



## *Ask the TITLEMAN™ #196*

**Q & A**

**John T. Lotardo  
Attorney-at-Law**

*Q. I have a dispute as to earnest money on the cancellation of a contract for some apartments that have been converted to condominiums. The Buyer did not get approved and the Seller wants \$500.00 of his earnest because he chose a purple paint, and the seller says it will need to be repainted to sell. Can they do that?*

A. Why would he have to repaint purple? It's great color. Anyway, I am assuming that the buyer is in the property and painted the property without permission. Wouldn't a prepossession agreement deal with such a matter? Unless, is the buyer a prior tenant who is now buying the property? In that case, the rental agreement should deal with this. I hope there is at least one of these or some other agreement out there between these two. Maybe I need more info to understand, but in either case, the written agreement should be reviewed. I hate to sound like an attorney but the written document can tell us a lot of who gets what when things go awry.

*Q. What do we truly need to accept the actions taken in the Foreclosure of the Right to Redeem? We usually have a pretty good idea what our local attorneys have done, but the out-of towners seem to do things in such a variety of ways, we're not sure what our 'minimum' would be. All we have to go on is what's of record. At first we were seeing a Lis Pendens recorded. Many of them seem to have gotten over that. It also seemed quite normal that we'd have the Judgment recorded before the Treasurer's Deed. Well, we are now seeing it go straight to Treasurer's Deed without any other recording taking place. They are showing the case number on the Deed so we know it was done in court and ordered by the judge, but we don't even know who all was named! Can we require that the Judgment be recorded? Should we?*

A. I think it's okay if the Treasurer's Deed says what it is- a deed after a lawsuit- technically. If they don't record the judgment you don't know that you have a judgment against the proper parties. You know us title people are, we are rather particular about what shows up in the county records on a piece of property. You need to assure yourself that they have named the right parties. If they don't record the judgment, then I would ask for more information. Perhaps make a "proper showing" requirement to substantiate the Treasurer's Deed. For starters, how about having them provide a copy of the final judgment.

***Q. I have a For-Sale-By-Owner (a FSBO) that I opened a while ago. Neither customer has signed my full blown escrows. The close of escrow is not for a while yet. Buyer did not want to sign escrows until his loan was in place and Seller was not in a hurry to sign either. They have signed an informal agreement between themselves, but that's it. Buyer says he is now cancelling for personal reasons and Seller thinks that he just found another house to buy. Seller has had the house off the market for the last three months. He's packed and ready to move. My seller is asking me what his recourse is and I would like to know what you think.***

A. Aren't FSBO's fun? When they work, they work. But when there are disputes, having real estate agents to represent the parties is very helpful. They help work through such disputes. Not to mention they typically will use the AAR standardized contract, which addresses these types of matters. Unfortunately, this is not the case here. I assume from the tone of your story that the documents which you do have signed by the parties does not address this type of buyer's remorse scenario. That said, you still have an escrow. You just don't have clear instruction about what to do with the money. Absent a mutual instruction from the parties, the seller will need to get a court order directing the buyer to either buy the house, forfeit the earnest money, or something in between. I hope this helps. Good luck!

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## ***Ask the TITLEMAN™ #197***

**Q & A**

**John T. Lotardo  
Attorney-at-Law**

*Q. A customer of mine would like to know who to contact to file a complaint against an escrow company. Who should I direct them to?*

A. I would suggest Arizona Department of Financial Institutions. Their email address is <http://azdfi.gov/>.

*Q. I've got a client that brought me copies of 4 deeds starting back in the 70's. Each deed was from one married woman to another married woman. No Disclaimer Deeds or Quit Claim Deeds from their spouses could be located. The wives on the 2 oldest deeds and their husbands are deceased, the 2 husbands on the other 2 most recent deeds are alive and well These 2 Quit Claim Deeds- which makes a good start to clear title. I understand the heirs of the first 2 deeds could come into the picture at any time. What do they need to do to complete clearing the title? They are in their 80's so I'm trying to make it as easy as possible, but can't see a way around quiet title. What would be their next steps?*

A. So it sounds as if the vesting to the 1970's woman was misstated as a married woman when it should have read a widow. This is a situation where uninsured deeds have complicated a rather direct transfer between what I assume to be friends. Now, how do we resolve it? That's the rub. I think I may need more details of when they died, if there's other children, etc. Your title department can make the proper requirements for a proper showing of this and thereafter may make a deed from her husband inappropriate. So all you have to deal with is the 2nd deed.

