

Real Property Law Section NEWSLETTER

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**REAL PROPERTY
LAW SECTION**

COMMENTS FROM THE CHAIR

*A. Michelle (Shelli) Willis, Esquire
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Here's to the New Decade! To a person, everyone I've talked to feels that this year will be better than last. Granted, part of that conclusion stems from the "been down so long it looks like up" adage, but the more promising part of it is good old American fighting spirit and optimism. Having been battered over the last couple of years, we've been to the corner for a towling and a breather now, and are ready to make something of the New Year.

In the real estate community, we are seeing signs of life in the residential market, and seeing that the commercial market, held in suspense over the past year, is beginning to make the necessary move toward processing distressed assets and resetting itself.

In our legal community, the market is forcing us to re-evaluate how we conduct our business. We don't yet know the extent of the "paradigm shift" we've spent the last year talking about and the changes it will require in our pricing, staffing and client service, but we can assume it will require increased discipline, efficiency, focus and practivity on our part. Change is inevitable though never easy, so let's embrace it and move on.

Like committing to live the clean life after a night of excess, we're ready to work, budget and save, and realize we will have to work longer, harder and smarter. The recent tragedy in Haiti, and the wellspring of American response to it, reminds us how fortunate we are to have the opportunity to do so.

I join in the sentiment that as we begin 2010 we are more hopeful than fearful, and ready to rise to the challenge.

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PRIVATE TRANSFER FEE COVENANTS

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Private transfer fee covenants have been around for some time, particularly in Texas and Florida, but they have recently gained traction and appeal among land owners in Georgia because of the dislocation in the financial markets and the inability of land owners to obtain capital through traditional sources of debt and equity. In theory, a private transfer fee covenant allows a land owner to enjoy future revenue from property that the land owner sells today. As part of the sale, the land owner records a declaration that imposes a covenant for a period of 99 years and provides that each time the property is sold during that time period a private transfer fee (typically 1% of the sales price) must be paid to the land owner (or such owner's successor in interest).

One of the original promoters of the private transfer fee program has designed proprietary documentation, called a reconveyance fee instrument (or RFI), that it licenses to land owners who wish to put in place a private transfer fee program. Because RFIs represent a future income stream that can be monetized, this promoter believes that RFIs can be pooled together for securitization (just as mortgages have been), enabling land owners to sell their interest in the RFIs in the securities markets and thus creating a source of capital that can be used to pay off mortgage loans, other debt, develop infrastructure and so on.

But the real estate attorney should be cautious when advising a client whether to enroll property in an RFI program. Marketability is perhaps the most significant issue to consider. Marketability poses the question whether an encumbrance, such as an RFI, will make a property harder to sell or finance in the future. The lawyer will want to consider and advise the client with respect to the likely reaction of both future buyers and future lenders. The client, and future buyers and lenders, will be interested in what the title companies have to say about the RFI.

Through the end of 2009, one of the largest title insurance companies had refused to insure the title of any property encumbered by an RFI. Effective as of December 31, 2009, however, this title company will now insure such property with the following exception:

Covenants, conditions and restrictions and other instruments recorded in the public records and purporting to impose a transfer fee or conveyance fee payable upon the conveyance of an interest in real property or payable for the right to make or accept such a transfer, and any

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all fees, liens or charges, whether recorded or unrecorded, if any, currently due or payable or that will become due or payable, and any other rights deriving therefrom, that are assessed pursuant thereto.

This exception should be discussed carefully with the client. Future buyers and lenders are likely to have concerns about it, but lenders in particular are unlikely to be satisfied. The lender is likely to want affirmative coverage for the sorts of matters that the exception excludes – e.g., assurance that transfer fees have been paid and that a failure to have paid such fees will not result in a lien that primes the lender's lien, or worse still, in a forfeiture of title. Furthermore, it is possible that a lender may not accept an RFI at all unless it is subordinated to the lender's security instrument. The client and future buyers might be willing to live with the exception provided that some of the matters covered by the exception can be independently confirmed – in particular, that all past transfer fees have been paid and that all lien rights and other rights have been extinguished. However, such independent confirmation may not be easy. Since the typical term of an RFI is 99 years, the problem of finding the parties entitled to payment may become harder, or virtually impossible, as time passes. The due diligence to address these matters may constitute an insuperable burden, resulting in an adverse effect on marketability.

Finally, it is not at all clear that the RFI vehicle is enforceable. Possible grounds for attacking the enforceability of an RFI include the following: (i) the RFI is an attempt to create a new estate in land; (ii) the RFI is an unreasonable restraint on alienation; (iii) the RFI does not "touch and concern" and thus is an unenforceable servitude; and (iv) the RFI's effect on marketability violates public policy. (See generally Marjorie Ramseyer Bardwell and James Geoffrey Durham, *Transfer Fee Rights – Is the Lure of Sharing in Future Appreciation a Flawed Concept?*, PROBATE & PROPERTY, VOL. 21, NO. 3, MAY/JUNE 2007.) For some or all of the foregoing reasons, private transfer fee covenants have been the subject of legislation in several states. Florida, Missouri and Oregon have each passed statutes prohibiting RFIs, subject to certain narrow categories of exclusions (e.g., transfer fees payable to §501(c)(3) entities and those payable to owner's associations are not prohibited). Kansas has enacted a complete prohibition against all RFIs without any exclusions. California's transfer fee statute allows RFIs but requires disclosure of the transfer fee covenant in a separate document printed in 14 point bold face type. Texas's statute is restricted to residential property only and is written so that arguably it prohibits parties from allocating the responsibility for payment of the transfer fee to the purchaser (according to this interpretation, an RFI does not violate the statute so long as the seller, but not the purchaser, is allocated responsibility for paying the fee).

