

DAKOTA HOMESTEAD AGENT EDUCATIONAL

Monday, October 17, 2011 – Sioux Falls, SD

AGENDA:

- The “*Answer*” to “Comprehend with Chris”...
Homestead Rights and Conveyances by Married People
 - Decedents’ Estates & Probate
Exceptions and Requirements Review
 - New Construction
Quick Review of What to Require and When to Require It
- Open Discussion on Current DHTIC New Survey Guidelines
Do We Need to Revise Them?
 - Miscellaneous & Reoccurring Issues
Severance of Joint Tenancy Estate
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“Arms Length Transaction Affidavit” & Short Sale Closings

The “Answer” to “Comprehend with Chris” ... Homestead Rights and Conveyances by (and between) Married People

We all know that SD law requires the marital status of all individual grantors/borrowers be recited in all deeds and mortgages, and if that person be married, the deed / mortgage must then include either: 1) the execution of the married grantor's spouse, or 2) a proper non-homestead recital. (This is because if it is homestead property, SD law requires the non-owner spouse to consent to the conveyance or encumbrance and essentially waive their homestead interest in order to make a valid conveyance or encumbrance of homestead (See SDCL 43-31-17), or because if it is not homestead, then that spousal execution requirement doesn't apply since the non-owner spouse has no homestead interest in it, but the deed or mortgage needs to disclose that fact via a proper non-homestead recital.)

43-31-17. Execution by husband and wife necessary for conveyance or encumbrance--Exception for prisoner of war or missing in action. A conveyance or encumbrance of a homestead by its owner, if married and both husband and wife are residents of this state, is valid if both husband and wife concur in and sign or execute such conveyance or encumbrance either by joint instrument or by separate instruments. However, for the sole purpose of a spouse of a person in the armed forces making application for a home loan under 38 U.S.C. 1701, et seq., the signature of the spouse alone is sufficient to convey or encumber the homestead if the person in the armed forces is officially declared to be: missing in action, captured in line of duty by a hostile force, or forcibly detained or interned in line of duty by a foreign government or power.

Ok so the question is, if Husband alone holds title to the spousal homestead property, and he, a married man, conveys that homestead property to himself and his Wife (or just to his Wife for that matter), does his Wife have to join in on the execution of this deed in order for it to be a valid conveyance under SD law?

Some Very Good Reponses From....

The “NO”, the wife does not have to sign camp

Chris, I hate answering questions like this, but I would say the non owner wife would not need to sign off on the deed from her sole owner spouse to Him and Her together. The reason for a non owner spouse signing is to convey any homestead rights she may have in the property, but in a deed from Him to Himself and her, her homestead rights aren't a consideration because she is now a true owner of the property.

Chris - shooting from the hip, I say no, the wife does not need to join in the conveyance to herself/herself and her husband. I say her acceptance of the deed indicates her consent. Her lack of joinder in the deed is a technical defect, which, in this case, does not defeat the purpose of the legal requirement, which is the consent of the non-titled spouse to convey/encumber the homestead. Her consent is implied by acceptance of the deed. By the way, this had better be correct, because I know I have insured title derived through such a deed!

The “YES”, the wife does have to sign camp

Say, is that a self portrait in the news letter? We think the wife should sign, also, just to clarify that she has knowledge of what is going on, ie: property being deeded to her alone or to their trust.

Chris – the statute clearly requires the non-owner spouse to sign if homestead. It doesn't say “except when the homestead conveyance is between spouses.” She has to sign.



And, the answer is...

Decedents' Estates & Probate

Exceptions and Requirements Review

When a person dies owning title to South Dakota real property, their interest in such property, at the moment of death, “devolves to their heirs or devisees, *subject to the (probate) administration of the decedent’s estate.*”

So, although title passes from the decedent to his/her heirs/devisees immediately upon death, proper probate administration of the decedent’s estate IN SOUTH DAKOTA is, nonetheless, required and essential to the marketability of title.

Thus, when you are aware that the record owner of the insured land is deceased, and no SD probate of the decedent’s estate has been completed, you should vest title to the subject real property in Schedule A of all Commitments in the following manner: ***John Smith, at the date of his death.***

This manner of vesting the current title to the real property indicates that the determination of whom succeeds to the interest of the decedent has not yet been determined or formalized and also indicates that the title to the real property, while legally vesting in the heirs/devisees of the decedent, may, nevertheless, be divested by a sale through a fiduciary (the personal representative).

Schedule B Considerations.

Note: Most of the time, we insure the title of the buyer who purchased real estate from an estate, which would result in an owner’s and/or lender’s policy. Rarely do we insure title acquired by the heirs of the decedent or mortgages obtained by the Personal Representative against estate real property. Thus, the following is, by and large, geared toward that third party purchase from an estate scenario.

