

Real Property Law Section

NEWSLETTER

State Bar of Georgia

A Publication for Real Property Lawyers

Winter 2008

COMMENTS FROM THE CHAIR

*Edward P. Hudson,
Hudson Law Offices, LLC*

Our Real Property Law Section is having an excellent year. As you know, we are the largest section of the State Bar of Georgia and one of the most active. Hopefully, each of you feels that your membership in our section is valuable to you and to your practice.

I want to thank Machel Redmond and Diedra Sorohan for chairing the annual Residential Real Estate Seminar on Feb. 1. Machel and Diedra worked very hard to put together an excellent program. I also want to thank the speakers who put so much volunteer time and effort into their presentations.

Patrise Perkins-Hooker and our section's legislative committee have been hard at work reviewing numerous proposed legislative bills and commenting when appropriate. In particular, Patrise and her committee have spent a great deal of time working on our section's proposal to amend the good funds statute. We appreciate the many hours that Patrise and her committee have put in on our behalf.

Under the guidance of Drew Marler and Nancy Liu, our section has made a great deal of progress in our electronic communications. Our website has become a valuable resource for all of our members. Our listserve has been an extremely active forum for discussion of various legal issues. We have initiated an electronic bulletin board to enable members to post announcements such as job openings and office space opportunities. We are now distributing this newsletter both in electronic form and in paper form. Furthermore, we are using e-blast messages to our members to communicate on a regular basis. All of these vehicles are intended to keep our members informed. I hope that you are taking advantage of these opportunities. If any of you have any ideas on how we can improve our communications with our members, please let us know.

In closing, I want to encourage you to attend this year's Real Property Law Institute to be held at Amelia Island Plantation, Fla., May 8-10. Susan Elliott has put together an outstanding program. I feel that every real estate practitioner would benefit from attending. I hope to see each of you at Amelia Island.

As always, I appreciate having the opportunity to serve as chair of our section. If I can be of assistance to any of you at any time, please let me know. Thank you.



Luci Cason, RPLS scholarship recipient from the University of Georgia, receives a set of Pindar from **Shelli Willis**, chair of the Awards and Recognition Committee at the Section's annual Fall Commercial Dinner held at the Capital City Club on Nov. 8.

Table of Contents

Comments from the Chair	cover
2008 Legislative Update	2
Upcoming Calendar Dates	3
Listserve and the GAR	3
Nominations from 2008 Pindar Award	3
Request from Legal Opinion Revision Committee	3
1031 Exchanges of Residential Property	4
Current Decisions	5
RPLS Bulliten Board Now Online	5
Supreme Court of Georgia Addresses Question Over Severance of Joint Tenancy	6
Getting Involved in Real Estate Pro Bono Activies	6
Bond for Title?	7
More Comments from the Chair	7
MERS Website	8

2008 Legislative Update

By Patrise Perkins-Hooker

RPLS Legislative Committee Chair

The Real Property Law Section's Legislative Committee has been busy working on behalf of the Section to monitor the status of two bills that the section introduced through the State Bar's legislative process. We have also been asked to comment on 19 other bills (as of Feb. 25, 2008), which were submitted to the Legislature by other parties. The following is a summary of the status of the various pieces of legislation:

HB 386 was reintroduced this session as HB 1018. This bill mandates proper recording of cross indexing and cross reference requests by the county clerks' offices and compensates the county clerks' offices for the expense associated with such requests at the rate of \$2 per cross reference entry. During the 2007 legislative session, this bill passed both houses of the Legislature but was vetoed by the Governor due to his objection to an amendment that was attached to our initial draft of the legislation. The amendment sought to extend the sunset date for the collection of additional filing fees by the county clerk's to 2014. The section's latest version of this bill, HB 1018, omits any reference to the portion to which the governor objected. HB 1018 received a favorable recommendation from the House Judicial Committee on Feb. 19, 2008, and is working its way through the House of Representatives for a vote. It is projected to be transferred to the Senate on the transfer date. If you want to review and monitor the status of this bill, you can access a copy of it at www.legis.ga.gov/legis/2007_08/sum/hb1018.