RPLS AWARDS CHAIRPERSON, Lisa Roberts, (far left) and RPLS Chair, Shelli Willis, (far right) welcome three of the scholarship recipients at the annual Commercial Real Estate Seminar held November 15th. Accepting awards are (l to r) Sarah Morang – UGASchool of Law; John Hampton – GSU College of Law, and Christine Rutz – Emory University School of Law.



LAW STUDENTS AWARDED SCHOLARSHIPS BY THE RPLS

On November 15, 2009, in connection with the Fall Commercial Real Estate Seminar sponsored by the Real Property Law Section, the Executive Committee of the Real Property Law Section awarded four scholarships pursuant to the Exemplary Real Property Law Student Award. The purpose of the Award is to encourage academic excellence in deserving students, and to encourage participation in the Real Property Law Section of the State Bar of Georgia. The Award is granted to second or third year law students who possess, among other criteria, an interest in a real estate legal career, have achieved excellent academic performance in an upper level real estate course and who have ties to Georgia. The students were honored, along with past Chairs of the Real Property Law Section, at a dinner held at the Capital City Club.

Recipients of the scholarships include John Hampton, who attended the Georgia State University College of Law. Mr. Hampton, a member in the top ten percent of his class, was the Co-President of the Environmental Law Society and a founding member of the Estate Planning and Wealth Management Law Society. Mr. Hampton has a background in commercial and residential title examination, where he focused for eight years primarily on tax deed titles and title defect resolution. After graduation, Mr. Hampton plans to form a title company of his own.

The University of Georgia School of Law was represented by Sarah Morang. A recipient of her Juris Doctorate in 2009, Ms. Morang was in the top third of her class and was a member of the Student Bar Association and Environmental Law Association. She is currently employed by Russell T. Quarterman, P.C. in Athens, Georgia.

Christine Rutz, of the Emory University School of Law, received her Juris Doctorate, cum laude and Order of the Coif in 2009. Ms. Rutz served as an Executive Managing Editor of the Emory Bankruptcy Developments Journal and was a member of the winning team for the Spring 2008 real estate case competition in conjunction with the Goizueta School of Business. She was a summer associate at Troutman Sanders in 2007 and 2008 and is currently employed with Friese Legal, LLC.

The Walter F. George School of Law of Mercer University was represented by Rebekah Betsill. Prior to attending law school, Ms. Betsill graduated cum laude from Clayton State University with a B.A.S. in Administrative Management. While pursuing her undergraduate degree, Ms. Betsill was employed as a real estate closing secretary. Ms. Betsill received the highest grade in Mercer's Real Estate Transactions course, and graduated from Mercer in May 2008. She is currently employed by the Law Firm of Stephen D. Ott, P.C.

Finally, John Marshall School of Law was represented by Clayton Keith. The 2009-2010 award recipients will be selected over the next few months and the scholarships will be awarded in the Fall of 2010.

TUNING UP YOUR TITLE EXAMINATION PROCEDURES

(For Residential Practitioners)

with guidance from the Georgia Rules of
Professional Conduct and Georgia Title Standards

Gayle Camp Keener, Esquire

Ethical considerations must drive residential practitioners at all times. This article focuses on the junction of the Georgia Rules of Professional Conduct and the Georgia Title Standards.

First, delegation to a non-attorney is prohibited under the Rules of Professional Conduct. Rule 5.3, Georgia Rules of Professional Conduct, Responsibilities Regarding Non Lawyer Assistants states as follows:

With respect to a non lawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Georgia Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Be careful. Because they do not have legal training, non-attorney title examiners and secretaries may not know certain things or understand the importance of certain things. Careful supervision is required, and you cannot assume that anyone else but you is providing it.

Further, Georgia Title Standard 24.1, provides as follows as it relates to the opinions rendered by Title Attorneys:

Under the laws of Georgia, one of the functions of an attorney and of the definitions of the "practice of law" is the rendering of opinions as to the validity or invalidity of titles to real or personal property derived and concluded from the examination of necessary records made, or caused to be made by the attorney. This does not necessitate the title attorney personally examining the record books, but does

necessitate the attorney's responsibility for all record searches authorized by or purchases by said attorney in the fulfillment of said attorney's title opinion contract with the client. No person under the laws of Georgia, other than an attorney at law, may express, render or issue any legal opinion as to the status of the title to real or personal property.