Where it appears from your title examination that the owner of the subject real property is deceased and no probate proceedings have been commenced IN SOUTH DAKOTA, You should require:

The Company requires a probate administration of the estate of John Smith, deceased, be commenced and completed in South Dakota, and that a Personal Representative be accordingly appointed. The Company will be unable to insure title to the subject real property until all relevant South Dakota probate procedures have been followed.

Note: Even if someone lived and died in another state, and a probate has been commenced in that other state, a South Dakota probate, *ancillary or otherwise*, must still be commenced and a Personal Representative appointed or approved by a South Dakota Clerk or Judge in order for the Personal Representative to possess authority to convey title to the decedent’s South Dakota real property. *The principle that each state has sole and plenary jurisdiction over a decedent’s real property of in that state is well established and generally accepted.*

SDTS 15-17. Foreign personal representative. A foreign personal representative must be appointed by an order from a South Dakota court or clerk, qualify and be issued letters in order to administrate the real estate. **Authority:** [SDCL 29A-3-103](#) and [29A-4-204](#), -205. **Note:** A will must be probated in order to prove title.

Note: “Domiciliary administration” is applied to the administration of a decedent’s estate in the state where the decedent was domiciled at the time of death. “Ancillary administration” is

applied to the administration of a decedent's estate in a state other than where the decedent was domiciled at the time of death.

Where it appears from your title examination that the owner of the subject real property is deceased and probate proceedings have been commenced in South Dakota, You should make the following exception:

Pro. No. 11-578 regarding the administration of the Estate John Smith currently pending in the Circuit Court of Turner County, South Dakota.

Because of the *In re Estate of Olson* (2008) South Dakota Supreme Court Opinion, we must now concern ourselves with: 1) whether the decedent died with a Will, and 2) if so, whether the decedent made a specific devise of the real property at issue.

Note: A specific devise in a Will is a devise of *specifically described property to specifically identified persons*. For example: *"I hereby devise and bequeath the NE1/4 of 29-116N-47, Deuel County, South Dakota, to my children, James Johnson, Jerry Johnson and Mary Johnson-Phillips, in equal shares. Hopefully they will learn to get along."*)

Therefore, unless you already know the decedent died without a Will, have or have access to the decedents's Will, or have otherwise have cleared the following issue, You should require:

The Company requires a complete copy of the decedent's Will and any Codicil thereto be submitted for review. In the event the decedent's Will makes a specific devise of the subject real property, the Company will require:

(1) A properly executed, acknowledged and recorded Personal Representative's deed for the subject real property to any specific heir(s) or devisee(s) identified in the decedent's Will (with certified copies of the Personal Representative's "Letters of Appointment" attached thereto); followed by properly executed, acknowledged and recorded deeds from such specific heir(s) or devisee(s) for the subject real property to the Purchaser; or

(2) A Court Order from the Circuit Court in Pro. No. 11-578 be issued and filed that: (1) authorizes the sale of the subject real property to the Purchaser, (2) affirms all heirs/devisees entitled to Notice of the sale, timely and properly received such Notice as may be required under the South Dakota Uniform Probate Code., and (3) affirms the sale of the subject real property to the Purchaser is necessary to satisfy the debts of the Estate or for any other valid purpose as authorized by the South Dakota Uniform Probate Code.

Note: The above requirements would not be appropriate if: (1) the decedent died without a Will and you knew that ("intestate"), (2) the decedent's Will did not contain a specific devise relative to the subject insured property, or (3) the subject insured property is being conveyed/sold to the specified heir(s)devisee(s) as directed by the decedent's Will.

Note: If the above requirements do not apply, then, in the vast majority of cases, the Personal Representative may convey the subject property directly to a third party purchaser without a Court Order and without heir involvement. (But, please make all attempts to review the probate file in order to determine any contested matters involving the property.)

The next set of universally applicable probate exceptions and requirements are as follows:

1) **Record PR Letters of Appointment.** In all cases, require certified copies of the Letters of Appointment of Personal Representative be recorded along with the Personal Representative's Deed (to purchasers or heirs/devisees). **Note:** The Letters MUST establish they were in effect at the date the Personal Representative executed the Personal Representative's Deed. "Early dismissal" of the Personal Representative is a common issue title agents run into (e.g., Estate has been closed and the Personal Representative accordingly dismissed (letters are extinguished), some of the estate property was inadvertently omitted, then after the next real estate tax notice arrives, the attorney for the estate drafts a new Personal Representative's deed in order to get the property out of the estate, but fails to get the Personal Representative reappointed. Personal Representative executes deed as Personal Representative – but his/her letters are no longer in effect.)