***Q. I've got a problem today. It is land that is being turned into a subdivision. I finally got the construction financing on Friday and had the borrowers come in and sign it. They disclosed to me that they had already started leveling and cutting the streets in. They are willing to sign an indemnity. They even said they could pay for the work that has already taken place if needed. The lender is going to take care of all disbursements to the contractors and the borrowers are coming in with some of their own money to put into a construction contingency fund with the lender. My Boss says the whole project becomes compromised when there is broken priority. Why is that?***

A. The issue with broken priority is just that- the normal priority that we are used to - first to record has priority- is broken when construction/materials are concerned. So, when an owner or more particularly in your case, a lender is lending money for construction, and they have already started the work, there is a risk of priority for the lender. In other words, if the lender has to foreclose, they would have to handle mechanic or materialman liens should they surface. Said another way, the mechanic lien claimant who records a lien after the deed of trust of the construction lender, could have priority over the insured deed of trust based upon the theory of broken priority. This puts the lender at risk if the lien claimant forecloses on its lien. It could wipe out the lender's deed of trust. In general terms, broken priority starts with the first work on the site until the final coat of paint- plus the relevant time periods allowing a mechanic lien to be recorded. That is why there is a risk for quite a long time to the lender if they started construction prior to the lender recording. Now there are several theories which give some protection to the lender such as the timing of the recordings, the recording/foreclosing process for mechanic liens, etc. So you need to consider the risks when in such a situation. Hope this helps explain what this is all about.

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## *Ask the TITLEMAN™ #198*

**Q & A**

**John T. Lotardo  
Attorney-at-Law**

***Q. Is there a special form of deed that is required to be used for transferring a residential lot from an individual into their revocable trust for property in Pima County?***

A. Not really. Per Arizona Statutes, the names and addresses of the Beneficiaries need to be disclosed of record. I know it seems counter- intuitive to have to disclose information on a trust where one of the reason people use trusts is to keep their private information, well, private. But the law requires this information so that there is a mechanism to determine who are the parties who claim an interest in the property should there be an issue later. I would suggest not using a quit claim deed which is sometimes mistakenly used by some probate folks since there are still some title polices out there which will terminate if you transfer your title via a quit claim deed. If you must use a limiting deed, use at least a Special Warranty Deed. One last thing- the grantee under the deed should read name of the trustee of the blankety blank trust dated ...and not jus the trust. (Meaning don't merely vest in the name of the Trust only but the Trustee of the Trust).

***Q. Well here I go. I hate to bad mouth you attorneys but I think one of them messed up on a probate for a piece of real estate I'm now handling. My seller is the heir who got the property by way of an Affidavit of Transfer that his attorney recently filed for them. Apparently he did not have an extra certified copy of the death certificate for me just the certified copy of Affidavit of Transfer that was filed with the court. I told them that I need it before we can close the sale. What do you think about recording a non-filed copy of the Death Cert.?***

A. I don't think you need to record a death certificate- that's overkill. You'll be recording the Affidavit of Transfer of Title to Real Property. The original certified copy of the death certificate was attached to the Affidavit of Transfer with the Probate Court already. The acceptance of the Affidavit by the Probate Court is enough.