The above means that title examiners cannot take for granted that they have the same understanding that attorneys have. For example:

- (1) Liens. Make sure your title examiners check the lien docket for at least ten years, not seven. While the duration of most liens is only seven years, federal tax liens have duration of ten years plus thirty days. Obtain a list of liens that affect Georgia real property with the appropriate durations listed.
- (2) Limited searches. Some title examiners think a limited search is a search forward from the most recent vesting deed. The actual requirement of at least one title company is a search from the most recent warranty deed, but not less than ten years. So, if the vesting deed is less than ten years old, the examiner has to go back to the first warranty deed that is at least ten years old.
- (3) What is "set up?" An attorney examiner will provide a Certificate of Title or opinion of title. A non-attorney examiner will provide a title report. Some items contained on a report may be determined not to affect marketability by application of the Title Standards by an attorney. If you use an attorney examiner, do you want him to use his judgment or set up everything for your review? If you use a non-attorney examiner, do you want her to be making these judgments -- there is no attorney review of matters not set up, but you are responsible for her judgments.

Some title services provide a title insurance commitment in lieu of a title report. If you are being provided a commitment, is there an attorney who made the judgments of what to include on the commitment? Is there a legal opinion being made by a non-attorney, and are you therefore participating in the unauthorized practice of law?

Next, the unauthorized practice of law is a growing challenge in the state of Georgia and could pose new issues in relation to the certifying of title. Rule 5.5, Georgia Rules of Professional Conduct, states as follows:

- (a) **A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.**

Also, be aware that you have a duty to inform clients of items which might not appear on a commitment -- items that would appear on a Certificate of Title. If you do not review a title report, you may not be aware of something of which you have a duty to inform your client.

Moreover, Georgia Title Standard 24.2, creates a duty to inform the client of certificate of title exceptions which can be insured over by title insurers, as follows:

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Exceptions in title certificates such as indexing errors of governmental personnel, forgeries, non record violations of truth in lending laws, matters of survey and actual notice of title defects to owners of record, should be brought to the attention of the client in order that the client may make the decision to obtain title insurance in addition to the certificate of title or to waive same.

Next, attorneys must realize that the exposure is ultimate for all acts of subordinates, such as associates and secretaries. For example, be careful in allowing secretaries to screen incoming title orders as to when they need attorney attention. Cash transactions and seller financed transactions may seem simple to a secretary, but pose more complex issues for your practice than the closing of transaction where a lender provides most of the documentation. For example, sometimes office staff will prepare a FNMA note for any transaction, but if you represent the seller in an owner financed transaction, the seller may not want to have to give the notices of default required in a FNMA note, or allow reinstatement. The client is trusting the closing attorney to use the correct document and if the differences are not discussed, then they have not been well represented. Another issue that is very important to consider is whether there is a need for a survey.

Next, professional courtesy in the daily practice of law is a mandate which should be followed at all costs, and especially in regards to title examination. Georgia Title Standard 1.2 states:

When an attorney discovers a situation which the attorney believes renders a title defective and he/she has notice that the same title has been examined by another attorney who has passed the defect, it is recommended that the attorney communicate with the previous examiner, explain the matter objected to, and afford an opportunity for discussion, explanation, and correction. The attorney contacted should cooperate fully and promptly in investigating his/her records and taking whatever steps are necessary to explain and/or correct the title defect complained of.

Based on the above, if you find an error made by another office, call them first. Give them the opportunity to correct it. And if you notify the office and you get no response, call the attorney yourself. They should quickly cooperate to explain or to correct the problem. It's the Golden Rule: Do unto others as you would have them do unto you. The day will come when someone discovers your scrivener's error or something you failed to do and you want them to call you first. Go one step further whenever necessary. If it appears that another attorney is not willing to be of assistance, you can explain to their prior client that a mistake was made that should be corrected and tell them to contact the attorney. BUT, first, stop and think if you can correct the problem yourself and save time and potential embarrassment for a harried colleague. For example, if there is an open loan deed where the loan was paid by another office, first call that law office hoping they can provide assistance. They may have the cancellation or a quitclaim in the file and failed to record it, or they may offer to file an affidavit regarding pay-

ment. Next, see if you can simply do what they failed to do – call the lender and see if a quitclaim deed can be obtained quickly. Being even more courteous than is required can actually save time for your practice.

Teach your staff not to argue with other attorneys, no matter how experienced or knowledgeable they are or think they are. Sometimes closing secretaries will place a call regarding a title issue, wind up with an attorney on the line, and (1) refuse to transfer the call to, or leave a message for, their attorney employer, and/or (2) threaten the attorney (for instance, to call a lender client and tell them the attorney did something incorrectly), when they simply do not understand what the attorney they have reached is trying to convey to them. It is unfair to expect a non-attorney to deal with all questions that arise in reviewing title reports. Teach your staff that if an attorney they have contacted asks to speak to you, to honor that request. After all the Title Standard recommends that you, the attorney, will contact your colleague – not that your secretary will.

Moreover, corrective work is a common part of any residential daily activities. Have your staff bring title problems to you for review and reserve the decision on the proper corrective action to be yours. Requiring staff to “clean up titles” without adequate supervision can result in situations that do not reflect well on a practice. For example, avoid unnecessary calls to the offices of colleagues. If a staff member does not recognize a situation where a Title Standard applies, their call to another office may take up valuable time – your offices' and your colleagues'. As stated in the Comment to Georgia Title Standard 1.1:

Title Standards are primarily intended to eliminate technical objections which do not impair marketability and some common objections which are based upon misapprehension of the law. The examining attorney, by way of a test, may ask after examining the title, what defects and irregularities have been discovered by the examination, and as to each such irregularity or defect, who, if anyone, can take advantage of it as against the purported owner, and to what end.