2) **Federal Estate Tax Lien?** In all cases, take an exception to a possible lien for federal estate taxes arising out of the estate of John Smith, deceased. Although it is possible to determine if the decedent's estate is subject to federal estate taxation via a close review of the probate file (see below), in all other cases, require documentary evidence be recorded that establishes all federal estate taxes have been paid, have been time barred, or are not due at all. Potentially, this evidence could come via affidavit from the Personal Representative or the attorney for the Estate.

SD Title Standard 15-10. Probate--existence of federal lien. No objection shall be made to the possible existence of federal tax liens if the personal representative provides to the title examiner a lien release, a closing letter or an affidavit stating that no federal estate tax liability exists. **Authority:** [Section 6321](#) and [6324 of the Internal Revenue Code](#). **Note:** A federal estate tax lien arises automatically upon death and is enforceable for 10 years.

A federal estate tax return, if required, must be filed and the tax paid by the Decedent's personal representative or person in actual or constructive possession of the property within nine months after the Decedent's death. IRC sections 6018(a), 6075(a), and 6151(a). Whether or not a return is required depends on the size of the gross estate, the year of death, and possibly also on what kinds of gifts were made by the decedent before death. Generally, an estate tax return must be filed if the gross estate exceeds the applicable exclusion amount (shown in the table below) for the year of the death of the decedent.

<u>Decedents Dying in (or Gifts Made in)</u>	<u>Applicable Exclusion Amount</u>
1982	\$225,000
1983	275,000
1984	325,000
1985	400,000
1986	500,000
1987 through 1997	600,000
1998	625,000
1999	650,000
2000 and 2001	675,000
2002 and 2003	700,000
2004	850,000
2005	950,000
2006 or thereafter	1,000,000

[See 26 U.S.C. Section 2010]

DHTIC Policy: If the gross (not net) estate does not exceed the above amounts for filing as established by the filed inventory or by an affidavit from the PR or attorney for the estate, you may assume no federal estate taxes are owed and no federal estate tax lien affects the property.

4) **Note on SD Inheritance Tax Lien:** Please be advised that the South Dakota inheritance tax was repealed (years ago). Still, a South Dakota inheritance tax lien is limited to twelve years from the date of death for any decedent dying prior to July 1, 2001. When the record does not establish that a decedent died more than twelve years prior to the examination of the title, a title examiner should require evidence of record that no tax is owed, that any tax owing has been paid, or that any potential lien has been removed from the subject property. This is a repeat of SD Title Standard 15-08.

Review Probate court file if you have access to it.

In addition to the “routine” probate matters discussed above, You should make all efforts to obtain and review at length the subject probate file in connection with determining the application of any of the topics addressed above and in regard to determining if any contested matters involve the property. If the decedent’s estate is being/has been probated in your County, the probate file will be located at the (Circuit Court) Clerk of Court’s office and you should review it. If the decedent’s estate is being/has been probated in a different County, however, reviewing the probate file may be impossible.

Items not required to be in Schedule B (but show up all the time).

1) Any exception or requirement for “creditor claims” made against the estate. Creditor claims made against the estate are not liens against the real property owned by the decedent. *But, be sure to show as exceptions any liens that have attached to the property, just like in any other case.*

2) Any exception or requirement for proof of notice to the Department of Social Services. The DSS may have a claim against the estate for unpaid services provided to the decedent, but their interest, like other creditor claims, are not liens against the real property owned by the decedent. *But, be sure to show as exceptions any DSS liens or County Aid liens that have attached to the property, just like in any other case.*

New Construction

Quick Review of What to Require and When to Require It

1. THREE (3) BASIC SCENARIOS OF INSURING NEW CONSTRUCTION.

A. **Important Initial Step – Find out what you are being requested to insure and proceed accordingly.** In communicating with the lender, resolve the following questions from the on-set:

- (1) Is the lender requesting title insurance coverage for its mortgage AFTER construction is complete (insuring the permanent financing mortgage) or DURING the construction project itself (insuring the construction mortgage)? (Or both?)
- (2) Is the lender requesting a standard or extended coverage policy for the insured mortgage?
- (3) Is the lender requesting any endorsement which would provide affirmative insurance for subsequently filed mechanic's liens?
- (4) Has / will construction commence(d) prior to the recording of the insured mortgage?

B. **First Scenario - Issuing a standard coverage policy and no mechanic's lien endorsements for any mortgage.** In the event the lender is requesting a standard coverage title insurance policy devoid of any endorsement which would provide affirmative insurance for subsequently filed mechanic's liens, whether that policy is issued during (construction mortgage) or after the construction project is complete (permanent financing mortgage), subsequently recorded mechanic's liens should not be an issue. Although the 2006 ALTA Loan Policy provides affirmative insurance for subsequently filed mechanic's liens (*see* Covered Risk 11), *a standard coverage policy will contain all general exceptions from coverage, including the standard exception regarding subsequently filed mechanic's liens (see General Exception No. 4).* Therefore, even if a mechanic's lien is recorded that may have priority over the insured mortgage, coverage for such recorded mechanic's liens will not be afforded under the policy.