SB 355 and HB 918 are the result of the RPLS' efforts to strengthen the Good Funds financing obligations for closing attorneys. As a result of the recent default on approximately \$28 million dollars in checks issued for loan closings, the Executive Committee reviewed the status of the Good or Collected Funds legislation in Georgia and the Legislative Committee drafted legislation which was designed to alleviate various exceptions to collected funds requirements for closings. In order to conduct a residential closing, the closing attorney is supposed to have been provided "Collected Funds" (also referred to in some states as "Good Funds") by a lender. Collected funds mean literally cash in hand and this term is defined in O.C.G.A. §44-14-13 as funds deposited, finally settled, and credited to the settlement agent's escrow account. A closing attorney (referred to as the settlement agent in the statute) is prohibited from disbursing settlement proceeds unless the same are "collected funds." Several exceptions were provided for in the statute which allowed for certified checks, cashier's checks or treasurer's checks from a federally insured bank, checks issued by a lender qualified to do business in Georgia, and personal checks of not more than an aggregate of \$5,000 to be deemed to be collected funds when they are deposited.

Our initial draft of the proposed legislation was designed such that only wired funds would have been considered collected funds for disbursement purposes because all of the exceptions listed in O.C.G.A. §44-14-13 (c) (1)- (3) were deleted. After approval by the State Bar Board of Governors, our version of the proposed legislation was introduced into the Senate. We faced opposition and support from several organizations for the proposed legislation.

We anticipate that some version of our proposal will be enacted, but as is often the case, a legislative compromise may result in less than we originally proposed. We however continue to advance our position.

If you want to review and monitor the status of the pending bills (HB 918 and SB 355), you can access a copy of each at www.legis.ga.gov/legis/2007_08/sum/hb918.htm.

Other bills upon which the Real Property Law Section has presented an opinion are as follows:

HB 271

Ripening of a Tax Deed—would shorten the time period by which title under a tax deed ripens is being opposed by the RPLS because it significantly limits the rights of property owners to redeem their property.

HB 974

Disclosure of Mineral Rights in a Deed—would require every deed that conveys land include a disclosure that the conveyance specifically includes or excludes mineral rights. This bill is being opposed by the RPLS because the current law is clear that mineral rights are included in deeds automatically unless the same are specifically reserved or retained by the grantor. This disclosure obligation interjects more confusion regarding the transfer of these rights and might result in more litigation about this topic than which exists currently.

HB 1069

Requires the county clerks' office to maintain a duplicate database for names of grantors and names and addresses of grantees. This information already exists in the public records on the Transfer Tax Declarations and it is required by state statutes to be included on a deed to secure debt. The Section feels that this information will be duplicative and an additional expense for the clerks' offices throughout the state to maintain. The RPLS opposes this proposed bill.

SB 374 and HB 1147

Modifications to the state's Materialmen's and Mechanics Lien Laws—This bill represents the House's version of a major rewrite and modification effort undertaken by a taskforce comprised of members from the House, the Senate, citizens, realtors, contractors, home owners, home builders, mortgage brokers and real estate professionals to correct several of the problems associated with the Materialmen's and Mechanics Lien laws in the state. The RPLS was a participant in this consensus effort and we support the version of the bill that reflects the language that the taskforce has introduced.

The Legislative Committee is currently reviewing several proposals for legislation regarding electronic filings and electronic signatures on legal documents such as the Uniform Electronic Transactions Act and the Uniform Real Property Electronic Recording Act.

Although there were more bills regarding real estate that were introduced in the state Legislature and submitted to our committee for comment, we do not submit comments on any legislation that is controversial or political (like the current Ad Valorem Tax bills SRs 686 and 796 and HB 1170, which are designed to freeze ad valorem taxes), or not germane to the actual practice of law in our

area (like the HB 1043 Childhood Lead Exposure Control Act).

