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Underwriting Death and Divorce Issues At the Title Company

By

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Judgments, Death, and the Joint Tenant

Generally speaking, when land is held in joint tenancy, and the joint tenancy is not severed, a judgment or other general lien against one joint tenant is not enforceable against the land if that debtor joint tenant dies prior to the death of the other joint tenant(s). (Of course, the judgment is enforceable against the personal estate of the decedent.)

In other words, provided that the joint tenancy was never severed, the title of the surviving joint tenant(s) is free of the lien of most judgments that were entered solely against the deceased joint tenant.

- *Example:* Anne and Andy own Blackacre in joint tenancy. In 2017 a judgment is entered against Andy and is promptly recorded. In 2018, before there is an execution and levy and enforcement of the judgment pursuant to 735 ILCS 5/12-119 *et seq*., Andy dies. Anne, as a surviving joint tenant, owns Blackacre free and clear of the judgment.

Consider a variation of the above example:

- *Example:* Anne and Andy own Blackacre in joint tenancy. In 2015 a judgment is entered against Andy and is promptly recorded. In 2016, Andy dies. Anne, as a surviving joint tenant, owns Blackacre free and clear of the judgment

  In 2017, a year after Andy dies, a judgment is entered against Anne, a widow. It is recorded. In 2018, Anne dies. The judgment against Anne is still enforceable for eight years from the date of entry of the judgment. (The death of the judgment debtor can extend the limitations period by an additional year, to eight years. See 735 ILCS 5/12-157.)

What if the judgment debtor is the surviving joint tenant?

- *Example:* Anne and Andy own Blackacre in joint tenancy. In 2017 a judgment is

entered against Andy and is promptly recorded. In 2018, before there is an execution and levy and enforcement of the judgment pursuant to 735 ILCS 5/12-119 *et seq*., Anne dies. Andy, as a surviving joint tenant, owns Blackacre, but he owns the land, subject to the judgment.

Public Aid Liens and the Deceased Joint Tenant

But tax liens and judgments in favor of governmental bodies are an exception to this general rule. Such liens that are against one joint tenant should continue to be treated as liens against the real estate, even after the debtor joint tenant dies.

Consider, for example, public aid liens. These are statutory liens that arise pursuant to the Illinois Public Aid Code, which is found at 305 ILCS 5/1-1 *et seq.*

In Illinois the Department of Human Services and the Department of Healthcare and Family Services (formerly the Department of Public Aid) provides aid to the aged, blind or disabled and aid to families with dependent children. It also provides for medical assistance. See 305 ILCS 5/1-6; 305 ILCS 5/2-12; 305 ILCS 5/3-1 *et seq.;* 305 ILCS 5/5-1 *et seq.*

The State of Illinois has a lien on the real property of a recipient for money received pursuant to these programs. See 305 ILCS 5/3-10 and 305 ILCS 5/5-13.5. The lien is enforceable for five years from the date it is recorded. The lien may be extended for additional five year periods upon the recording of a new notice prior to the expiration of said five year period. See 305 ILCS 5/3-10.2. Upon the death of the public aid recipient, the lien may be foreclosed in a judicial proceeding. See 305 ILCS 5/3-10.7.

305 ILCS 5/3-10.8 provides that Illinois public aid liens survive the death of a public aid recipient joint tenant. That is, public aid liens are enforceable against the land owned by the surviving joint tenant(s) as long as the lien is recorded while the recipient joint tenant is alive.

Because the state's recorded lien survives the death of a recipient joint tenant, the examiner cannot waive the recorded public aid lien simply because the recipient joint tenant is deceased. To clear the lien from title, the lien must be either paid off or be subordinated to the insured interest. (See, e.g., Cook County document 0413450085.)

- Note that if the lien is recorded after the public aid recipient dies, it is too late to enforce the lien against the land. Similarly, if the land is sold to a bona fide purchaser for value before the lien is recorded, it is too late to enforce the lien against the land. (However, the lien might still be enforceable against the personal estate of the deceased public aid recipient.)

- On the other hand, if the land is conveyed into a trust or to someone for no consideration, and later the public aid lien is recorded, then the examiner should continue to show the lien, even if it is recorded after the conveyance. In this

case, the conveyance might be deemed to be a *fraudulent transfer.* See 740 ILCS 160/1 *et seq*. See also 305 ILCS 5/3-1.3; 305 ILCS 5/3-11.