C. **Second scenario - Issuing extended coverage title insurance policy for post-construction permanent financing mortgage based on the previously issued "hold-open" Commitment.** In the event the lender is requesting an extended coverage title insurance policy (or is requesting any endorsement which would provide affirmative insurance for subsequently filed mechanic's liens) to be issued *after the construction project is complete* (usually in the case where the Commitment, as originally issued, is used for purposes of construction mortgage closing and left "open" until construction is complete, the Commitment is updated prior to conversion to a permanent financing mortgage and closing, and the final title insurance policy is issued to insure the permanent financing mortgage), the final policy cannot be issued unless and until:

- (1) Copies of all lien waivers from the subcontractors and suppliers of the project have been received by the title company prior to issuance, or
- (2) 120 days have elapsed from the date the construction project was completed (and any mechanic's liens recorded in that interim shown as exceptions from coverage in the policy).

To this end, the title company should require the following in the *originally issued* Commitment for title insurance:

- (1) A copy of the executed Sworn Contractor's Statement ("SCS"). The SCS provides an itemized summary of all the work to be done for and costs associated with the construction project by identifying all subcontractors and materialmen who will be providing work or materials to the construction project and by further providing a specific breakdown of each subcontractor's work and costs and each supplier's materials and costs. In order to account for and verify that the general contractor is using the construction funds as requested (paying its subcontractors and suppliers) and to determine if the project is staying on course or is over budget, the SCS is used in conjunction with both the invoices received from subcontractors and suppliers as well as the signed and returned lien waivers from those subcontractors and suppliers.
- (2) Copies of all invoices from the subcontractors and suppliers.
- (3) Copies of all signed and returned lien waivers from the subcontractors and suppliers.
- (4) Executed Indemnity Agreement regarding subsequently filed mechanic's liens from the General Contractor made in favor of the Title Company and DHTIC.
- (5) **IMPORTANT:** A Commitment issued under these circumstances **MUST** show the coverage / liability amount of the POST-CONSTRUCTION (PERMANENT FINACING) MORTGAGE TO BE INSURED IN SCHEDULE A OF THE COMMITMENT AND SHOULD NOT REFLECT THE CONSTRUCTION MORTGAGE AMOUNT. IF THE POST-CONSTRUCTION (PERMANENT FINACING) MORTGAGE AMOUNT IS UNKOWN AT THE TIME OF COMMITMENT ISSUANCE, PLEASE INSERT **\$1000.00** AS THE COVERAGE AMOUNT IN SCHEDULE A OF THE COMMITMENT. (The phrase "to be determined" should not appear as the coverage amount in any Commitment, including hold-open Commitments for new construction purposes.)
- (6) **IMPORTANT:** A Commitment issued under these circumstances **MUST** contain the following NOTE in Schedule B of the Commitment:

NOTE: This Commitment is being issued in connection with the issuance of Mortgagee Policy of Title Insurance that will insure the subject lender's mortgage that encumbers the insured property after the construction project is fully completed (the post-construction permanent financing mortgage). This Commitment is not relative to insuring or to the issuance of a Mortgagee Policy of Title Insurance that will insure the lender's construction mortgage that will fund the subject construction project.

FINAL NOTE: "Early Start" issues or "Early Start Approval", discussed below, is not relevant to this situation in which you are being requested to issue a policy AFTER the construction project is complete and that will insure the permanent financing mortgage – as discussed immediately above. In this circumstance and as stated above, you cannot issue the final policy unless and until you have received copies of all required documentation OR 120 days has passed since the project was completed. In addition, because the permanent financing mortgage/modified construction mortgage will be recorded after the project is complete, such mortgage will always be subordinate to the construction project and any mechanic's liens arising there from (at least for a 120 days).

Therefore, Early Start Approval is not a relevant consideration to the issuance of a post-construction loan policy of title insurance.

- D. **Third scenario - Issuing extended coverage title insurance policy covering the construction mortgage.** It is becoming more and more the norm for astute lenders to request an extended coverage loan policy (or to request endorsements which would provide affirmative insurance for subsequently filed mechanic's liens) that insures the priority of their construction mortgage (including priority over subsequently filed mechanic's liens). In this instance, it is of the utmost importance for the lender to record its mortgage prior to the project commencement to insure that it will have priority over subsequently filed mechanic's liens. However, marketplace circumstances often result in the commencement of construction (or earmarks thereof) prior to the recording of the construction mortgage.

Therefore, unless the Owner, General Contractor and/or Lender can provide affirmative evidence that establishes the construction mortgage was/will be recorded prior to project commencement, we should always assume that the construction project commenced/will commence prior to the recording of the construction mortgage and make our Commitment requirements accordingly.

