10 Conveyancing and Title Problems Caused by Misbehaving Documents

MACS Land Surveying Seminar
October 6, 2016

Presented by

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These materials were originally used at the 2015 Minnesota CLE Real Estate Institute. Thank you to Minnesota CLE for granting permission to re-use these materials.

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1. Conveyance was intended to create a joint tenancy.

Facts: The deed form, at the top, says

WARRANTY DEED	Minnesota Uniform Conveyancing Blanks
Individual(s) to Joint Tenants	Form 10.1.5 (2013)

The body of the deed, after the identification of the grantees, is silent as to tenancy. So the only place the words “Joint Tenants” appear on the deed is in the title.

What went wrong, and why?

Use the blank space to write your answer.
Turn to the next page for my analysis.

Analysis for Scenario 1, conveyance was intended to create a joint tenancy.

State "joint tenants" if that is what the grantees want. But you must state it in the body of the deed; the title to the deed is not sufficient. Frankly, the title to the deed could be "Aunt Martha's apple pie recipe" and the deed will be recorded. Minn. Stat. § 500.19, Subd. 2, states that "[a]ll grants and devises of land, made to two or more persons, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy."

2. Conveyance to a dead person.

Facts: Grandmother had previously conveyed part of the family farm to her grandchildren.

Grandma dies on July 24, 2001.

On August 1, 2001, the grandchildren execute and acknowledge deeds, conveying the land back to Grandma.

What went wrong, and why?

Use the blank space to write your answer.
Turn to the next page for my analysis.

Analysis for Scenario 2, conveyance to a dead person.

A conveyance cannot be made to a deceased person, because it is impossible to deliver the deed.

These facts come from *In re Estate of Savich*, 671 N.W.2d 746 (Minn. App. 2003). In that opinion, the court summarized the law as follows:

> In order to transfer title, a deed must be delivered. The essential elements of delivery are surrender of control by the grantor and intent to convey title. Physical delivery is not necessary; the grantor must merely show a present, unconditional intention to part with ownership. A deed signed, but not delivered, before the death of the grantor is void. Likewise, **a deed cannot be delivered to a deceased grantee. "Thus, * * * a conveyance cannot be made to a deceased person.** Not only would there be a failure to comply with historical requirements [of seisen], but it also would be impossible to make delivery to such a grantee."

671 N.W.2d at 750 (citations omitted).

3. Conveyance to a limited liability company not yet formally organized.

Facts: In November 2002, Keith Hammond drafts and signs articles of organization for Jetmar Properties, LLC. The articles are not filed with the secretary of state.

On May 14, 2003, Dale Stone conveys real property to Jetmar.

On March 11, 2004, Hammond files Jetmar's articles of organization and receives a certificate of organization.

What went wrong, and why?

Use the blank space to write your answer.
Turn to the next page for my analysis.

Analysis for Scenario 3, conveyance to a limited liability company not yet formally organized.

A deed to a limited liability company not yet formally organized under Minnesota Statutes Chapter 322B is void for failure of delivery.

These facts come from *Stone v. Jetmar Properties*, LLC, 733 N.W.2d 480 (Minn. App. 2007). In that opinion, the court summarized the law as follows:

> Under Minnesota law deeds cannot be delivered to nonexistent entities, whether the entities are natural or legal. A deed cannot be delivered to a deceased grantee, for example. Similarly, the supreme court has held that because an organization was not a corporation de jure or de facto, it could not take title to real estate. We can find no basis in Minnesota law for delaying transfer of title to some indeterminate future date when the grantee might come into existence. In fact, 'many, but not all, courts have denied validity to deeds conveying property to corporations which are not incorporated at the time of conveyance.' According to these courts, "[t]he effective date of a deed is usually stated to be the date of delivery, and if at that date the corporation is 'non-existent,' the ordinary rule governs and the deed is treated as a nullity."

733 N.W.2d at 486 (citations omitted).

Title Standard No. 33, "Filing evidence of legal existence and continuance of entities," states in part:

> It is not necessary to record an entity's organizational documents in the office of the County Recorder or Registrar of Titles to show legal existence, even if the filing of such entity's organizational documents in a public office is required in order to confer legal existence on such entity.