In 2006 the Illinois Supreme Court issued its opinion, *Hines v. The Department of Public Aid*, 221 Ill.2d 222, 850 NE2d 148 (2006), in which the court ruled that the Department of Public Aid could not assert a claim against a decedent *spouse's* estate. Under this set of facts, the husband and wife owned their home jointly. The husband received Medicaid assistance. The husband died, and the wife succeeded as sole owner of the home. The wife then died. The Illinois Department of Public Aid tried to assert its public aid claim against the non-recipient wife's estate. The court said that the law did not allow this.

Judgments, Death, and Tenancy by the Entirety

As of 1990 a husband and wife have been able to own their marital home as tenants by the entirety. This estate is unique in that it couples the survivorship attributes of joint tenancy with limited protection against creditors.

The law concerning tenancy by the entirety is set forth at 735 ILCS 5/12-112, 750 ILCS 65/22, and 765 ILCS 1005/1c.

A subsequent judgment creditor of just *one* of the homeowners cannot enforce his lien against the residence of the homeowners as long as they own the land as tenants by the entirety, are alive, remain married to each other, and occupy the home as their residence.

However, this protection is very limited in scope. Consider the following example:

- *Example*: Ben and Betty are married to each other and own their home as tenants by the entirety. Five years after they purchase this home, a judgment is recorded against Ben. As long as Ben and Betty own this home in the entirety, occupy this home as their homestead, and remain married to each other, the judgment creditor cannot enforce this judgment against the family home.

However, the protection that tenancy by the entirety affords is not absolute. If the tenancy by the entirety were to be broken—e.g., if Betty (the non-debtor spouse) were to die, if Ben and Betty were to divorce, or if Ben and Betty were to move to another home—the lien would immediately become enforceable.

Because the tenancy by the entirety protection against the enforcement of judgments can easily be broken, title companies will usually not endorse over judgments and other general liens that were recorded prior to the recording of an insured mortgage. (An exception to this rule is when a title examiner agrees to show a previously recorded judgment as being subordinate to the insured mortgage because the mortgage is a purchase money mortgage. But the examiner can do this because of the purchase

money mortgage doctrine—which is not limited to tenancies by the entirety—and not because of the illusory protection of this tenancy.)

Consider the following examples:

- *Example*: John and Jane are married. They own their home as tenants by the entirety. A judgment creditor records a judgment against John in 2016. In 2017 John and Jane decide to refinance their mortgage, and a new mortgage is recorded in 2017. Jane dies in 2018. The 2016 judgment is immediately enforceable. It is a valid lien that is prior to the mortgage recorded in 2017.

- *Example*: John and Jane are married. They own their home as tenants by the entirety. A judgment creditor records a judgment against John in 2016. In 2017 John and Jane decide to refinance their mortgage, and a new mortgage is recorded in 2017. John and Jane get divorced in 2018. The 2016 judgment is immediately enforceable. It is a valid lien that is prior to the mortgage recorded in 2017.

- *Example*: John and Jane are married. They own their home as tenants by the entirety. A judgment creditor records a judgment against John in 2016. In 2017 John and Jane decide to refinance their mortgage, and a new mortgage is recorded in 2017. In 2018 John and Jane decide to move to a new home. They will continue to own their old home; they will lease it to their son and his college friends. The 2016 judgment is immediately enforceable as a lien against their old home. It is a valid lien that is prior to the mortgage recorded in 2017.

As noted above, if a joint tenancy is not severed, upon the death of the joint tenant judgment debtor, the title of the surviving joint tenant(s) is free of the lien of most judgments and general liens that were entered solely against the deceased joint tenant. Because tenancy by the entirety is merely joint tenancy with the added limited protection against creditors, this same rule applies to tenants by the entirety.

- *Example:* Anne and Andy own their home as tenants by the entirety. In 2017 a judgment is entered against Andy and is promptly recorded. In 2018, before there is an execution and levy, Andy dies.

  Under the law of joint tenancy, when one joint tenant (the judgment debtor) dies, the surviving joint tenant owns the property free and clear of the judgment previously entered against the deceased joint tenant. The same is true for tenancy by the entirety.