In addition to the legislation that we monitor on behalf of the section on the state level, we also presented comments on legislation that was proposed in DeKalb County that would have imposed criminal sanctions against attorneys who conducted closings on houses in which the plumbing system was not retrofitted to new more water efficient toilets and other water saving plumbing. Representatives from our committee spoke against this measure at public meetings in DeKalb County and were effective in eliminating this provision from DeKalb County's plumbing retrofit ordinance.

More information about the ultimate outcome of the various pieces of legislation that we are monitoring will be provided at the Real Property Law Institute in May. The members of the Legislative Committee for the 2007-2008 year are:

Patrise Perkins-Hooker, Chair	David Burge Dawn Dwyer	Jeff Schneider Kaye Ford
Charles Chacko	Gayle Camp Keener	Lisa Roberts
Rhonda Carroll	Janney Sanders	Nancy Liu
Clara Fryer	Jeff Greenway	Peter Lublin

LISTSERVE AND THE GAR

In late December and early January, the Executive Committee "the Committee" of the Real Property Law Section "RPLS" noted numerous postings on the listserv, and received a number of e-mails, about the changes to the 2008 Georgia Association of Realtors "GAR" Forms and a call to action for our leadership to get involved. As a result, the Committee contacted the GAR leadership and they have graciously agreed to allow a representative from RPLS attend the future GAR Forms Committee meetings. Jay Dell, a member of the Committee, was appointed as the RPLS liaison, and has met with the GAR leadership and their attorney to discuss some of the issues that were raised in your e-mails; and, they have welcomed and encouraged his comments, attendance and participation in the process. This is a very positive step between our section and the GAR and will only help to improve the relationship between real estate attorneys and real estate agents. If you have any constructive comments or concerns about the GAR forms, Jay welcomes the same and will do his best to address them at the GAR Forms Committee meetings. This is a great opportunity and we look forward to working with the GAR Forms Committee. You may e-mail Jay Dell at jvd@bbgbalaw.com.

REQUEST FROM THE LEGAL OPINION REVISION COMMITTEE

The Legal Opinion Revision Committee is soliciting feedback from members of the Real Property Section as to whether or not there is a need for the existing Report on Legal Opinions to Third Parties in Real Estate Transactions to be replaced, revised or supplemented. Please provide your feedback to the committee by responding to a short survey which can be accessed at the Real Property Law Section's website at www.garealpropertylaw.com.

UPCOMING CALENDAR DATES

March 18
RPLS EXECUTIVE BOARD
MONTHLY MEETING

April 11
FORECLOSURE SEMINAR

April 15
RPLS EXECUTIVE BOARD
MONTHLY MEETING

May 8-10
REAL PROPERTY LAW INSTITUTE
AMELIA ISLAND, FLA.

May 15
CONSTRUCTION MATERIALMEN'S
& MECHANICS' LIEN SEMINAR
STATE BAR OF GEORGIA

NOMINATIONS FOR 2008 PINDAR AWARD

The Executive Committee of the Real Property Law Section is soliciting nominations for the George A. Pindar Award. This award honors a member of the section who unselfishly gives of him or herself for the benefit of the real estate bar and whose lifetime contribution has been significant to the real estate bar.

Please direct nominations to Nancy Liu by e-mail to nancy_liu@attorneyliu.com or by fax to 678-990-7558.

Please provide nominations by March 17, 2007, and include biographical information and support for your nomination.

1031 Exchanges of Residential Property: IRS Issues New Safe-Harbor Guidelines

By Jed Steven Beardsley

Baker Donelson Bearman Caldwell & Berkowitz, P.C.

Rev Proc 2008-16, 2008-10 IRB.

A new IRS Revenue Procedure provides a safe harbor under which the IRS will not challenge whether a dwelling unit qualifies as property held for productive use in a trade or business or for investment under Code Sec. 1031. Rev. Proc. 2008-16 sets rental standards, establishes a qualifying use period, and concludes that limited personal use will not prevent a dwelling unit from qualifying under the holding purpose test of the tax-free exchange rules. This Revenue Procedure comes on the heels of *Moore v. Commissioner*, T.C. Memo. 2007-134 (the recent vacation home case analyzed in the last newsletter).