For example,

Georgia Title Standard 5.1 When Defective Descriptions Do Not Impair Marketability, states:

Errors, irregularities, and deficiencies in property descriptions in the chain of title do not impair marketability unless, after all circumstances of record are taken into account, a substantial uncertainty exists as to the land which was conveyed or intended to be conveyed, or the description falls beneath the minimum requirements of sufficiency and definiteness which is essential to an effective conveyance. Lapse of time, subsequent conveyances, the manifest or typographical nature of errors or omissions, accepted rules of construction, and other considerations should be relied upon to approve marginally sufficient or questionable descriptions.

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Bearing in mind the above, avoid the indiscriminate use of Scrivener's Affidavits. There are limits to what a scrivener's affidavit can correct. One important example: You cannot use a scrivener's affidavit to put the correct legal description in a document when the document contains a description of the wrong property. The proper use of scrivener's affidavits is limited and is set out in the Title Standards as follows:

Georgia Title Standard 6.5 Scrivener's affidavits may be utilized by the preparer of a document, or other party in a valid position to know, to correct clerical errors when the original parties are unavailable. Such corrections should be unquestionably the original intention of the parties, minimal in extent, and supportable by extrinsic evidence if called into question and should be recorded.

In the situation of the incorrect legal description contained in or attached to a deed, a corrective deed is needed. A description of a completely different piece of property than the one intended to be conveyed is not a mere clerical error.

Finally, commercial transactions can provide extra challenges to the ethical landscape. An attorney should not agree to close a commercial transaction unless he/she has been trained by or will be aided in the transaction by another attorney experienced in closing commercial transactions.

If you have no experience handling the closing of commercial transactions, be aware that there are differences and train your staff to recognize a transaction that is really commercial, i.e. where the property is not an owner-occupied residence.

Always keep in mind your limitations in your practice to avoid an ethical collision. Rule 1.1 of the Georgia Rules of Professional Conduct states:

Competence. A lawyer shall provide competent representation to a client. Competent representation as used in this Rule means that a lawyer shall not handle a matter which the lawyer knows or should know to be beyond the lawyer's level of competence without associating another lawyer who the original lawyer reasonably believes to be competent to handle the matter in question. Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Even if you do have commercial experience but also handle residential closings, there needs to be a procedure in the office which sorts out commercial transactions for attorney attention immediately when they come into the office. Then you do not end up finding out that you are closing a commercial transaction when you sit down at closing and it is too late to give the transaction proper attention.

In conclusion, common sense, and a regular review of the ethical standards and title standards, can prevent all ethical dilemmas. If faced with a situation in which you are unsure what to do, the State Bar of Georgia Ethics Hotline at (404) 527-8741 or (800) 682-9806.

What's In A Deed?

J.V. Dell, Jr., Esquire

Blasingame, Burch, Garrard & Ashley, PC

A deed is defined as a "written document that transfers title or an interest in real property to another person."¹ It includes all *ex contractu* instruments that convey title to land. In Georgia, a valid deed must be in writing, signed, attested to, delivered and include consideration.² But these minimal statutory requirements are not enough.³ Regardless of the type of deed, there are nine indispensable elements and three basic parts of a deed that every lawyer should be familiar with.

Elements Of A Deed.

The nine elements of a deed are that the deed: 1) must be in writing; 2) contain a grantor; 3) contain a grantee; 4) be given for consideration; 5) contain words of conveyance; 6) describe the real property; 7) is signed by the grantor; 8) is attested to by two witnesses; and 9) is delivered. These elements are explained in more detail as follows:

1. **Writing.** In order to be valid a deed must be a written instrument and it is subject to the Statute of Frauds.⁴
2. **Grantor.** The person or entity that presently owns or has an interest in the real property and is conveying the same must be clearly identified in the deed. The grantor must be competent and *sui juris*. It is not essential that the grantor's name be in the body of the deed as long as the signature line is clear,⁵ but, it is the better practice to include the grantor's name in the body of the deed and in the signature line. Note that, if the name of the grantor in the body of the deed is different from the signature, in most cases the signature will control.⁶
3. **Grantee.** The person or entity that is receiving the interest in the real property must be clearly identified in the deed. A grantee does not have to be competent or *sui juris*, but they must be a natural person in being or a presently existing legal entity.⁷
4. **Consideration.** The deed must be made in exchange for good and valuable consideration.⁸ The consideration may be nominal, but without it the deed will fail. The one exception to this rule is the Deed of Gift or voluntary conveyance where no consideration is required.⁹
5. **Words of Conveyance.** There are no magic words or prescribed terms, but the deed must contain language that has the effect of conveying title. Most deeds use something similar to the following: "bargain, sell and convey" or "quitclaim, transfer and release," but any words showing intent to convey the title are sufficient.
6. **Description Of The Real Property.** The deed must contain a description of the land sufficient to identify the real property being conveyed or a key to be applied with extrinsic evidence so as to provide a means to identify the land.¹⁰ Without such a description the deed is invalid as a conveyance of title or even color of title.¹¹
7. **Signature.** The deed must be signed by the grantor.¹²
8. **Attestation.** The signature of the grantor must be "attested by at least two witnesses."¹³ Attestation is the act of subscribing one's name to a document as a witness and requires that the witness physically see the grantor execute the

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deed.¹⁴ Further, one of the witnesses must be notary public or some other statutorily appointed official witness.¹⁵ Without a notary public or other official witness there must be an acknowledgement of the grantor's signature.¹⁶

While the necessity of having two witnesses is a statutory requirement, the lack of one or both witnesses does not invalidate the deed. An unwitnessed deed is still valid as between the parties; it is just unrecordable and inadmissible in evidence.¹⁷

9. **Delivery.** Finally, until a deed is delivered it is not valid.¹⁸ Delivery is complete when the deed passes out of the grantor's control and dominion with the intention that it shall be conveyed to the grantee.¹⁹ Further a crucial part of delivery is acceptance. As such, in order for delivery of the deed to be complete, the grantee must accept the deed.²⁰

Parts Of A Deed.