The title standard includes the following caveat:

> This Standard reflects existing practice and does not address issues raised by *Kratky v. Andrews* (assignment of contract for deed, to a corporation whose charter has become void, is void and ineffective) or *Stone v. Jetmar Properties, LLC*.

(Related) Practice Tip: The date of delivery is ordinarily presumed to be the date on the deed. *Stone*, 733 N.W.2d at 480.

4. Grantee and notary are the same person.

Facts: A conveys the land to B, by a quit claim deed.

A's signature is acknowledged before B, who is the notary.

So, the grantee and the notary are the same person.

What went wrong, and why?

Use the blank space to write your answer.
Turn to the next page for my analysis.

Analysis for Scenario 4, grantee and notary are the same person.

> "**Undoubtedly, the policy of the law forbids that the acknowledgment should be taken before a party to the deed** or one who takes an interest under it, whether as grantee, mortgagee, partner, or trustee; and, when such interest appears on the face of the instrument, the record will disclose the infirmity, and third parties can take advantage of it."

Bank of Benson v. Hove, 45 Minn. 40, 42, 47 NW 449 (1890).

In that case, the document was a mortgage, the mortgagee was a bank, and the notary was the bank's cashier. The court held that a bank cashier may take the acknowledgment of an instrument running to the bank. 45 Minn. at 43.

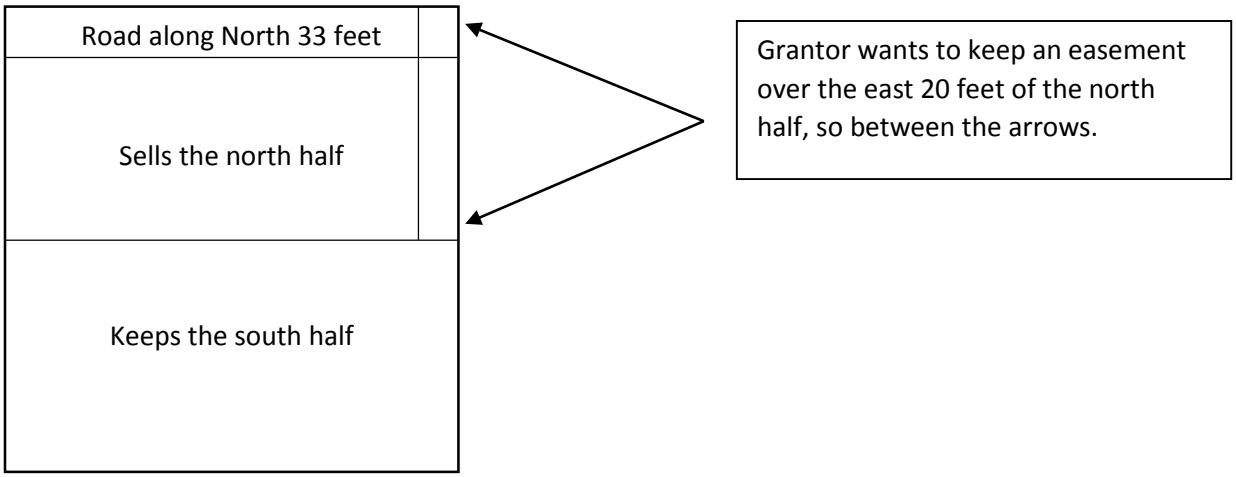
The court goes on to say that the mortgage was valid as between the parties to it, without an acknowledgment; and that if the face of the document does not disclose the alleged disqualification of the notary, the document would be entitled to be recorded, because "[a]ny other rule would destroy the reliability of the public records." *Id.*

Practice Tip: When the grantee is a person, don't allow her to also act as the notary. When the grantee is a business entity, it is ok to use an employee as the notary. Partnerships get confusing (the partner should not be the notary), so why not in all situations have the notary be the attorney who drafted the document, or the attorney's legal assistant, or the title company employee? That way you avoid any "misunderstanding."