***Q. Quick question, an investment firm I work with is refinancing several of their existing properties, but a few of them have lease options to purchase that are not scheduled to expire until next year. Can they refi those properties without the Buyers' (leasing parties) consent? I do not understand why these future Buyers have a right to determine why and how they finance the property. We are not changing the vesting. I am sorry but the laws are different here so I am just trying to understand.***

A. I understand your client's frustration and your bewilderment coming from another state but these buyers have rights too. This means, they have an interest in the property. The properties with leases will have to have the tenants subordinate to the new loans if the investors decide to refi the existing loans. The tenants have an interest in the property- even if the lease is not recorded, they are a 'party in possession' which the title examiner told about this would probably show as an exception on the lenders title policy. A lender generally wants to be in first position senior to any rights that a tenant/future buyer may have. They typically require some form of acknowledgment also known as a subordination agreement signed by those parties so that it is realized if the lender forecloses, the lenders either takes the property free of these parties' rights or not- all depending on the terms of the agreement. If no subordination is received, this is unclear for the lender and the title company for that matter. The title company would most likely place these leases with options to purchase as an exception (NOT in a junior position) on the lenders policy.

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## *Ask the TITLEMAN™ #199*

Q & A

**John T. Lotardo**  
**Attorney-at-Law**

*Q. My girlfriend and I are buying a new house together. She is worried about the possibilities of mechanics liens and wants to know a worse case scenario if a lien were to be recorded against our property.*

A. Congrats on the big move. I understand your girlfriend's concerns. She must have done her homework. Many times, as a first time homebuyer and you really should take a look at the title policy that will be issued to them by the title company. Depending upon the title policy issued you, you may or may not be covered for mechanic liens. These are the kind of liens that are field by the contractors when they are not paid by the builder. If the lien is not paid and is foreclosed you could lose title to the property. A standard owner's policy does not cover this unless they were recorded items at closing. Compare this to the homeowners, plain language or extended title polices which do give some coverage. A little "light reading" indeed but would go along way for you to understand their coverages. In either case, you need to speak with the title company to see if they are willing to give you this type of title insurance. Give them a call, it may work out that you're the hero.

*Q. I have just a general question about the idea of being a disinterested third party at a title company. If your partners who contribute money and name to a title company are also your customers (developers/builders), then how are you a disinterested third party to the buyer of a transaction involving them?*

A. I think your issue begs the question. You can have repeat clients who you've come to refers to as client but are considered 3rd parties. Disinterested deals with whether the title company employs its normal professional standards across the board to these parties just as it would if someone else requests its services as a title and/or escrow company. Affiliated businesses are not uncommon in the indirectly nowadays and the same holds true there as well. To uphold the standards that title company are known for- that of skill and integrity.

***Q. We received a call today from an employee from another title company asking if we have heard of a new law in regards to title insurance. The question is - When we issue an owners policy and then prepare a deed changing the way someone holds title such as putting the property in their trust or adding the husband/wife back then the policy is no longer valid and that the title company will be responsible if said owner is not covered if they allow the deeds to be prepared and recorded via the title company. Yikes!***

A. Although the issue about terminating coverage when you transfer title is an issue for title coverage in general (i.e. the 2006 policies permits a transfer into your personal trust without a termination of title insurance coverage) I guess they are alluding to the question about deed preparation. It brings to light the issue when clients instruct a title company to prepare and records deeds without knowing the full issue, the person's title insurance may be terminated unknowingly. If you become aware of this, I would suggest they contact their title company that issued the original policy to get the matter cleared up- the sooner the better.

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## ***Ask the TITLEMAN™ #200***

**Q & A**

**John T. Lotardo  
Attorney-at-Law**

***Q. I have one of my clients asking for a discount on the owner's title insurance on a sale file because the property was just purchased last year and now they are selling. Can they get one?***

A. Good question. It depends on what the title insurer has filed for their rates with the Department of Insurance. That said, many have such a discount- sometimes called a short-term reissue rate, which gives a discount for a new policy if a previous one was issued based upon a certain time period. As always, certain restrictions apply. In most cases, they have to surrender the old policy at the time they request the discount. Ask and you shall receive is the industry motto.

***Q. I don't know what to do. I have been asked to give a verification to a lender about funds being deposited into an escrow by a borrower when they haven't. The mortgage broker wants to give the borrower a credit for the money- but only after the transaction closed. This sounds fishy to me. What's up?***

A. Even being a Vegetarian, I too can smell a big plate of Mahi-Mahi being served up here. The ultimate lender would want to know about this type of shenanigans. I'm sure the Department of Financial Institutions would have some heartburn over this too. Why? Because you're verifying something that is not true. Even my fifth grade teacher, Mr. Burke, told me that's not right - way back then. And that still holds true today.