The three basic parts of a deed are the: 1) heading; 2) body; and 6) signature block. These parts are explained in more detail as follows:

1. **Heading.** The heading is located at the top of the deed and contains the caption, which shows the place of execution of the deed, the name and address of the person to whom the deed should be returned after recording,²¹ and other important recording information like cross-references to other instruments.
2. **Body.** The body is located in the middle of the deed and contains the Premises, Granting Clause, Description, Habendum Clause, and Warranty Clause. The premises is usually the first paragraph of the deed and contains the name of the parties to the deed and the date of the deed. The granting clause shows the intent to transfer title by listing the words of conveyance and frequently contains the recital of the consideration for the deed. The description of the land being conveyed can be a part of the body of the deed or referenced in an exhibit, but either way, it must be clearly set forth somewhere in the deed. The habendum clause typically follows the description of the land and defines the estate being transferred and the extent of the interest conveyed.²² Finally, the warranty clause, which is generally the last paragraph of the body of the deed, provides the type of warranty of title given by the grantor to the grantee. In a quit claim deed, there is no warranty of title and as such it does not contain a warranty clause.
3. **Signature Block.** The signature block is located at the end of the deed. The signature block contains the testimony,²³ grantor's signature, attestation, and sometimes the date.

In conclusion, the use of deeds with the above described elements will most likely prevent any legal challenges to the document being used to convey an interest in real property.

1. West Encyclopedia of American Law, 2nd Ed.
 2. Pindar's Georgia Real Estate Law and Procedure, 6th Ed., § 19-1.
 3. O.C.G.A. § 44-5-30.
 4. O.C.G.A. § 13-5-30.
 5. Sterling v. Parks, 129 Ga. 309 (1907).
 6. Georgia Title Standards, § 3.6.
 7. Pindar's Georgia Real Estate Law and Procedure, 6th Ed., § 19-137.
 8. O.C.G.A. § 44-5-30.
 9. O.C.G.A. § 44-2-3.
 10. Blumberg v. Nathan, 190 Ga. 64 (1940); See also, Pindar's Georgia Real Estate Law and

Procedure, 6th Ed., § 19-153.
 11. Id.
 12. O.C.G.A. §§ 44-5-30 & 13-5-30.
 13. O.C.G.A. § 44-5-30.
 14. West Encyclopedia of American Law, 2nd Ed.
 15. O.C.G.A. § 44-2-15 & 44-2-21.
 16. Pindar's Georgia Real Estate Law and Procedure, 6th Ed., § 19-67.
 17. *Stallings v. Newton*, Sheriff, 110 Ga. 875 (1900); *Budget Charge Accounts, Inc. v. Peters*, 213 Ga. 17 (1957); and O.C.G.A. § 44-2-14.
 18. *Hall v. Metro. Life Ins. Co.*, 192 Ga. 805 (1941).
 19. *Allgood v. Allgood*, 230 Ga. 312 (1973).
 20. *Stallings v. Newton*, Sheriff, 110 Ga. 875 (1900).
 21. O.C.G.A. § 44-2-14(b).
 22. West Encyclopedia of American Law, 2nd Ed.
 23. The concluding paragraph of the deed that starts with "In witness whereof".

SPOTLIGHT ON RPLS EXECUTIVE COMMITTEE MEMBER: BRADLEY A. ("BRAD") HUTCHINS

Attorney Bradley A. (Brad) Hutchins is a recent addition to the Real Property Executive Committee, having begun his first term in May 2009, after his election at the Real Property Institute in Amelia Island, Florida. Brad, a 1994 graduate of the University of Georgia and a graduate of Georgia State University College of Law, is a founding member of the law firm of Proctor Hutchins Porterfield, and is a former partner of the law firm of Proctor Hutchins. His firm focuses its practice on real estate property tax, zoning and planning land use, foreclosures, construction law and other commercial real estate and leasing matters. Admitted to the Georgia bar in 1997, Hutchins has focused his practice on tax related issues for many years, taking more than 20 appellate cases to the Georgia appellate courts on the issues.

Hutchins has brought hundreds of successful suits in property tax related cases. He is the recent past chairman of the State Bar's Property Tax Committee and a member of the Title Standards Committee. In addition, Brad was recently named one of "The 2008 Legal Elite: Georgia's Most Effective Lawyers" by Georgia Trend magazine.

His firm is located in Alpharetta. A resident of Cherokee County, Hutchins is also the recent co-founder of PropertyTaxPros.com which is a web-based company offering Metro-Atlanta homeowners assistance when their property taxes are disproportionate to their homes' current fair market value. The site was created when Hutchins and his partners, Attorneys Robert J. Proctor and John E. Ramsey, noticed the only area in this recession economy on the rise seems to be property taxes in the falling housing market.