5. Grantor intends to convey the fee and keep an easement.

Facts: Grantor owns the northeast quarter of the northeast quarter. A county road runs east-west along the north 33 feet of the northeast quarter. Grantor will convey the north half, keep the south half, and also keep an easement over the east 20 feet of the property being sold, for access out to the county road.

The picture looks like this:



The deed says:

FOR VALUABLE CONSIDERATION, Grantor hereby conveys and warrants to Grantee real property in Hennepin County, Minnesota legally described as follows:

The North Half of the Northeast Quarter of the Northeast Quarter, Section 28, Township 118, Range 24.

Subject to an easement over the east 20 feet.

What went wrong, and why?

Use the blank space to write your answer.
Turn to the next page for my analysis.

Analysis for Scenario 5, grantor intends to convey the fee and keep an easement.

> The words "convey" and "grant" are often used in easement deeds. The words "declare," "impose upon," and "subject the land to" are words and phrases often used in declarations. If the grantor wants to convey the fee but keep an easement for access to other property that the grantor owns, the grantor may "reserve" an easement. **But conveying property "subject to" an easement does not create an easement, but presupposes an existing easement.**

Werner v. Sample, 107 N.W.2d 43, 44 (Minn. 1961).

When you create an easement, answer these questions:

1. Exclusive or nonexclusive?
2. What is the purpose?
3. What is the benefited land? Most times the easement rights run with the land; this is called an appurtenant easement. An "easement in gross" means that the right belongs to an entity or person without regard to ownership of a parcel of land.

What would be a better way to describe the easement in the example?

Reserving, for the benefit of the south half of the Northeast Quarter of the Northeast Quarter, Section 28, Township 118, Range 24, a nonexclusive easement for ingress and egress over the east 20 feet of the north half of said Northeast Quarter of the Northeast Quarter.

6. Informal probate administration, deed given less than 30 days after appointment of personal representative.

Facts: Informal probate administration.

Personal Representative appointed on October 1st.

Personal Representative, by a deed dated and acknowledged on October 29th, conveys the decedent's real estate.

The deed and all necessary probate documents are recorded. The letters are certified to be in full force and effect.

What went wrong, and why?

Use the blank space to write your answer.
Turn to the next page for my analysis.

Analysis for Scenario 6, informal probate administration, deed given less than 30 days after appointment of personal representative.

A personal representative appointed in an informal proceeding shall not be empowered to sell, encumber, lease or distribute any interest in real estate owned by the decedent until 30 days have passed from the date of the issuance of the letters. Minn. Stat. § 524.3-711.

Practice Tip: When counting days, you exclude the first day, meaning you exclude the day the letters were issued. *See* Minn. Stat. § 645.15, regarding computation of time.

Practice Tip: A deed dated and acknowledged during the "waiting period" is not effective. You cannot simply use that deed and wait until 30 days are up to order your probate documents. The deed must be dated and acknowledged after the end of the waiting period.

Question: Do you have to wait until the end of the 30th day?

7. Conveyance by a joint tenant to a third party.

Facts: A and B are married and have two children, C and D.

A and B own the property as joint tenants.

A conveys her interest to their children, C and D, as joint tenants.

A and B intended the result to be joint tenancy ownership by B, C, and D.

What went wrong, and why?

Use the blank space to write your answer.
Turn to the next page for my analysis.

Analysis of Scenario 7, conveyance by a joint tenant to a third party.

A's conveyance to C and D severs the joint tenancy with B. Now, B owns an undivided one-half interest as a tenant in common with C and D, who own the other half-interest as joint tenants.

A and B should have joined in the deed and conveyed the property to B, C and D, as joint tenants.

Caveat: This analysis does not deal with inchoate (spousal) interests.

Background on joint tenancy:

Two or more people who own property as joint tenants own the undivided whole of the property. By a common law fiction, joint tenants together are regarded as a single owner. That means that when one joint tenant dies, nothing passes to the decedent's devisees or heirs. By right of survivorship, ownership of the property remains with the surviving joint tenant, free from the extinguished interest of the decedent. The last-surviving joint tenant owns in *severalty*, meaning owning real property without anyone else sharing in the ownership.