  Thus, under the above set of facts, Anne, now sole owner of the land, would own the home free and clear of the judgment that was entered against her late husband.

But now change the facts:

- *Example:* Anne and Andy own their home as tenants by the entirety. In 2017 a judgment is entered against Andy and is promptly recorded. In 2018, before there is an execution and levy, Anne dies.

  When Anne dies first, Andy, the judgment debtor, owns the land as surviving tenant by the entirety. But Andy owns the land, subject to his own judgment. In this instance the protection of tenancy by the entirety is gone.

Death, Divorce, and Tenancy by the Entirety: What is the Post-Divorce Tenancy?

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765 ILCS 1005/1c provides that upon a dissolution of marriage, "the estate shall, by operation of law, become a tenancy in common until and unless the court directs otherwise."

So how can this be a problem?

- *Example*: John and Jane own their home as tenants by the entirety. They get divorced. The divorce decree does not provide as to how the couple will own their home after they are divorced. A month after the judgment of dissolution is entered, John and Jane decide to sell their home. But before the couple enter into a contract, John dies. John and Jane have two children, ages 15 and 21. What are the issues?

As set forth in 765 ILCS 1005/1c, when a husband and wife who own their home in tenancy by the entirety get divorced, the home ownership defaults to tenants in common unless the court directs otherwise.

Prior to the divorce, John and Jane owned the land as tenancy by the entirety. After the divorce they own as tenants in common, not as joint tenants.

When two married people with children own their home as tenants in common and one spouse dies, the surviving spouse acquires a half interest in the deceased spouse's half interest, and the couple's children acquire the other half interest in the deceased spouse's half interest. (In other words, upon the death of one spouse, the deceased spouse's half interest splits, with one-fourth passing to the surviving spouse and one-fourth passing to the children of the deceased spouse.) See 755 ILCS 5/2-1(a), below:

> *755 ILCS 5/2-1*
> *The intestate real and personal estate of a resident decedent and the intestate real estate in this state of a nonresident decedent, after all just claims against his estate are fully paid, descends and shall be distributed as follows:*

> *(a) If there is a surviving spouse and also a descendant of the decedent: 1/2 of the entire estate to the surviving spouse and 1/2 to the decedent's descendants per stirpes.*
>
> *(b) If there is no surviving spouse but a descendant of the decedent: the entire estate to the decedent's descendants per stirpes.*

But in the above example with John and Jane, there is no surviving spouse. Although John and Jane own their home as tenants in common and have children, they are divorced at the time John dies. Because Jane is not a surviving spouse, 755 ILCS 5/2-1(a) does not apply. Instead, see 755 ILCS 5/2-1(b), above. John's half interest passes to the couple's two children. Therefore, upon John's death, Jane continues to own her half interest and the couple's two children own their deceased father's half interest.

In order to insure the sale of this property, the examiner will need deeds from both Jane and the children. Because one child is a minor, a guardian will have to be appointed for the child, and the examiner will need a court order, approving the sale. See 755 ILCS 5/11-1 *et seq.*, especially 755 ILCS 5/11-13(c). See also 755 ILCS 5/11-5 and 755 ILCS 5/20-3.

On the other hand, if John's estate were probated, an executor's deed could effectively transfer John's half interest in the home. An executor's deed would eliminate the need to be concerned about the interests of any minors.

Reviewing (or not Reviewing) the Divorce Court Case When All Parties are Alive

If the title insurance application and commitment disclose that the former husband and wife have divorced, but they are both still alive, does the examiner have to review the terms of the judgment for dissolution of marriage? Do these terms have to be set up in the title commitment? Not necessarily so. Consider the following example.

- *Example*: Adam and Betty own their home. Adam and Betty get divorced. The divorce decree provides that Adam will convey his interest in the land to his ex-wife Betty upon being paid $50,000. Ideally, Adam should receive $50,000 at the closing.

But sometimes the parties may agree to disregard the settlement agreement. For example, Adam might agree to convey his interest to Betty upon being paid only $30,000. This is acceptable, as long as both parties agree to this. The signatures of both parties on the closing statement—and on the deed—would be sufficient evidence of agreement.