"To me, the practice of law is a marathon, not a sprint," says Hutchins. He is a proud father of three and enjoys fishing, golf and relaxing on the beach in his time away from the office.

Brad Hutchins can be reached at bhutchins@proctorhutchins.com. His firm's website is located at www.proctorhutchins.com.

Deed Dogs in the 21st Century

John P. Cripe, Esquire

Jefferson, Georgia

Even in the era of quill pens and parchment, deeds and other such instruments were recorded so as to provide notice to the public at large of ownership and change of ownership of any given parcel of real property. A quick perusal of the Georgia colonial records of Chatham County will disclose recorded Crown Grants by King George III to his loyal subjects and recorded State Grants of property subsequently confiscated from those same loyal subjects by Georgia and conveyed to its rebellious citizens. (i.e. “an Act of Inflicting Penalties On and Confiscating the Estates Of such Persons as are therein Declared Guilty of Treason” dated May 4, 1782) The common thread among these conveyances is that they were all recorded and available for examination in the public records of the county.

And that manner of recording has been the subject of statute, virtually unchanged, from that time until the present. Only recently has the evolution of technology been significant enough to warrant noteworthy amendment to the recording statutes.

From the outset until the 1970’s generally, the primary point of data entry was from the recorded instrument into the paper grantor/grantee index which then became the first generation of recording information. Subsequent abstracting by title examiners, preparation of title certificates and issuance of title insurance policies were second, third and fourth generations of such information, each generation having the potential to introduce error into the original recording information. During the 1970’s the method of recording began to change and the primary point of data entry was from the recorded instrument into an electronic data base, its image on a computer screen becoming the first generation of recording information. As a result, the printed grantor/grantee index produced from the electronic data base became the second generation of recording information, having been once removed from the original recorded instrument.

Continued reliance on the paper indices was more a result of the scarcity of computer terminals than any unreliability of the data displayed. This is not to say that there weren’t programming glitches caused by the uncertain or inconsistent treatment of names of parties with respect to spacing, numerals, capitalization, the article “the”, series of initials or letters (e.g. AAA Aardvark Lead Smelter and Emphysema Asylum, Inc.) and other such issues which wreaked havoc with the logical appearance of both the first generation of information on the computer screen and the second generation of information in the printed index.

Over the years since the adoption of computerized data bases both of the problems referred to above have been dealt with. Slowly, the expense of computer terminals has come down and counties have been able to equip their record rooms with a sufficient number of terminals to adequately serve their patrons. This development, together with the advent of the internet, has caused the electronic data base, the first generation of information, to be available at will to virtually any interested party. And as the use of the electronic index has become more widespread,

the recognition of the various formatting problems were recognized and dealt with as well.

The printed index has not, however, passed into oblivion. It has remained a fixture required to be provided in the superior court record room in every one of Georgia’s 159 counties. (Actually 161 counties if one includes Campbell and Milton Counties consolidated into Fulton County in 1932. And, of course, there was the original Walton County lost after the Battles of McGaha Branch and Selica Hill during the unfortunate war with North Carolina.) Although the printed index is a second generation of information once removed from the original data entry, it provides an easily accessible research source for those who do not feel entirely comfortable with computer systems. And it remains the primary source of information and first generation of data entry for instruments recorded prior to the 1970’s.

The issue that has been repeatedly raised is whether the use of the computerized data base is more reliable than the older, more familiar printed index. As is pointed out above, initial data entry is now made into an electronic data base which may be viewed on a computer terminal. This is the first generation of information from the original instrument. The printed index is then produced from the data base and becomes the second generation of information, as it is once removed from the original data entry. As a matter of logic, the first generation information is likely to be more accurate than the second generation. This is not unlike the old parlor game wherein the first player whispers a story to the second and the second player whispers it to the third. After several retellings (generations) of the story, it returns to the first player, sometimes a humorously, unrecognizably different story.

This is similar to the “Garbage in, Garbage out” theory used in computer circles. If the incorrect data is entered in the data base it will not self-correct as it prints out. As a result, the printed information can be no more reliable than the electronic version. However, data entered and displayed correctly in the electronic view could contain downstream errors created as an element of the printing process, and thus the printed version could be less reliable. With this in mind, it would seem more prudent to rely on a first generation computerized index than a second generation printed index.

Whether we are permitted to make this reliance is dependent upon statutes given to us by the Georgia State Legislature. The current state of legislation in Georgia provides good but not perfect guidance in this regard. The foundation statute appears at OCGA § 44-2-2 and is slightly redacted here for ease of reading.

“The clerk of the superior court shall file, index on a computer program designed for such purpose, and permanently record, in the manner provided constructively in Code Sections 15-6-61 and 15-6-66, the following instruments conveying, transferring, encumbering, or affecting real estate and personal property: (A) Deeds; (B) Mortgages; (C) Liens of all kinds; and (D) Maps or plats relating to real estate in the county.”