Personal residences cannot be exchanged tax-free under Code Sec. 1031 because they are not held for productive use in a trade or business or for investment. The question challenging taxpayers has been "How much rental is needed to meet the holding purpose test?" Rev. Proc. 2008-16 squarely answers this and also provides indirect guidance on the issue of converting a principal residence into qualifying relinquished property prior to an exchange, or converting replacement property into a personal residence after an exchange.

New safe harbor, but just a safe harbor

IRS now provides taxpayers with a safe harbor under which a dwelling unit (real property improved with a house, apartment, condominium, or similar improvement that provides basic living accommodations including sleeping space, bathroom and cooking facilities) will qualify as property held for productive use in a trade or business or for investment for Code Sec. 1031 purposes even though it is occasionally used for personal purposes. The safe harbor is effective for exchanges occurring on or after March 10, 2008. No inference is intended with respect to the federal tax treatment of such exchanges taking place before March 10, 2008.

IRS will not challenge whether a dwelling unit satisfies the holding purpose test under Code Sec. 1031 if:

- the taxpayer owns both properties for the qualifying use period (for the relinquished property, at least 24 months immediately before the exchange; for the replacement property, at least 24 months immediately after the exchange); and
- within the qualifying use period, in each of the two 12-month periods immediately preceding and following the exchange, (i) the taxpayer rents the dwelling unit to another person(s) at a fair rental for 14 days or more, and (ii) the period of the taxpayer's personal use of the dwelling unit doesn't exceed the greater of 14 days or 10 percent of the number of days during the 12-month period that the dwelling unit is rented at a fair rental.

IRS pointed out that the new safe harbor applies only to the determination of whether a dwelling unit is held for productive use in a trade or business or for investment under Code Sec. 1031, and that a taxpayer using the safe harbor also must satisfy all other requirements for a like-kind exchange under Code Sec. 1031 and the Regulations. An exchange may still fall outside the safe harbor parameters and meet the statutory requirements, but increased scrutiny may be triggered. We do not yet know if Rev. Proc. 2008-16 will result in changes to the exchange reporting Form 8824.

Broad definition of personal use

The taxpayer is deemed to have used a dwelling unit for personal purposes on any day the dwelling unit is used by: (A) the taxpayer or any other person who has an interest in such unit (including a tenant in common), or by any member of the family of the taxpayer or such other person; (B) by any individual who uses the unit under a reciprocal arrangement which enables the taxpayer to use some other dwelling unit (whether or not a rental is charged for the use of such other unit); or (C) by any individual if rented for less than a fair market value rental. A taxpayer may rent the dwelling unit to a family member if the family member uses it as a *principal* residence (and not a vacation home) and the family member pays fair market rent. Some taxpayer usage may be allowed for repairs and annual maintenance as well. See Code Sec. 280A(d)(2) and (3).

Failing personal use test for replacement property

A taxpayer may file a federal income tax return and report a swap of dwelling units as a tax-free exchange, based upon meeting the qualifying use standard for the relinquished property and the expectation that he will meet the qualifying use standard for the replacement property, but ultimately he may fail to meet the latter standard. If necessary, in this situation the taxpayer should file an amended return and not report the transaction as an exchange under Code Sec. 1031.

Conclusion

To meet this safe harbor, the taxpayer must address the new qualifying use periods both 24 months before the exchange for the relinquished property, and 24 months after the exchange for the replacement property. In each of these four 12 month periods, personal use as defined above must be severely limited, and the property must be rented to a qualifying user for at least 14 days. Overall, taxpayers should be pleased to have such a liberal standard to qualify residential property for Code Sec. 1031 tax deferral.