***Q. I have someone asking me to comply with Provision of Executive Order 13224 as part of a transaction I'm involved in and I don't even know what that means. What am I getting into here?***

A. I think they're referring to the list of bad guys compiled by Uncle Sam. They call it the Specially Designated Nationals and Blocked Person List. This list, which has grown forever longer in recent years, compiles names and alias of those terrorist-types to prevent them completing transactions presumably for terrorist activity purposes. Since created, there are over 300 pages of names. The list will prevent a "Bin Laden" type of name that shows up in a real estate transaction from completing it. Although my associates and I have seen a few pop over the years, most of those have been false alarms. Good thing, since the authorities are required to be notified if they're the real McCoy and you certainly don't want to participate in any terrorists or money laundering activity.

***Q. Am I just being a cranky old title guy? My employee didn't notify me that the lender is a married man whose lending is his sole land separate property. When I told them we need a disclaimer deed from the lender's wife I was told "they have done many closings with this individual lender and have not ever done a disclaimer". Is there any reason why we wouldn't need a disclaimer?***

A. Fear not. Thorough perhaps- but never cranky. Your concerns stem from the presumption of community property in Arizona. Many do not see this issue that you are concerned about. This issue could arise down the road if the lender obtains title or if there's a divorce and his wife asserts an interest. Usually the account servicing agent wants to know if there is a community property interest or not since they process the payments. Can you rely upon a release from him down the road? Most likely, but why create a possibility of more work in the future. Get the disclaimer deed if you can. If not, the parties run the risk of additional underwriting requirements in the future.

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## *Ask the TITLEMAN™ #201*

**Q & A**

**John T. Lotardo  
Attorney-at-Law**

*Q. We have a refinance taking place where a quit claim deed was done to remove a husband (we're assuming) from the property and the wife would then hold the title to the property sole and separate. She purchased the property as a married woman and then her husband did a quit claim deed to her but not a disclaimer deed. There is nothing in the body of the quit claim deed that tells us that he was totaling removing his interests in the property. Do we need a disclaimer deed or do we need to do a quit claim deed removing interest due to the divorce? (Oops, did I forget to mention they are divorced now) We don't want to open a can of worms if we can help it.*

A. I usually prefer a disclaimer deed rather than a quit claim deed when a spouse is being asked to reiterate that they have no interest in the property. However, sometimes the parties or their title company they're using don't do it that way. I try to take what I can get to confirm that the title claiming to be sole and separate is just that- sole and separate. Unless you believe the title to the property has changed since the quit claim deed (transmuted from her sole and separate to community property) we generally do not require another deed from the soon-to-be ex. Does the divorce mention anything about the property? Is he claiming an interest now? If not, again I would say let it be. Trust me, as a former viewer of Fear Factor, worms don't taste good- so I wouldn't serve 'em up unless you have to.

*Q. I am needing your help. I don't think I am missing anything but want to make sure. We are having a purchase where the current owner is deceased. We have asked for a probate and was sent over her trust document being told that this is her living trust (it is Revocable) and that there is no probate. Since the trust was not in title, there should be probate done on the property, correct?*

A. You're thinking correctly. Although the deceased contemplated within her trust that the trust would hold title to the real estate, she failed to "fund the trust"- meaning she failed to deed the property into the trust. As a result, a probate is now necessary to get the property either into the trust, the individual beneficiaries of the trust in accordance with its terms or to some other distribution.

***Q. Can you tell me....does an Arizona Beneficiary Deed, from me to my son, create a community property interest with his wife? She's okay and all that, but I just don't want her to get my property.***

A. You should be okay and all that too since it's considered part of the exception in the statute that makes transfers by gift, heir or devise the sole and separate property of the grantee/beneficiary. If you change your mind and want her to have an interest, then add her specifically. If not, make it clear in the beneficiary deed that he is taking it as his sole and separate property- it helps to let everyone know ahead of time what you were thinking and prevents any confusion or need for clarification later on. Clarity now saves time and money later.