It is clear from this code section that the clerk is to index recorded instruments on a computer system. How that index shall be displayed and made available to the public is the subject of the two

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referenced sections. The most significant to a title examiner is the grantor/grantee index. In that regard, OCGA § 15-6-66 provides, again redacted, the following:

“The clerk of the superior court shall provide a suitable duplex index book, or a series of books, or a card index, or a microfilm record, or an electronic data base, or any combination of one or more of such systems, in which shall be indexed the name of the grantor and grantee of every instrument recorded pursuant to subparagraph (a)(4)(C) of Code Section 15-6-61, such index to include the character of the instrument, the book or location of the record, and the date of filing and to include the time of filing if not otherwise reflected in the record.”

In this code section the clerks of the various superior courts are authorized to select among a series of methods, or combination of them, to provide grantor and grantee information to the public.

A series of “or’s” is used in the statute rather than commas to emphasize, so it seems, the intent of the legislature that all of the methods listed are statutorily approved and it is for the clerks to select and implement an index system of his or her choosing. Finally, OCGA § 15-6-61 provides a slightly more detailed description of a Superior Court Clerk’s duties with respect to record-keeping as it applies to real and personal property records generally. Once more, this section is redacted for clarity.

“It is the duty of a clerk of superior court to keep in the clerk’s office the following dockets or books: a docket, file, series of files, book or series of books, microfilm records, or electronic data base for recording all deeds, liens, executions, lis pendens, maps and plats, and all other documents concerning or evidencing title to real or personal property.

“Nothing in this Code section shall restrict or otherwise prohibit a clerk from electing to store for computer retrieval any or all records, dockets, indices, or files; nor shall a clerk be prohibited from combining or consolidating any books, dockets, files, or indices in connection with the filing for record of papers of the kind specified in this Code section or any other law, provided that any automated or computerized record-keeping method or system shall provide for the systematic and safe preservation and retrieval of all books, dockets, records, or indices.

“When the clerk of superior court elects to store for computer retrieval any or all records, the same data elements used in a manual system shall be used, and the same integrity and security maintained.

“Regardless of the automated or computerized system elected, each clerk shall maintain and make readily available to the public complete, printed copies of the real estate grantor and grantee indices updated regularly, prepared in compliance with paragraph (15) of subsection (a) of this Code section and Code Section 15-6-66.”

As with OCGA § 15-6-66, this code section provides for a series of approved methods of record-keeping and presentation. The

“or” prior to “electronic data base” suggests that any of the methods, including the “electronic data base” may be a stand-alone method of record-keeping as long as it is securely maintained.

Based upon the language of the various statutes, it appears that the legislature has recognized the transition to electronic record-keeping in every respect and has approved it as reliable. And the closing paragraph of OCGA § 15-6-61 reconfirms the trend to computerized indexing systems in that it provides that regardless of the computerized system selected, each clerk will maintain an up-to-date printed grantor/grantee index.

The future use of and reliance upon computer generated indices is inevitable. The sheer mass of information and the move to a paperless court system will virtually dictate that title examiners, title insurance companies, the Georgia Bar Association, the Georgia Courts and, of course, the public in general, accept and rely on real estate recording information saved in the clouds and visible in the record rooms of Georgia on a computer monitor.

But lest we forget, in the last phrase of the last sentence of the last sub-paragraph of § 15-6-61 quietly resides the requirement of a duplicate printed grantor/grantee index: the last vestige of quill and parchment record-keeping in Deed Dog heaven.

UPDATE ON THE ELECTRONIC RECORDING ACT

Timothy W. Bailey, Esquire
Bailey Davis Brown & Sutton, LLC

Georgia’s version of the Uniform Real Property Electronic Recording Act was adopted in early 2009 and became effective May 5, 2009 (the “Electronic Recording Act”). The Electronic Recording Act is codified at O.C.G.A. § 44-2-35. Pursuant to O.C.G.A. § 44-2-39, the Georgia Superior Court Clerk’s Cooperative Authority (the “Authority”) has been authorized to adopt the rules, regulations and forms to implement this Electronic Recording Act. The Authority in turn adopted a resolution creating House Bill 127 to present to an “Advisory Committee” to assist in the implementation of the Electronic Recording Act. Under the bill, the Advisory Committee is to be comprised of three representatives appointed by the State Bar of Georgia Real Property Law Section, and two representatives appointed by the Georgia Bankers Association. It presently consists of private practice closing attorneys, a title insurance representative, a banker and a law school professor.

A major component of implementing the Electronic Recording Act is to design the technical specifications and requirements. The Authority and the Advisory Committee are also discussing such issues as: Who can be an electronic filer or “Trusted Submitter?” How will payments be made to the County? How do we safeguard the integrity and validity of the documents to be filed? How will electronic filing affect issues such as priority, notice, and fraud prevention?

Electronic filing will eventually be a reality. The intent of the Real Property Section Executive Committee and the Advisory

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Committee, together with the Authority, is to implement the Electronic Recording Act properly and after much thought. All members of these organizations wish to ensure the Electronic Recording Act is implemented using sound, reasoned, and deliberate standards in order to safeguard real property interests and the public.

FREE CONTINUING LEGAL EDUCATION SESSION RESCHEDULED TO APRIL 20TH

On January 8th, due to the inclement weather, and icy road conditions, throughout the state, but in particular the metro Atlanta area, the Executive Committee postponed the Continuing Legal Education session and social hour planned at the W Hotel in Midtown Atlanta in connection with the Mid Year meeting of the State Bar of Georgia.