CIRCULAR 230 NOTICE

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

Current Decisions

By Daniel F. Hinkel

ING Investment Management

Property owner cannot create an easement over her own property

A property owner owned five lots numbered 1, 2, 3, 22 and 23. There was a house on lot 1, which encroached onto lot 2. The property owner wanted to sell lots 1 and 2 separately, without removing the residence on lot 1. The property owner determined that she could not relocate the boundary lines between the two properties because of various zoning ordinances. Thus, the property owner created an encroachment easement for lots 1 and 2, and also gave the owner of lot 1 the complete use of certain portions of lots 22 and 23 for various purposes, including but not limited to, the construction of a garage. At closing, the property owner gave a warranty deed conveying lot 1 to the purchaser that specifically stated that it included all rights, including the easements created on lots 2, 22 and 23. The property owner also executed a sales contract to sell lots 22 and 23. The contract expressly stated that the property was subject to a perpetual easement over certain portions of the lots for the benefit of lot 1. The deed, however, conveying lots 22 and 23 did not refer to the easement for the benefit of lot 1. Lots 22 and 23 were later sold again. Neither deed referred to the perpetual easement. The owners of lots 22 and 23 brought an action to quiet title to their property against the owner of lot 1.

The trial court ruled in favor of the owners of lots 22 and 23 and stated that the purported perpetual easement was invalid. The Court of Appeals agreed with the trial court and held that the easement was invalid. The property owner's attempt to create an easement across one portion of her property for the benefit of another portion while she still owned both was ineffective. It is axiomatic that one cannot have an easement upon his own property, for the lesser estate, represented by the easement, will be merged into the fee, upon which it is subservient. The defendant argued that the merger doctrine applies only when the union or combination of estates occurs after the execution of the easement. The court dismissed such argument finding that the defendant had failed to provide any authority requiring such an express limitation. The court also dismissed the defendant's argument that the plaintiffs had actual and constructive knowledge of the easement when they acquired the property. The court held that a person couldn't have constructive knowledge of an invalid easement. The court again dismissed another argument that a perpetual easement was created in the conveyance from the property owner to the owner of lot 1. The warranty deed from the original property owner to the owner of lot 1 incorporated the perpetual easement by reference but did not specifically describe the property included in the purported easement. The Court held that an owner does not create an easement in one portion of her property by merely incorporating by reference an invalid and void easement that she attempted to create on another portion. *Gilbert v. Fine*, 288 Ga. App. 20 (2007).

Lease guaranty did not cover lease obligations of assigns of original tenant

This decision involves a commercial lease entered into between

a landlord and a tenant. The parent company of the tenant, which was a subsidiary, executed a guaranty of the lease obligations, which after defining landlord as the original property owner and tenant as the named subsidiary provided that the guarantor did thereby "unconditionally guarantee to Landlord and its... assigns the full and prompt payment and performance of any and all obligations of Tenant to Landlord when due...under the Lease." The guaranty also covered "all renewals, amendments, extensions, consolidations, and modifications of the Lease." The subsidiary tenant sold all of its assets to a third party and assigned its interest under the lease to the third party. The third party assumed the obligations of the original tenant under the lease. The guarantor agreed that the assignment of the lease to the third party did not affect the validity of its guaranty and its continuing obligations under the guaranty.

The new tenant defaulted on the lease and the landlord sought to recover from the guarantor for the new tenant's default. The trial court found that the guarantor had only guaranteed the original tenant's obligations under the lease and that the guaranty did not extend to the obligations of the new assignee tenant who assumed the lease. The Court of Appeals agreed. The Court of Appeals, using a narrow construction of the guaranty, found that the language was clear and unambiguous that the guarantor only guaranteed the obligations of the original tenant. The court found it persuasive that the word "assigns" was used in the definition of the landlord but not the tenant. The court also found persuasive that in the lease the term "tenant" was defined to include the original tenant and permitted assigns, but under the guaranty was defined only to include the original tenant. Thus, the guarantor promised to make good on the lease obligations of the original tenant to the landlord but did not agree to make good on the lease obligations of any assigns of the original tenant. *Highwoods Realty, Ltd. Partnership v. Community Loans of America*, 288 Ga. App. 226 (2007).

RPLS BULLETIN BOARD NOW ON LINE

We have developed yet another technological gadget to help you keep in touch with your fellow real estate professionals. We recently launched our new RPLS Bulletin Board. To sign up, simply go to the RPLS web site homepage at www.garealpropertylaw.com and click the link that says "Bulletin Board." Unlike the listserve, the Bulletin Board is a static message service that does not alert your email. We wanted to provide an alternative venue for communications that are not directly related to the practice of law (office space for rent, job announcements, help wanted, etc.) or for questions and discussions that you would rather not post on the e-mail listserve.