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## ***Ask the TITLEMAN™ #202***

**Q & A**

**John T. Lotardo  
Attorney-at-Law**

***Q. I have a law firm who is handling a foreclosure and giving me some flack on a payoff of their loan. Their payoff letter says we have until 5pm to get them their payoff funds. They have to wait until then to receive them right? The accountant at the firm when we called and told them the money was on there way, she said if the runner isn't here in 5 minutes, "I'm gone." Can they do that? What if the borrower who is refinancing wanted tired to bring it current?***

A. I think they should abide by their own letter. It's also true that the borrower has until 5 PM the day before the trustee sale to reinstate the loan. If the employee working the trustee sale is leaving the office prior to 5pm, that does not mean that the borrower loses neither his rights to reinstate nor the right payoff per the attorney's letter. If the borrower attempts to reinstate but he can't since the trustee closes early, that would most likely cause a postponement of the sale or at least some liability for the trustee since their letter said you had until 5 pm to pay it off.

***Q. I received a discounted payoff agreement from my lender who is accepting a short payoff. I just want to make sure that the lender will give me a release once they receive the amount listed in their statement or if I need anything else from them before I sell.***

A. These types of discounted payoffs are becoming more and more commonplace given the current marketplace. Was it issued by the lender or its servicing agent? You may want to verify the terms with them to ensure they will give you a full release and/or are not requiring you to execute another promissory note with them albeit not on the property you're selling. From a title perspective, your buyer is merely interested in getting the lien removed from the property they are buying. Sometimes the signing of an unsecured note is optional- meaning if you would like to pay it back, you can. Believe or not, borrowers sometimes are willing to do exactly that, even if there are not obligated to do so.

***Q. I have a case where a title company is arguing that a recorded certified Justice Court judgment (not a transcript of a judgment) is invalid because it was not filed with the clerk of the superior court as provided in the statute and therefore they are refusing to require that the judgment be paid before closing. I've never heard of this before. Is that your interpretation of this statute?***

A. Except for this current matter, I hope all is well with you. Sorry to say, I agree with them. It has been my long held belief (which I believe the statute backs me up), that the justice court judgment needs to be filed with superior court in order to get a transfer of judgment ("TJ") number. Thereafter, a certified copy of the judgment with the TJ number stamped on it would be recorded. It is at that time that it becomes a judgment lien against real property of the debtor. The process is you bring a certified copy of the judgment to the Clerk of the Superior Court and "file" it – which means pay the filing fee and get the judgment stamped with a TJ number - and then file it with the county recorder's office.

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## ***Ask the TITLEMAN™ #203***

**Q & A**

**John T. Lotardo  
Attorney-at-Law**

***Q. Okay, I need your help. A woman bought a home before she was married. The first mortgage is in her name only. She then got married and they did a second mortgage showing her spouse as "non-vested". He wasn't added to the title but he was included on the deed of trust as a "non-vested spouse". But I've never seen that before. I do know that the husband has judgments filed against him (These aren't against the property just against him). They're getting a refinance to pay off the mortgages but not the judgment. Is this okay for the new lender?***

A. From my perspective, you should be okay and be able to title insure this property. Many lenders will have a spouse who is not actually holding title sign off as a "non-title holding" (in your case they call it "non-vested") spouse to ensure he or she knows about the mortgage or just to guaranty the payment under the obligation (subject to laws limiting recouping monies from the parties personally rather than merely from just the property mortgaged.) The concern would be if the property transmuted from separate property to community property (I know it's a big word, remember, I'm a lawyer. It just means the character of the property changes). But this usually comes up in divorce proceedings, which sounds like is not the case here. If he hasn't taken title, the lender should be okay. If and when he takes title then the judgment could attach.