Construction mortgage recorded before project commencement.

If, however, it can be affirmatively established that the insured construction mortgage has been or will be recorded before project commencement, subsequently recorded mechanic's liens should not be an issue as such liens will be subordinate to the priority of the insured construction mortgage. Thus, you should be able to issue an extended coverage policy and any mechanic's lien endorsement without regard to any of the following --- if the insured construction mortgage is in fact recorded before any work on the project began.

Note: Please be advised, however, that even if the lender gets the construction mortgage recorded before the project commences and we accordingly insure that construction mortgage without regard to mechanic's liens, the lender will likely request title insurance again once the project is complete, which insurance would cover the permanent financing mortgage or the construction mortgage as modified. *In that case, the exact same mechanic's liens issues, and the exact same Commitment requirements and exceptions as detailed in Section 1. C. above – will apply! All mechanic's liens stemming from the project, if any, will have priority over the permanent financing mortgage or the construction mortgage as modified.*

Construction mortgage recorded after project commencement.

If a lender has requested an extended coverage loan policy (or has requested endorsements which would provide affirmative insurance for subsequently filed mechanic's liens) that insures the priority of their construction mortgage during the construction project, *and no affirmative evidence has been presented that establishes the construction mortgage was/will be recorded prior to project commencement*, the title company should require the following in the Commitment for title insurance (or upfront as circumstances may dictate):

- (1) Lender's submission of the completed and executed DHTIC "Early Construction Start Approval" ("ECSA") form to the title company. (The ECSA Form will also require some of the following documents be submitted along with it)
- (2) Executed Indemnity Agreement regarding subsequently filed mechanic's liens from the General Contractor made in favor of The Title Company and DHTIC.

- (3) A copy of the executed Sworn Contractor's Statement. (See above for detail.)
- (4) A copy of the Disbursement Agreement. Please be aware that in most circumstances, DHTIC requires its issuing agent to act as the disbursement agent for the construction proceeds and requires all payments be made to the subcontractors and suppliers directly based upon their submitted invoices.
- (5) Copies of all invoices from the subcontractors and suppliers.
- (6) Copies of all signed and returned lien waivers from the subcontractors and suppliers. Said lien waivers must be submitted to the title company prior to any disbursement of construction mortgage funds and all outstanding lien waivers must be submitted upon project completion.
- (7) * (This requirement is subject to waiver by DHTIC underwriting) Owner to Record a Notice of Project Commencement at the ROD's Office within 30 days of commencement of work in accordance with SDCL 44-9-50.
- (8) * (This requirement is subject to waiver by DHTIC underwriting) Provide evidence that the name and address of the general contractor and a location notice has been posted at the job site in accordance with SDCL 44-9-51. The location notice must contain the following statement: "The contractor on this project has filed a notice of project commencement at the county courthouse. Any sub-subcontractor and any supplier to a subcontractor shall comply with the notice provisions of SDCL § 44-9-53 before filing liens in connection with this project."

NOTE: By complying with (7) and (8) above, any sub-subcontractor or supplier may not file a lien within the 120 day period unless the sub-subcontractor or supplier has first provided notice of furnishing labor or materials by certified or registered mail to the contractor identified in the notice of project commencement and has provided a copy of the notice to the owner of record. This notice pursuant to SDCL 44-9-53 is required to be made no later than sixty (60) days after doing the last of such work, or furnishing the last item of such skill, services, material, or machinery, and the post office receipt for mailing such notice shall be attached to the lien and filed in the office of register of deeds.

It is believed that if the sub-subcontractor or supplier does not comply with SDCL 44-9-53 by giving mailed notice to the General Contractor and Owner within the sixty (60) day period following the completion of their contribution to the project, the sub-subcontractor or supplier will be unable to file a valid lien against the property after the sixty (60) day period has expired. (If the sub-subcontractor or supplier does comply with SDCL 44-9-53, the sub-subcontractor or supplier may continue the lien during the 120 day period as provided by SDCL 44-9-15.)

- (9) Use of the Pending Disbursement Endorsement and CLTA Endorsement 122 in regards to the lender's policy. The disbursement endorsement will be issued with the final policy and the CLTA 122 endorsement will be issued to the lender each time they make a disbursement of their construction proceeds thereby affecting their coverage amount accordingly. The following paragraph should be included in the Commitment:

The final policy will include a Pending Disbursement Endorsement relative to the disbursement of the full proceeds of the loan secured by the Insured Mortgage and notwithstanding the Amount of Insurance shown in Schedule A and any terms

and provisions of the policy to the contrary, the Amount of Insurance given by the policy shall be limited to an amount equal to the amount actually disbursed under the Insured Mortgage at Date of Policy. No disbursements made subsequent to Date of Policy shall be insured by the policy unless made with the written approval of the Company. The Company's written approval of each disbursement shall be in the form of a CLTA Form 122 Endorsement which, when issued, shall insure the disbursement as a valid and enforceable lien prior to any liens, encumbrances or other matters, except those listed in the endorsement, if any, and those shown as exceptions in Schedule B of the policy.