- *Example*: George and Grace buy their home in 2010. In 2018 they get divorced. The divorce decree states that upon a sale of the property, George will get $10,000 and Grace will get the balance of the net sale

> proceeds. At the closing, the examiner discovers that George's attorney had earlier submitted closing figures indicating that George was to receive $15,000 at the closing. Is there a problem?

Not necessarily. As long as all parties to the divorce (in this example, George and Grace) sign the closing statement, together with any deed or deeds, the final distribution of proceeds can be freely adjusted, as long as all parties agree to the change. As the settlement agent, the title company follows the instructions of the consenting parties. The title company is not responsible for enforcing the terms of the decree of dissolution.

- *Example*: Fred and Wilma buy Bedrock in 2010. In August of 2018 they get divorced. The judgment of dissolution states that Fred will convey his interest in the land to Wilma in exchange for $50,000. In September of 2018 a deed from Fred to Wilma is recorded. In December of 2018 the title company is asked to do a closing. Wilma is now refinancing Bedrock.

Question: Does the title company have to make sure that Fred got paid? Does the title company have to follow the terms of the judgment for dissolution of marriage?

Answer: Not necessarily. If Fred's deed was not "subject to" the terms of the divorce, if the land in question was not lis pendened as to the divorce case, and if a "memorandum of judgment" relative to the divorce was not recorded, then when Fred executed the deed, he gave up all interest in the land. See 765 5/10:

> "Quitclaim deeds may be, in substance, in the following form: The grantor, for the consideration of _____, convey and quitclaim to _____ *all interest in the following described real estate . . . ."*

Fred gave up all interest he had in the land by signing and delivering the deed to Wilma. Therefore, the title company does not have to check to make sure that Fred was paid.

If Fred was not paid, then what he has is not a lien on the land. The wording of the deed makes it clear that he gave up his interest in the land. Rather, he has what is called a "constructive trust" on the proceeds of the refinancing. But that is not the title company's concern. Title companies insure land; they do not insure the proceeds of sale.

The title examiner *will*, though, want to carefully examine the deed in order to make sure that the deed was not a forgery.

Rule of Title Practice: Reviewing the Settlement Agreement when All Parties Are Alive

- Generally speaking, when the owners of land are divorced, still alive, still in title, and the title company is insuring title pursuant to one or more deeds of the land signed by both parties, the examiner does not have to obtain the court proceeding and review the terms of the settlement agreement.

- If the ex-husband and the ex-wife own the land, and the land is being sold to a third party, and the judgment for dissolution (or memorandum thereof) is not recorded, a lis pendens for the proceeding is not recorded, and the deed or deeds is not "subject to" the divorce decree, there really is no reason to review the judgment for dissolution to determine if an ex-spouse should be paid money upon a conveyance of the land. The closer will be receiving a deed or deeds signed by both parties. If an ex-spouse expects to be paid at closing, he or she will tell the closer.

- Did the ex-husband and ex-wife take title to their home as tenants by the entirety? To convey their home, married tenants by the entirety must execute one deed with two signatures. Pursuant to 765 ILCS 1005/1c, a husband and wife who own their home as tenants by the entirety cannot deliver their own individual deeds. But divorce severs the tenancy by the entirety. Once divorced, the ex-husband and the ex-wife can execute individual deeds of their home.

- Assume that one of the former spouses will be buying out the other spouse and executing a new mortgage. The examiner is being asked to issue a loan policy. In that event, the examiner should determine who is in title, determine if a lis pendens has been recorded against the land, and then ask who will be executing the mortgage to be insured. The examiner must make sure that there will be a deed from the other party. Is this deed "subject to" the terms of the divorce decree? If no lis pendens has been recorded, and if the deed is not subject to the terms of the divorce decree, there is no need for the examiner to look at the divorce decree. Again, if an ex-spouse expects to be paid at closing, he or she will tell the closer.

But when the facts change, this general rule is subject to several caveats.

- If both parties are in title to the land, and if the judgment for dissolution (or memorandum thereof) is recorded, or if a lis pendens for the proceeding is recorded, the examiner will have to review the divorce proceedings. The judgment of dissolution may provide, for example, that when the family home is conveyed, the attorney for one of the spouses should be paid. Or the case may simply contain a money judgment for attorney's fees against one of the litigants. (However, as between the titleholders, the ex-husband and the ex-wife are still free to jointly alter the terms of the judgment as it affects them.)