There are no fees associated with the use of the Bulletin Board. We already have over 100 members! We hope that you find this service useful.

Supreme Court of Georgia Addresses Question Over Severance of Joint Tenancy

By Jeff Schneider

Weissman, Nowack, Curry & Wilco, P.C.

On Jan. 28, 2008, the Supreme Court of Georgia answered a question that many real estate practitioners, trial courts and title insurance companies have struggled with; what is the effect on the joint tenancy when less than all joint tenants executing a deed to secure debt. In *Biggers v. Crook* (Supreme Court of Georgia, Case No. S07A1686), the Supreme Court answered the question by holding that the execution of a deed to secure debt by less than all joint tenants does not sever the joint tenancy.

The facts in the underlying case were as follows: William G. Biggers and Linda B. Crook inherited property from their mother. Biggers and Crook took title as joint tenants with rights of survivorship. Biggers and Crook agreed that Biggers would retain possession of the house and would maintain it and pay taxes. Thereafter, Biggers married Diane Nichols Biggers. Before the marriage, Biggers and his wife entered into an ante-nuptial agreement, which provided that he would maintain ownership of all real property even if the wife contributed to its maintenance.

Prior to William Biggers' death, he executed a note in favor of Rita Craig, and executed a deed to secure debt conveying the subject property to secure payment of the note. Following Biggers' death, Crook filed an action for declaratory judgment, seeking a determination that she was the sole owner of the property and that neither Craig nor Diane Biggers held any interest in the property. Diane Biggers counterclaimed, seeking to set aside the ante-nuptial agreement and to recover a one-half interest in the property. Craig counterclaimed, seeking payment on the note and claiming that the

deed to secure debt attached to the subject property.

The trial court granted summary judgment to Crook, determining that she was the sole owner of the property and rejecting Diane Biggers' and Craig's claims. From this decision, Diane Biggers and Craig appealed. On appeal, Craig argued that when William Biggers executed the deed to secure debt, he legally severed his interests as a co-tenant from Crook. Craig relied upon O.C.G.A. § 44-6-190, which provides, in relevant part, that a joint tenancy "may be severed as to the interest of any owner by the recording of an instrument which results in his lifetime transfer of all or part of his interest." The Supreme Court framed the issue as whether a security deed is an "instrument that results in the transfer of all or a part of the grantor's interest." The Court concluded that it does not.

In reaching its conclusion, it relied upon authority from other jurisdictions, including California. The Court concluded that the grant of a deed to secure debt does not carry the "incidence of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt." As such, the Court concluded the joint tenancy between William Biggers and Crook was not severed by means of the deed to secure debt. Upon Biggers' death, he ceased having an interest to which the security deed attached. The Court concluded that Craig had no cause of action against Crook on the underlying note, as Crook was not a party to the note. The Court summarily rejected Diane Biggers' contention that the ante-nuptial agreement was void. Based upon these conclusions, the Supreme Court of Georgia upheld the trial court's decision.

Although the issue of severance of a joint tenancy has been posed to the Courts before, see *Mabra v. Deutsche Bank*; 277 Ga. App. 764, 627 S.E.2d 849 (2005), we now have guidance in regards to deeds to secure debt.

Getting Involved in Real Estate Pro Bono Activities

The Pro Bono Matchmaker Project (PBMP) has successfully matched several of our matchmaker volunteers with real estate pro bono needs throughout Georgia. We continue to seek attorneys to participate in the PBMP and pro bono projects for attorneys who have already agreed to participate in the PBMP. The Real Property Law Section created the PBMP to increase pro bono participation by real property attorneys by matching attorneys with pro bono opportunities. Numerous attorneys have already volunteered to be a part of the PBMP. Thanks to all the attorneys who have volunteered, particularly those who have already agreed to provide legal assistance.