2. "EARLY START" APPROVAL PROCESS.

- A. **Purpose.** Because the lender funding a construction project understands and acknowledges that commencement of the project prior to the recordation of its construction mortgage will cause the loss of intended first lien priority status of said mortgage, the lender, nevertheless, requests the applicable title insurance company to issue an extended coverage policy and/or mechanic's lien endorsements insuring its construction mortgage as a first lien against the property. Simply put, the lender is attempting to verify that the underwriter is willing to provide an extended coverage loan policy for the construction mortgage *despite* the fact that the construction mortgage has lost first lien priority status. Once the underwriter receives the Early Construction Start request and accompanying documentation from the lender, the underwriter must determine if it is or is not willing to accommodate the lender's request. The underwriter's determination is ultimately based upon an assumption of risk analysis. The completed Early Construction Start Approval form will assist the underwriter in its risk analysis of the transaction.
- B. **Procedure.** Once you have determined that the lender is requesting an extended coverage loan policy (or is requesting endorsements which would provide affirmative insurance for subsequently filed mechanic's liens) that insures the priority of their construction mortgage during the construction project and no affirmative evidence has been offered that would establish that the insured construction mortgage will be recorded prior to the commence of the construction project, you should require the lender to complete and submit a DHTIC "Early Construction Start Approval" ("ECSA") form along with the required additional documents identified in the form.

The ECSA form is available in the Agent's section of the DHTIC website: www.dakotahomestead.com. The form can be downloaded and emailed or faxed to the lender.

The ECSA form requires the requesting lender to submit the following additional documents with the completed form:

- (1) Dakota Homestead Indemnity Agreement executed by Borrower/Owner (also available on the DHTIC website);
- (2) Dakota Homestead Indemnity Agreement executed by General Contractor (also available on the DHTIC website);
- (3) Financial Statements of Borrower/Owner;
- (4) Financial Statements of General Contractor;

The ESCA form also requires the following documents to be submitted to the title company in connection with insuring the construction mortgage (these documents do not need to be included in the early start approval package sent to DHTIC):

- (1) Sworn construction statement be submitted to the title company;
- (2) Notice of Project Commencement recorded in accordance with SDCL 44-9-50;
- (3) Name and address of the general contractor and a location posted at the job site in accordance with SDCL 44-9-51;
- (4) All lien waivers collected for labor and material provided to the project to date.

Once the lender has completed and signed the ECSA form and has submitted all required accompanying documentation, the lender is instructed to send the early start approval package to the title company.

The title company then reviews the ECSA form and accompanying documentation, checking to see if the lender has completed the ECSA form fully and properly, if adequate explanation has been given if any requested item is left blank, and if the lender has submitted all required accompanying documentation.

Once the title company had reviewed the early start approval package from the lender, the agent signs the ECSA form (showing their review of the early start approval package) and offers any remarks, questions or concerns the agent may have regarding the early start approval or the transaction as a whole to DHTIC.

The title company then sends the early start approval package to DHTIC for review to aid in its determination if early construction start is warranted. The early start approval package can be mailed or emailed to DHTIC (originals are not necessary).

If DHTIC determines that it is willing to insure the construction mortgage despite the fact that it has lost priority to possible mechanic's liens, DHTIC will approve the early construction start request by signing the ECSA form, subject to any further requirements as indicated in the ECSA form. DHTIC will then send the ECSA form, via facsimile or email, back to the title company. For all intents and purposes, this process is meant to mirror the "policy approval" process.

If DHTIC determines that it is unwilling to insure the construction mortgage under the circumstances, DHTIC will not sign the ECSA form and will advise the title company accordingly.

Open Discussion on Current DHTIC New Survey Guidelines

Do We Need to Revise Them?

The following, more or less, are DHTIC's current underwriting guidelines regarding new surveys. These guidelines have been in place since June of 2009.

Certainly, the facts and circumstances of any particular transaction will continue to dictate when to require a new survey for purposes of title insurance. Thus, these underwriting guidelines aside, there will be transactions where you must use your professional experience and best judgment in determining if a survey should be required for purposes of title insurance. If there is any question regarding the necessity of a survey for any particular transaction, please do not hesitate to call Dakota Homestead underwriting to discuss the issue.

