveyance to the parties creates a tenants by the entireties estate
- The entireties estate may be overcome with express language in the instrument creating tenancy in common
- “Tenor of the contract” may establish tic rather than entireties estate

Quit-claim Deeds

IC 32-17-2-2

- IC 32-17-2-2: a Quit-claim Deed passes all of the estate owned by the Grantor
- Grantor cannot quit-claim what the Grantor does not own
- Quit-claim Deeds can convey merchantable title or insurable title
- Who created the phrase “Quick Claim Deed?”
- Try a Google search

Quit-claim Deed

- General words of conveyance from a Grantor to an identified Grantee with a proper description of the real estate and statement of consideration, signed, sealed, acknowledged is a proper deed
- Is good and sufficient conveyance in quit-claim to the Grantee
- IC 32-21-1-15

Transfer on Death Deed Recording

- Transfer on Death Deeds are controlled by IC 32-17-14
- TOD Deed must be recorded before Owner/Grantor's death
- TOD Deed may transfer the estate to a trustee
- TOD Deed by a spouse and tenants by the entirety requires both spouses to sign
- TOD Deed by a joint tenant severs the joint tenancy

Transfer on Death Deed (continued)

- Once a TOD Deed is recorded, a subsequent deed by the owner to a party will void the TOD Deed
- The subsequent deed must be recorded before the owner's death or the previously TOD Deed will control
- IC 32-21-1-15 (b)

Small Estate Affidavit

- IC 29-1-8-1
- Value of probate estate v. Affidavit of devolution
- (b) Affidavit must state the gross value of probate estate does not exceed \$50,000 (certain deductions are allowed)
- Affidavit of Devolution – real estate is part of the probate estate

Sale of Real Estate out of an Estate

- Transfer by Small Estate Affidavit
- Non-probate transfer deeded Affidavit of Devolution
- Personal Representative Deed in unsupervised administration
- Personal Representative's Deed in supervised administration
 - Court approved Deed?
 - LWT Power to Sell?

Life Estate Conveyance

- Life estate is a property interest that may be conveyed
- Life tenant attempting to convey an estate greater than the life estate interest is:
 - Not a forfeiture of the life estate interest;
 - Is effective to transfer or convey the life estate interest, notwithstanding language that purports to convey a greater interest
- IC 32-17-2-5

Trustee Deed

- Proof of trustee power and authority to transact with real estate owned by the trustee (and held in trust)
 - Trust instrument
 - Certification of trust – IC 30-4-4-5
 - Required contents of the certification delineated in the statute

Trustee Deed (continued)

- Record certification?
 - statute: §5 uses “may” regarding certification
- Recipient may require excerpts from original trust instrument that designate trustee; confirm powers
- Good faith reliance on certification
- Mandatory in Florida?

Root of Title

- IC 32-20-2-6
- A title transaction that creates an interest
- Rely on root of title issues to determine marketability of title
- Most recent recorded instrument that creates or identifies the interest at least 50 years before the date determining marketability
- Example: Old Ellettsville Elementary School

Nuell, Inc. v. Timothy D. Marsillet & Property-Owners Insurance Co., Ct App. Case No. 20A-PL-1427 (February 16, 2021)

- A harsh result for what may be not an unusual practice?
- Judge Najam decision – history of interesting real estate law opinions
 - See *Miller v. Geels*
- Issue: Property conveyed to a trust, meaning the trustees, trustmaker – settlor – beneficiary – trustees all one and the same (husband and wife)

Nuell, Inc. v. Timothy D. Marsillet & Property-Owners Insurance Co. (continued)

- Lease executed by husband and wife apparently in individual capacity
- For real estate titled to the trustee, the lease signed by the landlord identifying the husband and wife individuals and not in trustee/settlor/beneficiary or any other capacity related to the trust was ineffective
- Court: as individuals, husband and wife had no authority to lease the property because it was owned by them as trustees.

Nuell, Inc. v. Timothy D. Marsillet & Property-Owners Insurance Co. (continued)

- Lease stated the property was owned by the husband and wife, not identifying their capacity as trustees
- Court: the trust did not enter into the lease agreement
- Court: Husband and wife had no authority to commit the trust to the lease even though they were known to all parties to be the settlors/trustees/beneficiaries of the trust

Nuell, Inc. v. Timothy D. Marsillet & Property-Owners Insurance Co. (continued)

- Court mixes references to trustee as owning the real estate and the trust as owning the real estate
 - A typical problem
- It is common for attorneys to refer to the trust owning the real estate when more specifically the trustee owns the real estate held in accordance with the terms of the trust instrument

Nuell, Inc. v. Timothy D. Marsillet & Property-Owners Insurance Co. (continued)

- Title underwriter preference:
 - Title work should reference title vested in the trustee, not in the trust
- Trustee names not required. Trustee can change from time to time and title is always held in the then properly appointed trustee by whatever name