

Top Ten Title Issues for Attorneys and Closing Agents

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One of the challenges of real estate work is the variety of issues that arise. The following issues are meant to provide guidance on some of the more common title issues.

1. Proper execution of mortgages.

a. Verification of identification by the notary public.

The following short form certificates of notarial acts are sufficient for the purposes indicated, if completed with the information required by section 9E.14, subsection 1 of the Iowa Code. Note that the acknowledgement should *not* recite the marital status as this is not something required under Iowa Code § 9E.9. The Bar form for the warranty deed has recently been modified to remove the recital of marital status. 9E.15. Short forms:

- 1) For an acknowledgment in an individual capacity:

State of _____
(County) of _____

This instrument was acknowledged before me on _____ by ____

(signature of notarial officer)
(Seal, if any)

Title (and Rank)
[My commission expires: ____]

- 2) For an acknowledgment in a representative capacity:

State of _____
(County) of _____

This instrument was acknowledged before me on (date) by (name(s) of person(s)) as (type of authority, e.g., officer, trustee, etc.) of (name of party on behalf of whom instrument was executed).

(Seal, if any) _____
(signature of notarial officer)

Title (and Rank)
[My commission expires: ____]

b. *Marital status must be shown.*

The question of the enforceability of a mortgage which lacked a spouse's signature was resolved by the Court of Appeals in *Wells Fargo Bank, N.A. v. Hudson*.¹ The case is attached as Exhibit A. The Court held that a mortgage which lacked the signature of the spouse of the mortgagor was void, "not merely voidable by the spouse who did not sign."² The marital status is best recited by a statement of the parties giving the mortgage rather than reciting it in the notary section. The notary is only to verify the identity of the person signing the document, not the mortgagor's marital status. Note that the recital "John Doe, a married person, and Jane Doe, a married person" does not provide sufficient verification that they are married to each other.

If the marital status is omitted, but all the necessary parties signed the mortgage, Exhibit B is an example of a curative affidavit to address the missed recital. If a signature was missed, the mortgage is void and a new mortgage should be signed and recorded. (Recite on the mortgage that the mortgage is being re-recorded to correct the prior mortgage.)

c. *Marital status shown in the notary.*

In the event the marital status was only shown in the acknowledgment, this may be relied upon.³

¹ *Wells Fargo Bank, N.A. v. Hudson*, 742 N.W.2d 605 (Iowa Ct. App. 2007).

² *Id.* at 2. See also *Martin v. Martin*, 720 N.W.2d 732, 736-37 (Iowa 2006).

³ See Iowa Land Title Standard 5.1.

d. *Recital of marital status in light of Varnum v. Brien, 2009 WL 874044 (Iowa 2009).*

Varnum permits same-sex marriage. I recommend using “a married couple” as the recital of marital status.

e. *Marital status and dissolution of marriage.*

It is common for there to be confusion about who needs to sign the mortgage once a dissolution of marriage proceeding has been filed. The couple is married until the Decree of Dissolution is filed.

Closings are sometimes delayed where the non-borrower spouse refuses to join in giving a mortgage where a dissolution of marriage has been filed. Provide the documents to be signed by the non-borrower spouse well in advance of the closing and encourage the person to seek his or her own legal counsel as to the effect of the mortgage.

f. *Advise the mortgagors to sign in the same manner as names are recited on the mortgage.*

Lenders will sometimes require a mortgage to re-signed and re-recorded depending on the degree of the variation. In the alternative, suggest using an affidavit of identity.

g. *Powers of attorney.*

If a power of attorney is being used, remember to use the representative capacity acknowledgement (*See Iowa Code § 9E.15*) and to record the power of attorney. Exhibit C shows a stamp that can be conveniently used when affixing the proper acknowledgement throughout a closing package.

The power of attorney should be submitted for review in advance of the closing and recorded. Where a borrower is to use a power of attorney, the document should also be reviewed by the lender. In recent years, lenders have started requiring additional recitals such as the street address of the property, the amount of the loan, or the loan number. As a reminder, a conveyance by a person on behalf of their spouse by virtue of a power of attorney does not need to recite the legal description of the real estate

if the real estate is their homestead property.⁴ However, there should be a recital that the spouse is alive and, if the power of attorney is not durable, a recital that the spouse is not under disability.

h. “Predatory borrowing” – mortgage fraud by leaving off a spouse.