Required Survey Transactions/Property: That said and in GENERAL, Dakota Homestead will only require a new survey (one that is less than six months old) to remove the general survey exception from policies that insure property in the following circumstances:

- (1) Subdivided property that bares an ambiguous legal description or otherwise cannot be accurately described without the benefit of a new survey.
- (2) Property that is subject to on-going or recent real improvements (new construction).
- (3) *Whenever issuing an extended coverage Owner's Policy of Title Insurance (in any circumstance).*

Utilization of the DH Affidavit in Lieu of Survey: In the event you are not requiring a new survey, which will usually be in connection with the issuance of an extended coverage lender's policy for previously surveyed and/or platted property, you must require the owner of the property to complete and submit Dakota Homestead's "AFFIDAVIT IN LIEU OF SURVEY". The "Affidavit in Lieu of Survey" will allow is to insure the property without the need of obtaining a new survey (in the event the insured property does not involve any of the required survey transactions listed immediately above). The "Affidavit in Lieu of Survey" is a new form for Dakota Homestead, is intentionally general in nature, and is available on the Dakota Homestead website. A copy of the new Dakota Homestead "Affidavit in Lieu of Survey" is attached hereto for your reference and review. All previous Dakota Homestead Affidavit's in Lieu of Survey have been removed from the website and you are authorized to dispose of any such out dated forms that you may have at your office.

Agland of 5 acres or greater does not require a survey (loan policies only): Given the nature of agland, the expense associated with obtaining a survey on large parcels of agland, and the unlikelihood of a payable claim resulting from a survey matter on agland, Dakota Homestead will not require a new survey be obtained in connection with the issuance of an extended coverage loan policy for agland that is 5 acres or greater in area.

This underwriting standard does not apply to acreages or farmsteads, or agland that is less than 5 acres in area. However, acreages or farmsteads, or agland that is less than 5 acres in area may be subject to waiver of the survey requirement like any other property, subject to the limitations discusses at items (1) – (3) above.

IS IT TIME TO REVISE THESE GUIDELINES?

The following page is intentionally left blank for your notes of this discussion.

NOTES:

Miscellaneous & Reoccurring Issues

1. Severance of Joint Tenancy Estate.

A joint tenancy estate, one estate owned by several persons equally, is created through commensurate joinder of the essential “four unities” of time, possession, interest and title.

Unity of time – requires all interests of all joint tenants to vest at the same time.

Unity of possession – requires all joint tenants to enjoy possession of the entire land at issue.

Unity of interest - requires all joint tenants to hold interests in the JT estate equally.

Unity of title – requires the JT estate to be created through a single transfer, via deed or Will.

Provided the four unities are in place, a joint tenancy estate is created in South Dakota ONLY if it is expressly declared in the transfer /conveyance clause contained in the deed or Will. In South Dakota, the operative words of conveyance to co-grantees as “*Joint Tenants*” in a deed or Will are sufficient to create a joint tenancy estate.

Severance of JT estate during the lifetimes of the JTs. In South Dakota, for purposes of conveyance (or encumbrance I would opine), JTs are treated as owning equal shares of undivided interests (like TIC would). Therefore, a conveyance of the subject property by one JT, without the joinder of the other JTs, severs the JT estate as it pertains to the interest of the lone conveying JT, but leaves the remaining JT estate intact as it pertains to the remaining JTs (if there is more than one remaining JT in original JT estate).

Examples:

Bill and Ted own as JTs. Bill conveys to his Mom without the joinder of Ted, which causes a severance of the JT estate held by Bill and Ted, the only persons that held an interest in the original JT estate. The severance of the JT estate in this case is complete/total, as it results in Ted and Bill’s Mom owning title to property as TIC, an undivided ½ interest each.

Sara, Stacy and Keith own as JTs. Keith conveys to his Mom without the joinder of Sara or Stacy, which causes a severance of the JT estate (as it pertains to the interest of Keith, but leaves the JT estate held by Sara and Stacy intact). The severance of the JT estate in this case is partial, as it results in Sara and Stacy owning 2/3’s interest in the property as JTs, while Keith’s Mom own’s a separate undivided 1/3 interest in the property.

Note 1:

My opinion is that only one JT executing a mortgage without the joinder of the other JTs will result in severance of the JT estate (in South Dakota), and only the severed interest of the unilaterally borrowing JT will be encumbered by the mortgage. Thus, make sure all JTs are signing the insured mortgage or you set up your commitment / policy appropriately to ensure proper exception is taken to the interests of the non-executing JTs (or specifying the mortgage is insured only to the extent of the interest held by the signing JT/borrower).

Note 2 (this is what I really wanted to discuss under this topic):

A quick review of the 4 essential unities of a JT estate will tell you that MARRIAGE is not one of the 4 essential unities. You and I could be JTs even though we are not married (you wish). It follows then that DIVORCE, by itself, does not cause severance of JT estate held originally by spouses. I think this notion that divorce causes severance of spousal JT estate is based upon:

(1) Confusion with another type of real property co-ownership/estate called “tenancy by the entirety”, which does have the required element of marriage in order to create and perfect but is not a recognize estate in SD; and

(2) Equating the property settlement agreement / decree / order in a divorce action, which may cause severance as a result of conveying the property from 1 spouse to the other, with the divorce itself. Divorce is one thing (does not cause JT severance – just severance of the marriage) and a property settlement (which may cause severance as a result of a transfer of the property), though convenient at the time of divorce, is something different.