***Q. There's property owned by an unmarried woman and unmarried man. The property goes through a foreclosure and there were no bidders. So the property went back to the Lender. The Lender is now selling it back to the unmarried woman only. There was a Judgment against the unmarried man (only) that was wiped out by the sale. I don't think it re-attaches in any way. Do you agree or disagree?***

A. I would be cautious here. The normal reattachment of lien theory is somewhat complicated when you have a judgment only against one of two title holders. How did they hold title? Joint tenancy with right of survivorship or as tenants in common? Is he still in the picture and this is just a way to avoid paying the judgment creditor? It may not re-attach but do you want to fight it out with the creditor. Find out a bit more info before you make your next move.

***Q. I have a real estate broker which is in Los Angeles showing as Buyer's agent wanting to be paid a commission. I do remember this being discussed at one time in one of my real estate classes but have not had the situation before. I did check the Arizona Department of Real Estate website and he is not licensed here. Doesn't he need to get a cooperative agreement set-up with someone in Arizona?***

A. You're correct; you shouldn't pay an out of state real estate broker without them having a written cooperation agreement with the Arizona Licensee. Sometimes you may not be told about this or may even be misled but here it looks like you know he's out of state and not AZ licensed. Have him get a cooperating agreement set up with one that is licensed.

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## *Ask the TITLEMAN™ #204*

**Q & A**

**John T. Lotardo  
Attorney-at-Law**

***Q. I am selling my property to someone who wants me to hold the mortgage on the property for him. He will make the payments to me every month. I haven't ever done this before. If he doesn't make payments, do I automatically get my property back? I heard about doing a trust sale. Is that what I should do?***

A. What you are speaking of is what is called carryback financing. In that instance, you as a seller act as the lender for your buyer by carrying the loan for him. You would be named as the beneficiary under the deed of trust created for the sale. If your buyer defaults on his monthly payments to you, you can conduct a "trustee sale". A trustee sale is a non-judicial manner of enforcing the obligation of the buyer. If necessary, you can foreclose judicially (through the court system). In the non-judicial (trustee) sale, a third party, the trustee, actually handles the sale rather than the court and does all the things necessary to complete the sale including the mailing/recording of notices of the sale date, conducting the auction itself and other statutory requirements. Each state has its own special procedures. There could be other parties bidding at the sale, so there is always a chance that you would only receive the monies owed to you and not the property back. If you are concerned about dealing with these things, you may want to decline the opportunity to become your buyer's lender and insist that you get paid in full at the time of sale.

***Q. I had a client who has requested her earnest money be returned immediately. It took the escrow company nearly a week to get the money released. They said it was because they were waiting for an instruction from the sellers. The sellers had agreed to release the monies. When the escrow company finally received their verbal agreement to give the monies to the buyer, they released the money. In the interim, my client has filed a grievance because of this delay. What was I to do? Was the escrow company wrong in doing what they did?***

A. Kudos to you- I think you handled it well. An escrow company sometimes does not release earnest money immediately or automatically. You do not tell me the reason why the buyer demanded his money or why he was entitled to it. Apparently, he was under the circumstances. As its name reflects, the earnest money deposit is deposited into escrow to ensure the intention of the buyer to purchase the property. Although the buyer deposits it, it is placed into escrow for the benefit of BOTH the buyer and seller. Should the buyer default, the seller usually makes a claim for these funds. In your case, the escrow did not close and the buyer demanded the return of his money. The particulars of the problem would be helpful in order to know the rationale of the escrow company for holding the money to begin with. When escrow did not close and the escrow company is unsure as to who to give the money, it will need an instruction on how to proceed. Normally at this point, the parties instruct the escrow company to cancel their file and release the monies on deposit in a particular manner. This written instruction is a "mutual cancellation." The escrow company more than likely sent this mutual cancellation out to the parties for their signatures and was waiting its return when your client filed his grievance.