The RPLS Pro Bono Committee has established points of contact with several qualifying organizations that need real property legal services. Attorneys can simply volunteer to be part of a pool of attorneys available to take on such projects. Once an organization communicates a real property pro bono project to us, we send an e-mail solely to the pool of volunteer attorneys with a project description. Once volunteer(s) respond to the e-mail agreeing to assist with the project, we put the organization and volunteer(s)

in contact with each other to coordinate handling of the project. Potential projects include land closings, declarations, easements, affordable housing, single-family housing and property tax appeals.

If you are interested in joining our volunteer pool for the PBMP, please e-mail Angela McCord at amccord@pogolaw.com or Elizabeth Howard at elizabeth.howard@sablaw.com. Once a project is identified, all members of the pool receive an e-mail with the project description and invitation to assist with the project. Please note that by agreeing to be included in the pool of volunteers, you are only agreeing to receive e-mails about possible projects; you are not obligated to take on any projects.

We are aware of how difficult it can be for attorneys to identify quality pro bono opportunities that involve real estate. This project has been specifically designed to make that process easier. Please consider submitting your name to be included in the pool of volunteer attorneys.

You can also assist us by identifying projects for our volunteer attorneys. If you become aware of any pro bono needs with which our group of volunteers may be able to assist, feel free to pass such information along to Angela McCord or Elizabeth Howard.

Bond For Title?

By Stan M. Lefco

Law Offices Stanley M. Lefco, P.C.

The lease-purchasers called it a bond for title. It was just their lease-purchase agreement. (Creativity on the part of counsel?)

Here's the story: Michael Britt agreed to sell a house to the Morrisises for \$65,000 under a lease-purchase agreement. He would transfer the property to them IF they exercised the option to purchase by paying \$2,500 on or before June 5. They did not exercise the option by that date, but "continued to make the required monthly payments for some time thereafter." They also made certain repairs and additions to the house.

Then the Morrisises stopped sending money to Britt. He did what any landlord would do; he filed a disposition action. The trial court ordered them to pay rent into the court, which they failed to do as well, and a writ of possession was entered.

They had filed a counterclaim, claiming that Britt had been unjustly enriched. It turns out that the improvements they had made during the tenancy totaled over \$100,000, so they claimed. The lower court disagreed with the counterclaim for unjust enrichment. "The theory of unjust enrichment is basically an equitable doctrine that the benefitted party equitably ought to either return or compensate for the conferred benefits when there was no legal contract to pay." Further, the "concept of unjust enrichment in law is premised upon the principle that a party cannot induce, accept, or encourage another to furnish or render something of value to such party and avoid payment for the value received." (No such thing as a free lunch?)

And, for this doctrine to apply, "the party conferring the labor and things of value must act with the expectation that the other will be responsible for the cost." (Lot of bells and whistles for this doctrine to take hold.)

So, was Britt unjustly enriched? No; the evidence showed that the "Morrisises acted with the intention of personally benefitting from the repairs and additions to the house and without any expectation that Britt would be responsible for the cost."

The court was sympathetic to their plight: "Sadly," the court opined, "the Morrisises failed to protect their investment in the property by exercising the option to purchase the property or by reaching some separate agreement with Britt concerning the improvements."

Obviously, recognizing his dilemma in representing the Morrisises, their attorney tried to put a new twist into the meaning of a lease-purchase by calling it a bond for title, the equivalent of a sale with a mortgage. Lawyers can be ingenious at times. Anyway, the appellate court made short work of this. It labeled that form of transfer "unwieldy" and "nearly extinct." The court concluded that title was not transferred because of their failure to exercise the option.

If the Morrisises spent more than \$100,000 on the house, it now belonged to Britt. *Morris v. Britt*, Civil Action No. AO5A1101. The case originated in the Superior Court of Gwinnett County.

MORE COMMENTS FROM THE CHAIR

Edward P. Hudson,
Hudson Law Offices, LLC

As chair of the Real Property Law Section, I am glad to see that our listserve is generating so many interesting questions and so much good discussion. If you have not joined, I would encourage you to do so. Simply go to our section website, www.garealpropertylaw.com to join.