  A recorded judgment for dissolution (or memorandum thereof) has the effect of the more familiar memorandum of judgment. Thus, the judgment of dissolution is essentially a lien on the land.

- Did the parties take title to their home as tenants by the entirety? If the two owners are still married (e.g., they have filed divorce proceedings, but no judgment for dissolution of marriage has been entered), and both parties are still

occupying the home as their homestead, then both title holders must execute one deed.

- If one ex-spouse has conveyed his or her interest in the family home to the other ex-spouse (or a third party), and the judgment for dissolution (or memorandum thereof) is recorded, or if a lis pendens for the proceeding is recorded, or if the deed is "subject to" the provisions of the judgment for dissolution, then the title examiner must examine the judgment. Does the judgment indicate, e.g., that the grantor is supposed to be paid as a condition of the grantor's conveyance? If so, the examiner must make sure that the grantor has been paid before agreeing to insure a conveyance or mortgage of the home.

  A recorded deed that is "subject to" the provisions of the divorce decree indicates that the land was not conveyed free and clear of the terms of that decree.

The examiner should carefully examine the deed from one ex-spouse to the other ex-spouse. Was the deed notarized? Is there a possibility that the deed is fraudulent?

Reviewing the Court Case When a Joint Tenant or a Tenant by the Entirety is Deceased

The previous section set forth the general rule that when the two homeowners are alive, still in title to the land, but divorced, the title examiner does not have to review the terms of the dissolution of marriage court case—assuming that no lis pendens or memorandum of judgment has been recorded.

But what if the two homeowners owned their home in joint tenancy or tenancy in common, and now one of them is deceased? How do these facts affect the general rule?

The appellate court in the case, *In Re Marriage of Dowty*, 146 Ill. App. 3d 675, 496 N.E.2d 1252 (2nd Dist. 1986), stated that a divorce decree, in and of itself, does not sever a joint tenancy. The court added, however, the following comment:

> *An agreement between joint tenants to hold property as tenants in common will sever an existing joint tenancy, and may be inferred from the way in which the parties deal with the property when they treat their interest as belonging to them in common. . . . Where, however, it may be seen from the language of the judgment, and the property agreement incorporated therein, together with the matters disclosed in the transcript of the dissolution hearing, that the parties intended a division of the property, the joint tenancy will have been severed. . . .*

Despite the wording of this case, most title companies take the position that joint tenancies are broken by deed and not by oral agreements, court transcripts, or settlement agreements. However, the settlement agreement may provide some form of

equitable rights in favor of the estate of a deceased joint tenant or tenant by the entirety. Thus, the title company must consider the settlement agreement in the disposition of sale proceeds.[1]

> *Example*: John and Jane are married and own their home in joint tenancy. They have one child, a daughter named Annie. In 2017 they get divorced. The judgment of dissolution marriage states that the couple will put their home up for sale and upon the sale of the home, the proceeds will be split equally between the parties. In 2018 John dies. Jane continues to attempt to sell the home, and a few months later she finds a buyer. At the closing, the title company needs only one deed from Jane, as surviving joint tenant. The proceeds of the sale should be disbursed, taking into account, if necessary, the rules of distribution set forth in 755 ILCS 5/2-1:
>
> *The intestate real and personal estate of a resident decedent and the intestate real estate in this State of a nonresident decedent, after all just claims against his estate are fully paid, descends and shall be distributed as follows:*
> *(a) If there is a surviving spouse and also a descendant of the decedent: 1/2 of the entire estate to the surviving spouse and 1/2 to the decedent's descendants per stirpes.*
> *(b) If there is no surviving spouse but a descendant of the decedent: the entire estate to the decedent's descendants per stirpes.*
> *(c) If there is a surviving spouse but no descendant of the decedent: the entire estate to the surviving spouse.*
> *(d) If there is no surviving spouse or descendant but a parent, brother, sister or descendant of a brother or sister of the decedent: the entire estate to the parents, brothers and sisters of the decedent in equal parts, allowing to the surviving parent if one is dead a double portion and to the descendants of a deceased brother or sister per stirpes the portion which the deceased brother or sister would have taken if living.*

Thus, in the above example, the proceeds should be divided pursuant to 755 ILCS 5/2-1(b), half to Jane and half to Annie.