*CitiMortgage, Inc. v. Danielson*⁵ is now pending before the Iowa Supreme Court. In this case, husband was on title, attends the closing by himself, and signs purchase money mortgage as a single person. (The wife had bad credit and was not a borrower.) Husband, wife, and child move into home. The lender forecloses and the husband claims that because his wife did not sign the mortgage, the mortgage is void. He asserted that he signed the documents without reading them and never told anyone he was single. The District Court declared the mortgage void. Depending on the holding, it may be advisable to ask single mortgagees to verify their marital status to eliminate the creation of this defense.

A related recent case is *Freedom Financial v. Boesen*.⁶ The mortgage was held enforceable over the dower interest of the surviving spouse.

2. Considerations for manufactured housing.

Exhibit D explains the process of merging a manufactured home into real property.

3. Closing loans with trustees as mortgagors.

Iowa Code § 614.14 provides the showing of trustee and grantee affidavits required when a trustee is conveying real estate. No showing of the trust instrument is recited. However, when the trustee is giving a mortgage, lenders will sometimes ask for

⁴ See Iowa Code § 561.13.

⁵ Supreme Court Case No. 08-1473.

⁶ Polk County Case No. EQCE059787).

a letter from an attorney which states that based upon a review of the trust, that the trustee has the authority to give a mortgage on behalf of the trust.

In the alternative, the better practice is to encourage a lender's underwriter to consider the use of a Certification of Trust. *See Exhibit E.*

4. Judgment liens.

a. Judgments in general.

1) Judgments as title objections. This is one of the most common objections raised. The following paragraph can be used when identifying a judgment:

Entry No. <> reports a judgment in favor of <> against <> entered on <> in <> Case No. <>, in the initial amount of \$<> plus interest and costs. Unless the defendant named is not the same as the titleholder shown above<> Upon recording of the deed to the proposed grantee (unless the defendant named is not the same as the grantee) this will constitute a lien against the real estate which must be paid.<> You are advised to check with the Clerk of Court prior to closing to determine the correct amount of the judgment and the amount of any court costs which may be payable.

Be sure to sufficiently describe the judgment so that others can respond to the objection. If the judgment is actually for someone other than a titleholder or an intended titleholder, an affidavit of identity will satisfy the objection. *See Exhibit F.* It is preferred to have a third party sign the affidavit to avoid having a self-serving affidavit, but this varies with local practices.

2) Judgments and homestead. Judgments do not attach against homestead property. Procedures for establishing a property as homestead property is a matter of some dispute. Iowa Code § 561.4 provides a means of platting the homestead in order to establish of record that certain real estate should be considered homestead property.⁷

⁷ *See also Baratta v. Polk County Health Services, Inc.*, 588 N.W.2d 107, 114 (Iowa 1999) (holding "We find that the purpose of the enactment of subsection two of Iowa Code § 624.23 was not to change prior law on the effect of judgment liens upon homestead rights, but to provide a simplified procedure for homestead owners to clear the

3) Judgments and purchase money mortgages. Iowa Code § 654.12B provides that “[t]he lien created by a purchase money mortgage shall have priority over and is senior to preexisting judgments against the purchaser and any other right, title, interest, or lien arising either directly by, through, or under the purchaser.” The mortgage needs to recite that it is given as a purchase money mortgage. One of the risks associated with relying on this provision is that it is a protection where “the funds are in fact so used” for the purchase of real estate.⁸ The closing agent should verify the use of the funds where the purchase money mortgage protection is sought. The following language should be used in the title certificate:

It is my opinion that the above-described lien is subordinate to the mortgage you intend to issue a Title Guaranty Certificate upon. This is because the mortgage is marked “purchase money mortgage” and because all of the funds advanced upon this mortgage were actually used to purchase the property or to pay for the costs in connection with the purchase. Purchase money mortgages are superior to liens against the purchaser pursuant to Iowa Code Section 542.12(B).

4) Judgments and the supersedeas bond. If the abstract shows a judgment against the titleholder, but an appeal has been filed, it is important to note that filing a supersedeas bond *does not* allow the debtor to convey the real estate free of the judgment.⁹

b. Child support and alimony judgments.