So, it is incorrect to say that "A owns an undivided half-interest in the property, as a joint tenant with B." A and B both own the undivided whole.

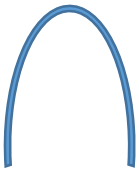
Practice Tip: What if the affidavit of survivorship gives a different name for the survivor? This document is used to identify the decedent—the deed shows you who is left owning the property. I would not rely on the affidavit of survivorship to support a new name for the surviving joint tenant.

8. Condominium issues, allocated interests and identification of units.

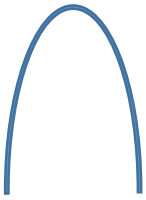
Facts (this is a two-part scenario):

First issue: There are 23 living units, and the allocation of interests, under Minn. Stat. § 515B.2-108, are equal. The allocated interests are stated as a percentage, so 4.35 percent for each unit.

Second issue: The condominium also sells parking spaces as separate garage units, and there are no allocation of interests to the garage units. The drawing in the sales office shows a horseshoe shaped garage floorplan, with the parking spaces numbered like this (so starting in the lower left-hand corner):

Parking Space 1  Parking Space 23

The declaration document includes a floorplan page, with the garage units numbered like this (so starting in the lower right-hand corner):

Unit 23  Unit 1

What went wrong, and why?

Use the blank space to write your answer.
Turn to the next page for my analysis.

Analysis of Scenario 8, Condominium issues, allocated interests and identification of units.

4.35 (percent per unit) x 23 (units) = 100.05 percent

100/23 = 4.34782609

Minnesota Statute Section 515B.2-108 provides as follows:

> (a)(1) The common interest community declaration shall allocate to each unit in a condominium a fraction or percentage of undivided interests in the common elements and in the common expenses of the association and a portion of the votes in the association.
>
> (b) The declaration shall state the formulas used to establish allocations of interests. If the fractions or percentages are all equal the declaration may so state in lieu of stating the fractions or percentages. The declaration need not allocate votes or a share of common expenses to units that are auxiliary to other units, such as garage units or storage units.
>
> (e) The sum of each category of allocated interests allocated at any time to all the units must equal one if stated as a fraction or 100 percent if stated as a percentage. In the event of a discrepancy between an allocated interest and the result derived from application of the pertinent formula, the allocated interest prevails.

In any event, the garage units must be allocated an undivided interest in the common elements, since there is no statutory exception for interests in common elements, in Section 2-108(b)!

What would be a better way to draft the allocated interests?

Equality among living units, for all three categories (i.e., interests in common elements, expenses, and votes), so 1/23 each.

No allocation of votes or common expenses to the garage units.

Then, equality among the garage units for interests in common elements.

And finally, maybe an 80/20 split on the share of interests in common elements for living units/garage units.

Regarding the **Second Issue**, the numbering of garage units, in opposite order, just hope you own unit 12, located in the same spot whether you start on the left or the right. The legal term for this situation is “train wreck.” Obviously, there was a “misunderstanding” between the attorney, the surveyor, and the developer.

9. Legal descriptions.

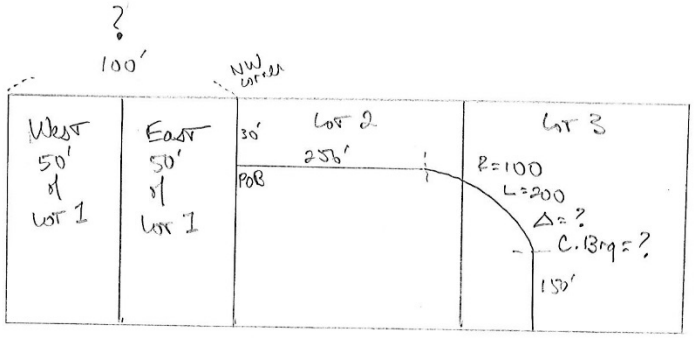
Facts (this is a three-part scenario):

The plat shows Lot 1 as 100 feet wide, east to west.

First issue: The owner of lot 1 conveys the west 50 feet to A, and then the east 50 feet to your client. Lot 1 may, or may not, actually measure 100 feet wide.