And now change the facts slightly:

> *Example*: Tom and Teresa are married and own their home in joint tenancy. In 2017 they get divorced. The judgment of dissolution states that Tom is to quit claim his interest in the family home to Teresa. Before he executes the deed, however, Teresa dies. John should convey the property to the heirs of Teresa pursuant to the above rules of descent and distribution.

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[1] See also *In Re Marriage of Dudek*, 201 Ill. App. 3d 995 (1990) and *Sondin v. Bernstein*, 126 Ill. App. 3d 703 (1984).

Rule of Title Practice: Reviewing the Settlement Agreement When Title is Held in Joint Tenancy, the Parties are Divorced, and One of the Parties is Deceased:

When insuring the sale of property when property was owned by a married couple in joint tenancy and the parties have divorced, and one of the parties has subsequently died, the examiner should obtain and review a copy of the settlement agreement. The examiner and closer should consider the terms of the settlement agreement in closing the transaction and disbursing sale proceeds. However, in order to insure a sale of the property, the examiner needs to have only the surviving joint tenant execute the deed.

Rule of Title Practice: Reviewing the Settlement Agreement When Title is Held in Tenancy by the Entirety, the Parties are Divorced, and One of the Parties is Deceased:

When insuring the sale of property when the family home was owned by a married couple in tenancy by the entirety, and the parties have divorced, and one of the parties has subsequently died, the examiner should obtain and review a copy of the settlement agreement. The examiner should consider the terms of the settlement agreement in closing the transaction and disbursing sale proceeds.

But in addition, what does the settlement agreement state in regards to the tenancy of the home? If the agreement is silent, or if the agreement states that the tenancy is tenancy in common, then the examiner will need either deeds from all the heirs of the deceased owner or an executor's deed. If the agreement states that the tenancy is joint tenancy, then the examiner needs a deed from the surviving now-joint tenant.

Deed from One Ex-Spouse to the Other Ex-Spouse that is "Subject to" the Terms of the Judgment for Dissolution

What if a deed from one ex-spouse to the other ex-spouse is subject to the terms of the divorce? Consider the following examples.

- *Example Number One:*

  Husband and wife own their home. They get divorced, and now the ex-wife is refinancing. She brings to closing the deed from her ex-husband to herself. The deed reads that it is "subject to the terms of order entered in dissolution of marriage case number. . . ."

  The divorce decree provides, among other things, that the ex-husband shall quit claim his interest in the land to his ex-wife, but that when their youngest child reaches the age of eighteen, the house should be sold, and at that time, the ex-husband shall be paid fifty percent of the sale proceeds.

Despite the terms of the divorce decree, could the ex-wife still mortgage the property, keep the money, and eventually sell the home, with virtually nothing in gross proceeds to split with the ex-husband? This is possibly so. Nonetheless, this scenario is not the title company's concern. The title company is issuing a loan policy, and this wording does not affect the priority of the insured mortgage. The title company does not need to obtain the ex-husband's consent to the mortgage. The title company need not insist that the ex-husband subordinate his post-divorce rights in the property to the insured mortgage. The insured lender does not have to accept its policy "subject to" the terms of the divorce decree. However, if the title company were issuing an owner's policy in favor of the ex-wife, the terms of the decree should be raised in Schedule B of the policy.

Some judgments for dissolution will contain wording that addresses this issue:

> *Ex-wife agrees that she will not mortgage the property without ex-husband's consent, whose consent will not be unreasonably withheld.*

- *Example Number Two:*

In this second example, the judgment provides for post-dissolution maintenance payments to the ex-wife. How can the title company underwrite these payments?

> Fred and Ethel get married in 2010 and buy a home together. They get divorced in 2018. Ethel quit claims her interest in the home to Fred on September 1, 2018. In December of 2018 Fred decides to refinance the home's mortgage. Fred's attorney orders a title insurance commitment. The title search reveals that on August 1, 2018 (a month before Ethel deeded the home to Fred), Ethel's attorney recorded the judgment for dissolution of marriage. The judgment states that in addition to a lump sum payment, Fred also has to pay Ethel some ongoing monthly maintenance payments for the next five years. Fred's refinance is clearly within this five-year window. How does the title company underwrite the recorded judgment for dissolution of marriage?