Keep in mind that this issue was resolved in less than 7 days. Similar matters can take much longer. At times, the parties to a transaction need to hire attorneys and have a court decide who is to receive the monies. In this case, the sellers had agreed to release the monies. When they received the verbal agreement to give the monies to the buyer, they released the money. As you know, relying upon a verbal instruction in a real estate transaction is risky and certainly places the escrow company in a vulnerable position because it is difficult to prove such agreements. The escrow company decided to take that risk for your buyer's benefit. We are glad that this stressful situation was resolved as quickly as it did. It is unfortunate that your buyer feels that he was not treated fairly. Use this situation as a reminder that real estate transactions are stressful for individuals and to endeavor to help them through the difficult times as those experienced by your buyer.

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# *Ask the TITLEMAN™ #205*

Q & A

**John T. Lotardo, Attorney-at-Law**

*Q: Does the lien of a judgment attach to the real estate acquired by the judgment debtor after the date of the entry of the judgment? In other words, do judgments attach to future acquired property?*

A. Yes- judgments that record in the County Records become "Judgment Liens" on existing and future acquired assets of the debtor- so long as the Judgment is valid that is (renewed as required by statute every five years, domesticated in the correct court/jurisdiction, etc.)

*Q: I had a request the other day for a form that somebody could use for a "Transfer Upon Death" request on a note. That was the first time I had got that request. Would you know what they could be talking about?*

A. I think they are trying to transfer the holder of the note's interest as well as the beneficial interest under a Deed of Trust at the time of death. Although there may be one, I have not seen a separate form. What I normally see is the survivorship language normally used on documents such as deeds incorporated right into the document.

*Q: I have a transaction wherein one of the sellers filed a Bankruptcy in 2002 under a Chapter 13. His repayment plan was approved. He acquired interest in the property being sold in 1998, as an heir. He told the escrow officer that he did not include this property in his Bankruptcy. The property is in foreclosure, set to go to sale soon. It doesn't look like he had an attorney. I made a request for court approval of this sale, is that correct? Does it make a difference that the property was an inheritance with other people? This sounds like an "Ask the Titleman" question. What say you?*

A. I believe you made the correct call on this. The debtor should have listed the property as an asset of his estate. Do you have any liens that are being requested to be wiped out/avoided? If not, then you want to determine if the debtor can act without Court order. Does the Chapter13 plan permit the debtor to sell his properties with only trustee approval? If so, perhaps you can get approval from the trustee to permit the sale to close. The trustee will want to review the title/settlement documents to make the decision. The trustee may even want the proceeds pending further order of the Court. Since it is unlikely that the trustee will give you approval, be prepared to get the Court order.



## ***Ask the TITLEMAN™ #206***

**Q & A**

**John T. Lotardo  
Attorney-at-Law**

*Q. I just read your latest article. I have a question. My former partner, since passed away, and I set up an irrevocable trust when we discovered he may not survive cancer. We were both HIV+, and wanted to do something to insure I'd have our home when he passed. We got a family lawyer to draw up this trust, in order to also protect his mother's loan, which we used to buy our home. We figured it was only a matter of time before I too would succumb, so the place would have gone to his mother. Well, he did not survive, but I survived. With his life insurance, which he left to me, I paid off the house, paid off the loan to his mother, and now am the sole owner. The problem is, we felt we'd leave the house to a charity. Well several years have passed, and I'm healthy and have a special man in my life! My partner and I saw a lawyer to draw up our wills, powers of attorneys, etc. When it came to the house, I wanted to leave it to my partner. We were informed that since we had an irrevocable trust, and one of us passed, it has to stay as stated, the house going to the charity. Total bummer, as now I can't do anything with it. Friends have told me it should be pretty easy to have a judge override the trust, given the circumstances. I just want your opinion, and maybe a reference to trust lawyers I might talk with. Is it possible to revoke this irrevocable trust? Thank you for your time.*

A. Thank you for your recent question. I am glad to hear you're as fit as a fiddle, have a new man in your life and are being proactive in your estate planning goals. With a question like yours, I thought I would get some help and order in the big guns. I contacted my good friend and fellow lawyer, Michael J. Tucker, Certified Specialist in Estate & Trust Law of Michael J. Tucker, P.C. to get his take on your dilemma. He tells me, "It is possible to revoke an irrevocable trust by going to court. The process will require a hearing with advance notice to the charity and any other parties in interest. There are possible (but not certain) tax implications." So it is not as simple as your friends suggest but possible. Of course, these details you would need to go over with the attorney you decide to use locally. As far as finding an attorney in your area, you should contact the local state bar offices for a referral as they have a referral service available. For more information about the state bar referral service, you can check out their website- [www.azbar.org](http://www.azbar.org). Good luck.