1) The duration of the lien. As a reminder, a judgment remains a lien for 10 years against property owned by the judgment debtor. A pitfall to avoid is to assume that there could not be a lien for child support where the child is over age 18. Read the decree carefully. The following paragraph can be used when identifying a child support or alimony obligation:

◇. Entry No. ◇ reports Dissolution of Marriage Case No. ◇, in which a judgment was entered on ◇ in favor of ◇ (the Petitioner◇ Respondent◇) against ◇ (the Petitioner◇ Respondent◇) for child support◇ alimony◇ and other matters. I require the judgment holder, ◇, file an Affidavit which

title of their homesteads from any recorded judgments against them which may cloud title to the property.”)

⁸ See Iowa Code § 654.12B(2).

⁹ Iowa Land Title Standard 6.6.

acknowledges receipt of all child support and other judgment payments due under the decree of Dissolution up to and including the date upon which your deed and/or mortgage is recorded. You are advised to check with the Clerk of Court prior to closing to determine the amount of any court costs which may be payable.

2) Calculating the amount owed. Temporary payment obligations are not liens where a final decree has been entered and incorporates the temporary judgment into the final decree. Future unpaid installments of alimony or child support obligations are not liens against the judgment debtor's real estate.¹⁰ Thus, *where the entry showing the dissolution allows*, the examining attorney should calculate the amount owed (not prorated to the closing date) and compare it to the amount paid. If the judgment debtor is current, no lien exists. I recommend that the following paragraph be used in a title opinion in this situation so as to alert the parties to the obligation in the event the closing does not take place in the month anticipated:

◇. Entry No. ◇ reports Dissolution of Marriage Case No. ◇, in which a judgment was entered on ◇ in favor of ◇ (the Petitioner◇Respondent◇) against ◇ (the Petitioner◇Respondent◇) for child support◇ alimony◇ and other matters. I have calculated that the total amount owed through <month, year> is \$◇ (<◇ months x \$◇ per month). The Entry reports that \$◇ has been paid. Thus, there is no lien due if the closing takes place by the end of said month and year. You are advised to check with the Clerk of Court prior to closing to determine the amount of any court costs which may be payable.

In the event the closing is delayed, you are reminded that unpaid alimony or child support obligations become a lien against the real estate. This will necessitate verification of the additional payments or requiring the judgment holder, ◇, file an Affidavit which acknowledges receipt of all child support and other judgment payments due under the decree of Dissolution up to and including the date upon which your deed and/or mortgage is recorded.

3) Obtaining a release. If the judgment debtor is not current or the payment record is not accessible, the judgment debtor will need to sign a release. *See* Exhibit G.

If the status of the obligation cannot be determined and the judgment holder refuses to sign a release, the parties may need the Court to resolve the

¹⁰ *See Slack v. Mullenix*, 66 N.W.2d 99 (Iowa 1954).

dispute. Unfortunately, there is currently no mechanism by which a judgment debtor can force the judgment holder to sign a release short of Court intervention. Such an approach might require the filing of a proof of payment with the Court and giving notice to the judgment holder that he or she has thirty (30) days to file a dispute with the clerk of court that the obligation is current. If the thirty (30) days elapses without dispute, this relieves the real estate of the lien. This would be similar to filing a notice of contract forfeiture.

Also, consider whether the purchase money mortgage protection applies. Given the frequency of this problem, remind judgment debtors to pay through the clerk of court and encourage family law attorneys to draft dissolution decrees that allow for verification of compliance by payment records.

4) Iowa Child Support Recovery Unit. If the ICSRU is involved, you can obtain information from: <https://childsupport.dhs.state.ia.us/generalinfo.asp#faq> or by telephone (888-229-9223). If the judgment has been assigned to the Unit, a release will need to be obtained from them. This can prove difficult, especially if time is an issue. I have provided the following paragraph from the Unit's FAQ page:

Q: How do I get a lien on my house removed?

To get a lien on property removed, a Release of Lien or a Satisfaction of Judgment must be filed with the Clerk of the District Court in the county where the child support order is filed. Contact the Child Support Recovery Unit for assistance if part or all of the child support is owed to the State of Iowa. Contact a private attorney if all of the child support is owed to the other parent.