The title examiner should obtain evidence—either from Ethel, her attorney, or as a last resort, from Fred—that Fred has paid Ethel her lump sum payment and that he is current with his monthly payments.

When the title examiner issues the loan policy, the examiner should show the recorded judgment as an exception to title. The examiner, however, can endorse over the judgment with the standard endorsement used to endorse over liens and proceedings. The reason as to why the examiner can endorse over the lien is set forth in 750 ILCS 5/504(b-7):

> *Any new or existing maintenance order including any unallocated maintenance and child support order entered by the court under this*

> *Section shall be deemed to be a series of judgments against the person obligated to pay support thereunder. Each such judgment to be in the amount of each payment or installment of support and each such judgment to be deemed entered as of the date the corresponding payment or installment becomes due under the terms of the support order, except no judgment shall arise as to any installment coming due after the termination of maintenance as provided by Section 510 of the Illinois Marriage and Dissolution of Marriage Act or the provisions of any order for maintenance. Each such judgment shall have the full force, effect and attributes of any other judgment of this State, including the ability to be enforced. Notwithstanding any other State or local law to the contrary, a lien arises by operation of law against the real and personal property of the obligor for each installment of overdue support owed by the obligor.* (emphasis added)

Reviewing the Court Case When Only One Ex-Spouse Is in Title

> *Example*: Adam and Betty are married. Only Adam owns the home in which they both live. Adam and Betty get divorced. Adam is now selling the home. Does the title examiner have to review the court case and read the judgment for dissolution of marriage to see if and how the court addresses the ownership of the home?

No, the examiner does not have to review the court case. That is, as long as Adam's deed is not subject to the terms of the judgment, and as long as a lis pendens was not recorded against the land, the examiner can ignore the court case. Adam is the sole owner of the home; Betty does not own an interest in the home. The court may direct Adam to pay Betty all or a portion of the sale proceeds. The court may even enjoin, or prohibit, Adam from conveying the property. But unless a lis pendens is recorded, or unless Adam's deed is subject to the terms of the case, the Company is free to insure a sale of the property without reviewing the case. A "constructive trust" may be imposed on the sale proceeds for the benefit of Betty, but that is not the Company's concern. The Company insures land; it does not insure the proceeds of a sale of the land.

Insuring Title Pursuant to a Court Order and not a Judge's Deed?

Assume that the title company issues a title commitment for the sale of property; the last deed of record is to a married couple. One of the title exceptions is a current divorce case wherein the decree provides that the ex-husband is to quit claim all interest he has in the property to his ex-wife. But this deed was never recorded. The sale is now closing, and the ex-wife is prepared to sell "her" home to a new purchaser. Her attorney tells the examiner that the examiner can rely on the court case. "After all," the attorney explains, "the judge ordered the ex-husband to convey the house to my client." Can the examiner insure the sale to the new purchaser with only a deed from the ex-wife to the insured?

No, the examiner cannot insure the sale with only a deed from the ex-wife. Perhaps the ex-husband and ex-wife later reconciled and decided that the ex-husband did not have to execute a conveyance. In order to insure the sale of the home from the ex-wife to the new purchaser, the examiner will need a deed from the ex-husband.

The entry of a final order in a dissolution of marriage proceeding is not sufficient to divest title. A deed is necessary. If an ex-spouse fails to execute a deed pursuant to order of court, the judge may execute the deed instead. See 735 ILCS 5/2-1304(b).

Dissolution of Marriage and the Land Trust

Assume that the title company issues a title insurance commitment for the sale of a home and determines that title to the home is in an Illinois land trust. But the title application states that the seller is "Anthony Anderson." The title examiner prepares a name search of Anthony Anderson, and the examiner discovers a current divorce case. The judgment for dissolution of marriage states that Anthony Anderson is supposed to convey his interest in the home to his ex-wife in exchange for $50,000. Anthony Anderson is now at the closing with a trustee's deed, ready to tender a deed from the land trustee to the new buyer. Should the examiner be concerned about whether or not Anthony's ex-wife received the $50,000?

The examiner need not be concerned. When title to land is in an Illinois land trust, the trustee owns the land; the land trust beneficiary has only a personal property interest in the land. Assuming that the divorce case has not been "lis pendened" against the home, the divorce decree is a nullity, as far as the title company (and the home) is concerned. The title company is insulated from any liability for failing to collect the ex-wife's $50,000.