Second and third issues: Your client needs an access easement over parts of Lots 2 and 3, and these two lots are owned by the same party.

The picture looks something like this, with the centerline of the easement being shown (ten feet on both sides):



The legal description is written as follows:

A 20 foot easement for ingress and egress, over Lot 2, Block 1, Blackacre, for the benefit of the east 50 feet of Lot 1, Block 1, Blackacre, the centerline of said easement is described as follows:

Beginning at the northwest corner of said Lot 2, thence on an assumed bearing of South 0 degrees 02 minutes 10 seconds East, along the west line of said Lot 2, a distance of 30 feet to the actual point of beginning of the line being described; thence South 89 degrees 29 minutes 41 seconds East a distance of 256 feet; thence southerly, along a non-tangential curve concave to the southwest having a radius of 100 feet, for a distance of 200 feet; thence South 45 degrees 20 minutes 20 seconds East a distance of 150 feet to the south line of Lot 3, Block 1, Blackacre, and said centerline there terminating.

The side lines of said easement are to be prolonged or shortened to terminate at the west line of said Lot 2 and the south line of said Lot 3.

What went wrong, and why?

Analysis for Scenario 9, legal descriptions.

Even if you absolutely positively know that Lot 1 is 100 feet wide, do not describe the remainder as the east 50 feet. Unless you want to pick a fight.

What is a better way to describe the remainder?

Lot 1, except the west 50 feet.

The land burdened by the easement is Lots 2 and 3. **The introduction to the legal description appears to limit the burdened land to Lot 2.** You could have a situation where someone else owns Lot 3, but that is not this example. Here, both lots should have been identified as the burdened land.

For a **tangential curve**, you need to know the length, the radius, and the delta.

For a **non-tangential curve**, you need to know the length, the radius, the delta, and also the chord bearing and the chord distance (although the chord distance is not usually seen in the legal description).

In the example, the legal description does not include the delta or the chord bearing.

A great resource is Report Four, Metes and Bounds Descriptions, which has been updated by "Fant, Freeman & Madson on Writing Legal Descriptions," and a link to the order page (item 1E) is below:

https://msps.site-ym.com/store/ListProducts.aspx?catid=349332

I also use "Writing Legal Descriptions" by Gurdon Wattles, and a link to the Amazon website page is below:

http://www.amazon.com/Writing-Legal-Descriptions-Gurdon-Wattles/dp/0960696288

Practice Tip: Do you need to be a licensed surveyor to review a metes and bounds legal description? NO. Can you issue spot, and ask questions? YES

10. Miscellaneous disasters.

A. Dissolution Judgment and Decree. When you choose to record the full marital dissolution judgment and decree, you end up with dirty laundry in the real estate records, for example:

There has been an irretrievable breakdown of the marriage relationship of the parties due to the Husband's infidelity.

Father is an alcoholic and although he received treatment for his addiction after his criminal conviction, Father continues to abuse alcohol.

These are not made up. **Use a summary real estate disposition judgment.**

B. When Grantees don't have separate last names. This is always a favorite of mine, although seldom seen.

Correct identification of grantees: John Smith and Sally Smith

Incorrect identification of grantees: John and Sally Smith.

Correct identification on holiday greeting card envelope: John and Sally Smith.

C. Entities can't own life estates. Black's Law Dictionary defines a life estate as "[a]n estate whose duration is limited to the life of the party holding it, or some other person."

So, the following does not work:

A and B, as Trustees of the A and B revocable trust, grantor, hereby convey and quit claim to C the land described as Lot 1, Block 1, Blackacre, *reserving for the revocable trust a life estate for the natural life of A and a life estate for the natural life of B.*

Instead, A and B, as trustees, can convey the fee to C, and they can convey a life estate to A, measured by A's life, and a life estate to B, measured by B's life.

Some may disagree with my analysis, however disagreements as to the effect of recorded documents is what you want to avoid…

D. The Will contains the sole provision regarding burial instructions. Your mother's Will says: *"I request that my body be cremated."* However, the Will is not obtained until a week after the funeral. You were understandably busy preparing the posters of photos and greeting relatives, and preparing for the burial at the local cemetery. Oops.