If you are presented with proof of payment to address a title objection you have raised, it is important to distinguish between "official" and "unofficial" payment records. Again, the ICSRU's FAQ page:

Q: What is the difference between an "official" payment record and an "unofficial" payment record?

An "official" payment record has been certified by a designated employee of the Collection Services Center as a true, accurate, and correct copy of the original on file. You may want to use one when showing your payments to the court or applying for a loan, for example.

An "unofficial" payment record has been printed from this website and has not been certified by a designated employee of the

Collection Services Center. You may want to use one to compare your records to those of the Collection Services Center or to verify your eligibility for certain assistance programs, such as subsidized housing or energy assistance.

You will want to make sure that the party with the judgment arranges for a showing of record that the judgment has been satisfied.

5) Child support for post-secondary education. When child support for post-secondary education is required, a release from the adult child is needed. The following language may be used in the title opinion:

◇. Entry No. ◇ reports Dissolution of Marriage Case No. ◇, in which a judgment was entered on ◇ in favor of ◇ (a child whose date of birth is ◇) against ◇ (the Petitioner◇Respondent◇) for support for post-secondary education pursuant to Iowa Code § 598.1. Iowa Code § 598.1(8) indicates that this obligation may be required for educational expenses of a child who is between the ages of eighteen and twenty-two years if the child is regularly attending a course of vocational-technical training either as a part of a regular school program or under special arrangements adapted to the individual person's needs; or is, in good faith, a full-time student in a college, university, or community college; or has been accepted for admission to a college, university, or community college and the next regular term has not yet begun.

I require the judgment holder, ◇, to file an Affidavit which acknowledges receipt of all support for post secondary education due under the decree of Dissolution up to and including the date upon which your deed and/or mortgage is recorded.

6) Conveyance by warranty deed by both parties. If a dissolution decree leaves John Doe and Jane Doe as tenants in common and also creates a judgment in favor of one of them, a warranty deed from both conveys all of their interest in the real estate – including the lien. No specific release is required. However, a judgment for court costs or attorney fees would remain as a lien.

c. Property distribution.

A dissolution decree will sometimes require one of the parties to make installment payments towards a property distribution. For example, John Doe owes

\$10,000 to Mary Doe, with monthly payments of \$500 beginning the month after the entry of the decree. This looks very similar to a child support or alimony obligation and it would seem reasonable to only have the judgment debtor current on monthly payments. *However, the entire amount of the property settlement, because of the certainty of the amount owed, is a lien against the real estate and must be satisfied.*¹¹ In the alternative, the judgment holder can release the property without satisfying the entire judgment. See Exhibit H for such a release.

d. Attorney fees and court costs.

Note whether the judgment debtor is also responsible for the attorney fees of the judgment holder. In addition, court costs also constitute a lien which must be satisfied.

e. Bankruptcy and judgment liens.

According to Marshall § 21.1, “[t]he effect of bankruptcy upon a judgment lien is that in the event the bankrupt is discharged he is relieved only of personal liability to all provable debts but *the lien remains.*” (emphasis added).¹² Thus, the judgment holder must still release the lien. This can be achieved by asking the judgment holder to release the lien or by making application with the Bankruptcy Court for a release of the lien.

5. Limited liability companies.

At the time of preparing this outline, there remains some discussion as to the showing required for limited liability companies formed after January 1, 2009, when Iowa Code Chapter 489 took effect. On January 1, 2011, the current LLC statute (490A) will be repealed. Iowa Code § 489.302 *permits* the filing of statements of authority with the Iowa Secretary of State and the county recorder which provide notice of limitations on the authority to convey real estate. This appears to be consistent with Iowa Land Title

¹¹ See Section 10.3 of Marshall’s Iowa Title Opinions and Standards.

¹² See also Iowa Land Title Standard 13.4.

Standard 15.3, allowing reliance on the represented authority of the member, manager, or officer of the LLC.

6. Mechanic's liens.

A mechanic's lien is barred after 2 years and 90 days from the last day work or material was provided.¹³ These liens may be lifted by the filing of a bond. A mechanic's lien can also be forfeited pursuant to Iowa Code Chapter 572. *See* Exhibits I and J.