In response to some of the recent discussion on the listserve regarding the revised GAR form purchase and sale agreement, our forms committee, chaired by Josh Kamin, has been working on producing form purchase and sale agreements for the last several months. This is not an attempt to compete with the GAR forms, or any other existing forms. However, members of our section will hopefully have forms to use when they deem it appropriate. We are happy to work on other forms in addition to purchase and sale agreements if our members would find them helpful.

Furthermore, our section has been working on a public relations effort to help educate the public on the importance of an attorney's role in a real estate transaction. Jay Dell is the chair of the public relations committee.

In addition, it is my understanding that the GAR forms committee meetings are open. Jay Dell, who also serves as our section's liaison with the GAR, will be attending these meetings in the future. We are not sending a representative in an adversarial spirit, but, rather, in hopes of providing valuable input in the process.

Lastly, our Executive Committee is committed to working to improve our members' real estate practice. We are certainly open to any suggestions or thoughts on projects that we could undertake to help our members. If at any time, any of you have any questions or suggestions for me, please do not hesitate to contact me.

RPLS Dues Reduced

At its December 2007 meeting, the RPLS Executive Committee voted to reduce the Section dues from \$30 a year to \$25.

The new dues will go into effect starting with the upcoming 2008-09 Bar year and will be included in the State Bar of Georgia dues renewal forms being sent out this spring.

MERS® Website

*By J. Noel Schweers III
Augusta, Ga.*

As everyone knows, the frequent sale or transfer of servicing rights on many residential and commercial loans is a fact of life in today's marketplace. This can often result in confusion as to the actual holder or servicer of a loan.

Traditionally, all assignments of a security deed must be examined to determine the current holder of a particular loan. The failure to timely or correctly file an assignment often leads to confusion as to the correct party to contact to obtain a payoff or other loan information. A missing assignment can also lead to title related issues, such as when a loan is satisfied by a party who is not the holder of record. From the lender's prospective, recording fees and the obligation to comply with varying recording requirements in many jurisdictions imposes added expense and other burdens. It is with this background that Mortgage Electronic Registration System (MERS) was developed. The system is now available in all 50 states.

According to its website, "MERS acts as nominee in the county land records for the lender and servicer. Any loan registered on the MERS® System is inoculated against future assignments because MERS remains the nominal mortgagee no matter how many times servicing is traded." In December 2006, MERS introduced a free web-based system to determine the servicer and other information relating to a particular loan. This can be a valuable tool to find the correct servicer or to confirm servicer information provided by a borrower or seller. The easy to navigate website comes complete with a user guide. The website also contains a manual describing the role MERS can play in connection with a foreclosure in Georgia and other states.

Generally, the manual indicates that MERS can act on behalf of the servicer and describes the recommended procedure for doing so. The relevant websites can be found at the following:
MERS Home Page: www.mersinc.org
MERS Servicer Identification System: www.mers-serviceid.org/sis
MERS Foreclosure Information: www.mersinc.org/foreclosures

New Online Notary Public Training Course Available

The Georgia Superior Court Clerks' Cooperative Authority has launched a new Online Notary Public training course for all Georgia's notaries public. The course was developed by the Notary Division of GSCCCA with valuable input from Superior Court Clerks of Georgia. The course was created with the intent of providing Georgia's notaries public with current and accurate information to equip them with the necessary tools to effectively carry out their important duties as a notary.

The course is available free of charge with an opportunity to take a final exam for \$10. Upon successful completion of the final exam, a Certificate of Completion will be granted. The course and test are available at <http://training.gsccca.org> and registering. Please contact Rachel Rice, GSCCCA training coordinator, at rachel.rice@gsccca.org or 404-327-7322, with any questions or comments.



REAL PROPERTY
LAW SECTION

State Bar of Georgia
104 Marietta St., Nw
Suite 100
Atlanta, GA 30303-2743

NON-PROFIT ORG
U.S. POSTAGE
PAID
ATLANTA GA
PERMIT NO. 1447