The Executive Committee has re-scheduled the continuing education session, to April 20, 2010, from 3:00 p.m. to 4:00 p.m. . The CLE is free to all members of the Real Property Section of the State Bar and an RSVP will be circulated by the State Bar via email.

The April CLE event will be held at the State Bar of Georgia Headquarters in downtown Atlanta and will include light refreshments. The previously scheduled Social Hour will most likely be re-set to a future date. This event, sponsored by the Real Property section at no cost to its members, follows a highly successful lunch and learn recently held in Savannah. The Real Property Section sponsored the lunch and learn event in conjunction with the Savannah Bar Association. The topic of the day, RESPA Reform, was presented at the South Georgia State Bar Headquarters in Savannah on January 7, 2010. The event was well attended by about 40 attorneys and paralegals. Dawn Lewallen of Stewart Title presented this very timely topic and the same was very well received.

The free April CLE in Atlanta is a one hour session geared towards "New Closing Attorneys". The class will be taught by a team of senior closing attorneys and will highlight the most common problems and pitfalls new real estate closing practitioners may face. Areas which will be highlighted include the ethical issues of who is your client", spotting and correcting title problems and liens, and other tips for a strong practice, including a question and answer session with the panelists and members of the Executive Committee of the Real Property law section.

UPCOMING CALENDAR DATES REAL PROPERTY LAW SECTION

— 2010 —

February 12th, 2010

Spring Residential Practice Seminar
Georgia Public Television Headquarters
(February 18th Replay)

February 16th, 2010

RPLS monthly meeting
(Troutman Sanders)

March 16th, 2010

RPLS monthly meeting
(Troutman Sanders)

April 1st, 2010

Foreclosure Seminar
Georgia State Bar Headquarters

April 20th, 2010

Free RPLS CLE
followed by RPLS monthly meeting
Georgia State Bar Headquarters

May 6th - 8th, 2010

Real Property Law Institute
(Sandestin Hilton)

IN MEMORIAM: BRUCE P. COHEN, 1940-2009

Former Real Property Law Section Chair, and prior recipient of the George A. Pindar Award for lifetime achievement, Bruce P. Cohen, passed away on November 17, 2009. Born on September 23, 1940 in Indiana, Bruce was a graduate of the University of Wisconsin (BS-1962), Northwestern University (JD-1965), as well as Georgia State University (MBA-1970). Bruce practiced law in Atlanta for over forty years.

Initially contributing to the real property section through his work in his own firm, Cohen, David and Associates, Bruce concluded his practice at Gambrel Stolz (now Baker, Donnellson, Berkowicz) as a partner. He was a recognized speaker and publisher in his field and held various leadership positions within the State and Local Bar Associations including chairman of the Atlanta Bar Association, as well as the aforementioned role in the Real Property Law section. Bruce was widely regarded by his peers as a technical expert and historian in the history of the real property section and Bruce was widely respected by his colleagues for the ethics, thoughtfulness, and professionalism he displayed over the decades.

In retirement, he spent his time in Belleair Beach, Florida and remained active locally as a community activist. Bruce volunteered for numerous organizations including the American Jewish Committee - Atlanta Chapter, Ansley Park Civic Association, Atlanta Jewish Federation, Greater North Fulton Chamber of Commerce, The Epstein School, Leadership Sandy Springs, Riverwood High School - Local Advisory Committee, and the Sandy Springs Business Association.

Surviving him are his wife, Jeril, the Executive Director of the Real Property Section, as well as three sons, Brandon, Seth, and Ross; sister Judy; stepchildren Rob, Katja, and Eric Weinstock and grandchildren, Alex, Jake, and Ryan Weinstock. His quiet presence will be missed by family and colleagues alike.

REAL PROPERTY LAW SECTION

2217 Donato Dr

Belleair Beach, FL 33786

**REAL PROPERTY LAW SECTION TO SPONSOR "RESIDENTIAL REAL ESTATE"
CONTINUING EDUCATION SEMINAR ON FEBRUARY 12TH**

The annual Residential Real Estate Continuing Education Seminar, presented and sponsored by the Real Property Law Section of the Georgia State Bar, in connection with the Institute of Continuing Legal Education in Georgia, will be held on February 12, 2010 at the GPTV studios in Midtown Atlanta. The seminar will be simultaneously broadcast across the state to various locations including Albany, Athens, Augusta, Jasper, Macon, Morrow, Valdosta, Savannah, Tifton, Rome, Columbus, Brunswick and Bainbridge. The program is chaired by Monica K. Gilroy and Jeffrey W. Rubnitz, members of the Executive Committee of the Real Property Section of the State Bar. The program will highlight many current topics to aid the residential closing attorney and those that support closing attorneys. Topics include an update on the new RESPA reforms, a panel discussion on how to best handle an REO closing, a discussion on short sales and a segment on how to deal with current homeowner association issues, including subdivisions which find themselves at a crossroad after the builder/developer is foreclosed upon. Discussions which will provide practice tips regarding ethics, foreclosure trends and recent changes to the GAR purchase and sale agreement will also be held. An examination of the current state of mortgage fraud, as well as how to prevent title claims, will also be spotlighted on the agenda. The seminar will be re-broadcast across the state on February 18, 2010. Contact ICLE at www.iclega.org to register.