***Q. I have a strange one. A husband is married but his wife could not be on title because she wasn't old enough (it was a reverse mortgage). Husband died. The only thing that stated the wife gets the property is his will. What verbiage has to be on the will for her refinance when she was never on title? I'm not sure exactly what to do, can we just record the will or do we need to do some kind of beneficiary's deed?***

A. Boy now that sounds like a very early May and late December romance. Hopefully the wife isn't any longer a minor. Only kidding- I get it; it wasn't that she was a minor- it was that she was not old enough to qualify for a reverse mortgage. But I am not sure why they took her out of title at this critical time of life when the issue of survivorship is so important. With that said, you just can't just record the husband's will. That's way old school. There's more to it than that. And, sad to say, the Beneficiary Deed idea is too little too late- the grantor is already dead. A beneficiary deed needed to be recorded prior to his death to be valid (plus he no longer around to sign it!). Perhaps they are entitled to file the will and death certificate with the probate court together with an affidavit of transfer of title to real property, which is a form of streamlined probate proceeding. There are certain restrictions based upon the value of the decent in the property, time of death, etc. They can contact the self-help desk at the local court for some information on the details of restrictions, costs, etc.

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## ***Ask the TITLEMAN™ #207***

**Q & A**

**John T. Lotardo  
Attorney-at-Law**

*Q. I am trying to figure out whether or not probate is needed. We seem to be going around and around with the borrower. You see John and Mary received the property back in 2000 and took title as husband and wife with the acceptance of joint tenancy with right of survivorship. They then deeded to their trust in 2002. The trust then deeds to them as individuals, husband and wife, as community property with right of survivorship and then deed back into the trust again in 2002. In 2003, (the final deed) the trust deeds back to John and Mary, as husband and wife, but no joint tenancy or community property with right of survivorship is declared on that deed. John is now deceased. Does the death certificate remove his interest? I am thinking that since the last deed done in 2003 does not express the tenancy that we are going to need probate for John.*

A. You are correct. I believe a probate for John is now needed since the last deed could be presumed to be community property since there was no other vesting declared. With plain community property presumed, there is no automatic survivorship right and, with the property not being in the trust, some form of probate is needed. A trust is only as good as the parties make it. By taking it out and not putting it back into the trust, its use- at least for the house- is greatly diminished. I guess too many rolls of the dice has them losing some of the benefits of having the trust.

*Q. Where a child would otherwise be next in the line of succession to obtain real property from a deceased parent and dies prior to executing an affidavit of transfer of real property, leaving a child and no spouse, can the grandchild sign the affidavit since it is now his interest in the property?*

A. To answer your question, I have one for you? Is the grandchild the sole heir to the deceased's estate? I assume there was no will making the laws which govern inheritance when there's no will (intestate succession) applies. If you have answered yes to my question, then the use of the affidavit by the grandkid could be appropriate under certain restrictions. If the grandparent's will says the property goes directly to grandchild that's great. If there's a will, you are bound by its terms. For example, if the will of the grandparent gives the property to the grandkid's parent, then you'll need to deal with the estates of both grandparent and parent. Makes sense?

***Q. The prior owner held property as husband and wife then transferred to wife's revocable trust, with the wife is the only Trustee. Trustee was the only grantor on the deed to our people now in title. Should a spouse sign off on the deed, where title is vested in a Trust?***

A. In Arizona, we typically can rely upon the trustee of his or her own trust to be able to transfer title of property held in the trust. Unless you know she was not permitted to do so, such as if she was incompetent or if she was not the sole trustee, then she generally would be able to transfer the property. Remember to include the disclosure of the names and addresses of the beneficiaries of the trust in any deed in or out of the trust pursuant to state statute.

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