Even the risk of a mechanic's lien poses a threat to the priority of the new mortgage. Therefore, the closing agent is required to ask the parties if construction has been provided within ninety days of the closing. If it has, then a lien waiver is required. *See* Exhibit K as a sample. Real estate companies should be encouraged to remind listing agents to inquire about construction during the 90 days prior to closing *before* the closing so that the lien waivers can be obtained. For new constructions, the general contractor's statement developed by Title Guaranty should be used. *See* Exhibit L.

7. Relocation companies.

Determine the timeframes for HUD approval. Typically, a relocation company will require additional time for HUD approval.

A common dispute with relocation companies is their status on the settlement statement. If the relocation company wishes to be listed as the seller, it needs to be a titleholder. If the relocation company will not be a titleholder, then the only accommodation you can provide is to recite that the relocation company is the agent for the seller.¹⁴

¹³ Iowa Code § 572.27.

¹⁴ *See* 12 USCA, RESPA Reg. X, 24 C.F.R. Pt. 3500 App. A, Instructions for Completing HUD-1 and HUD-1A Settlement Statements (2006) (requiring that the actual seller be recited on the settlement statement). The settlement agent is also charged with accurately preparing the Form 1099-S.

8. Installment contracts.

a. The process.

1) Documents: installment contract, escrow for deed and abstract agreement (*See Exhibit L.*); and warranty deed in fulfillment of contract.

2) Title work. If the intended sellers are themselves buying the real estate on contract, you need to review their underlying contract to verify their ability to enter into this contract and whether there would be any barriers to providing title when the new contract balloons.

3) Closing the transaction. Note that the transfer tax is not paid until the deed is recorded.

4) An Owners' policy is available through Title Guaranty.

b. The risk of a "deed in lieu of forfeiture."

If a contract buyer seeks to end the installment contract, be very cautious about accepting a deed in lieu of forfeiture (presumably analogous to the deed in lieu of foreclosure) because if there are judgments that have attached as liens, the real estate is conveyed *with the liens*.

9. Environmental lien waiver language.

a. Sample language.

Some lenders are requesting representations addressing environmental protection liens. Care must be taken to not warrant more than what is shown in the abstract. The sample language has been approved by Freddie Mac:

This abstract does not contain any environmental protection liens recorded in the land records created under the State statute for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge or filed in the federal district court for the district in which the property is located, if there is a federal district court in the county where the property is located. Other than Iowa Code Section 455B.396, there is no Iowa statute in effect on the date of the abstract that could provide an environmental lien that could gain priority over the lien on the property that is subject of this abstract.

b. Environmental Protection Lien ALTA Endorsement 8.1-06.

Title Guaranty provides the Environmental Protection Lien Endorsement at no cost. Exhibit N shows a sample endorsement and instructions. This may be helpful to provide a lender who requests that the title opinion address Environmental Protection Liens.

10. Open-end lines of credit.

These are common and huge potential traps for the unwary. Abstractors must bring extra attention to these mortgages in their abstracts (including Form 900s). Attorneys must bring these mortgages to the attention of closing agents. The following is language for showing of a mortgage with an open-end line of credit:

◇. Entry No. ◇ reports the real estate is encumbered by an **open-end** mortgage given to ◇ on ◇ and recorded on ◇ as Inst. No. ◇ in Book ◇, Page ◇ of the county records. This mortgage secures a loan in the amount of \$◇. **I advise that you determine whether this mortgage is securing a line of credit that will require written instructions from the borrower in order to obtain a mortgage release.**

Payoffs for these loans sometimes include a statement for the borrowers to sign if the line of credit is to be closed. Exhibit O is a form for instructing a lender to close the line of credit. Failure to properly close the line of credit will mean that a subsequent lender's mortgage remains in second position.¹⁵

¹⁵ See *Bank of America, N.A. v. Ping*, 879 N.E.2d 665 (Ind. Ct. App.) (holding that a mortgage securing a line of credit requires (1) any debt must be paid, (2) the credit agreement must be "terminated," and (3) the borrower must perform all other required obligations, and because the borrower had never instructed the closing of the credit agreement, the lender was not required to release the mortgage.)