Name Changes

The examiner should always be aware of the possibility that the judgment of dissolution of marriage may indicate that an ex-wife will take back her maiden name. Naturally, if the ex-wife was an owner of the family home, that name should be searched in all appropriate indices.

However, the examiner does not have to obtain a copy of the judgment solely to determine if the ex-wife changed her name. Looking at the issue from a cost-benefit analysis perspective, the burden of obtaining and reviewing the judgment solely to see if the ex-wife changed her name outweighs the risk of a possible title claim.

Case Law

***Peru Federal Savings Bank v. Weiden*, 2016 IL App (3d) 140205**

In 1998 Donald and Tina Weiden, husband and wife, purchased their home. They obtained a purchase money mortgage with Peru Federal Savings Bank. In 2006 they got divorced. The court awarded Donald the home and ordered him to pay Tina about $34,000 for her share of the property. A marital settlement agreement, incorporated in the judgment of foreclosure, provided that Tina would execute a quit claim deed of the home to Donald. In return, Donald would refinance the home and pay Tina about $34,000. The parties also agreed that they would pay their own attorney's fees.

The law firm of Olivero & Olivero represented Donald. Shortly after the court entered the judgment of dissolution of marriage, this law firm got a judgment of about $18,000 for its attorney's fees. The law firm recorded a memorandum of this judgment in 2008.

In 2012 Peru Federal Savings Bank filed a complaint to foreclose its mortgage. The Olivero law firm and Donald and Tina were named as defendants. The property was sold at judicial sale for almost $36,000, more than the amount owed on the mortgage. The bank set a hearing for the distribution of the excess funds. The bank noted that Olivero & Olivero was a recorded lienholder.

Tina, though, claimed that she had a lien against the property and that her lien had priority over all other liens. The trial court denied Tina's claim, ruling in favor of Olivero & Olivero.

On appeal, however, the appellate court determined that the judgment of dissolution of marriage created an *equitable lien* that represented Tina's interest in the marital property. The language of the judgment indicated that the marital residence was the security for Tina's equitable interest—that is, Tina would execute a quit claim deed in exchange for about $34,000. Thus, the judgment of dissolution of marriage created an equitable lien in favor of Tina that had priority over the judgment lien that was recorded by Olivero & Olivero.

Does This Case Change Title Company Underwriting Procedures?

This case should not change title company underwriting procedures. Had Donald and Tina set a closing to refinance the Peru Federal Savings Bank mortgage, the examiner would have issued a commitment showing the mortgage in Schedule B. Assuming that no lis pendens for the divorce case was recorded, there would have been no need for the examiner to review the terms of the judgment for dissolution of marriage. Tina would not have executed a deed in favor of Donald unless she was paid at closing. There would have been no reason for Tina to draft her deed so that it was "subject to" the terms of the judgment.

Of course, if either Donald or Tina had been deceased, then the examiner would have to review the judgment for dissolution of marriage. This caveat is consistent with the Company's underwriting procedures.

This case, however, is still a bit unsettling. Olivero & Olivero did everything right—that is, the law firm recorded its memorandum of judgment for attorney's fees. It does not appear that a memorandum of the judgment for dissolution of marriage was recorded. Nonetheless, the appellate court ruled that Tina's apparently unrecorded equitable lien was prior to the law firm's recorded memorandum of judgment. Granted, the memorandum of judgment was recorded *after* the judgment of dissolution of marriage was entered, but the memorandum of judgment was recorded, and it appears that the judgment for dissolution of marriage was not recorded.

The opinion is silent as to why the court ruled this way. It is possible that the court determined that Tina's equitable lien was prior because the law firm was not a third party creditor. Rather, because Olivero & Olivero represented Donald, the law firm obviously had knowledge of the provisions of the judgment for dissolution of marriage.

So just one question remains—would the appellate court have ruled the same way in favor of a third party creditor? For example, what if a third party judgment creditor of Donald recorded his memorandum of judgment a month after the judgment of dissolution of marriage had been entered? Would the appellate court still determine that Tina's equitable lien was prior to the recorded judgment of this third party creditor? Such a decision very likely *would* change title company underwriting practices!