2. Adjacent and Vacated Public ROWs.

Please be advised that an adjacent owner is presumed to own to the middle of a public right of way (ROW), being a street, road, alley or highway, and a conveyance of property, which abuts upon a vacated public ROW includes that (portion of the) vacated public ROW, either by operation or presumption of law, unless a contrary intent appears (meaning, unless it is excepted from the conveyance or was deeded to someone else before this conveyance).

This means that if you have a chain of title for property that included a vacated public ROW in it, and none of the deeds post-ROW vacation mention the vacated ROW, in the legal or otherwise, all the post-ROW vacation deeds included to the vacated ROW automatically.

The question comes up all the time, do we need to show the vacated ROW as part of our insured legal even though it has never shown up in any of the legals in this chain of title?

I don’t think there is a right or wrong answer here. My opinion would be to be consistent with the chain of title as you find it, show it if it was shown before, don’t show it if it wasn’t. If not shown in the legal, it would probably be a good idea to note the vacation in Schedule B of the Commitment / Policy.

Also, I suspect that given the SD law in this regard, we would be insuring title to the vacated ROW when we insure adjacent property (regardless of whether it is shown in our legal or not) – unless we take an exception to it, which does not make a lot of sense in my opinion.

3. Affidavit of Possession Prerequisites.

In order for an owner of real property to enjoy the benefits of recording an affidavit of possession (terminating unreleased and ancient record interests in the property), an owner must have:

(1) **Color of title to the property** – a recorded instrument (deed, decree of distribution, order of quiet title, etc.) that purports to vest them with exclusive title to the property (apparent title, the appearance of title), even though their title may not be any good at all.

(2) **A prior 23-year unbroken chain of title to the property** – a connected chain of title, regardless of how large or small (i.e., “immediate or remote grantors”, multiple deeds or just 1 deed), that commences with a recorded transfer instrument for the subject property (color of title) that was recorded at least 23 (22?) prior and during which 23 year period no one challenged or claimed title to the subject real estate (“with nothing appearing of record purporting to divest such person and his immediate or remote grantors of such purported interest.”)

So what's it fixed?

43-30-1. Marketable record title--Unbroken chain of title of record for twenty-two years or longer--Exceptions. Any person having the legal capacity to own land in this state, who has an unbroken chain of title to any interest in land by himself and his immediate or remote grantors for a period of twenty-two years or longer, and is in possession of such land, **shall be deemed to have a marketable record title to such interest**, subject only to such claims thereto and defects of title as are not extinguished or barred by the application of the provisions of this chapter, instruments which have been recorded less than twenty-two years, and any encumbrances of record not barred by the statute of limitations.

43-30-3. Marketable record title held free and clear of interest, claims, and charges--Limitation--Notice of claim of interest. **Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of all interest, claims, and charges whatever, the existence of which depends in whole or in part upon any act, transaction, event, or omission that occurred twenty-two years or more prior thereto, whether such claim or charge be evidenced by a recorded instrument or otherwise, and all such interest, claims, and charges affecting such interest in real property shall be barred and not enforceable at law or equity**, unless any person making such claim or asserting such interest or charge shall, on or before twenty-three years from the date of recording of deed of conveyance under which title is claimed, or on or before July 1, 1958, whichever event is the latest in point of time, file for record a notice in writing, duly verified by oath, setting forth the nature of his claim, interest, or charge; and no disability nor lack of knowledge of any kind on the part of anyone shall operate to extend his time for filing such claim after the expiration of twenty-three years from the recording of such deed of conveyance or one year after July 1, 1957, whichever event is the latest in point of time.

43-30-10. Purpose of chapter--Construction. This chapter shall be construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to deal with the record title owner as defined herein; to rely upon the record title covering a period twenty-three years prior to the date of an affidavit of possession made and recorded as prescribed by § 43-30-7, and to that **end to bar all claims that affect or may affect the interest thus dealt with, the existence of which claim arises out of or depends upon any act, transaction, event, or omission antedating a period twenty-two years prior to the date of an affidavit made and recorded as prescribed by § 43-30-7, unless a notice of such claim, as provided in § 43-30-5, shall have been duly filed for record.**

43-30-11. Claims barred by chapter--Definition. **The claims hereby barred shall mean any and all interests of any nature whatever, however denominated, whether such claims are asserted by a person sui juris or under disability, whether such person is, or has been within or without the state, and whether such person is natural or corporate or private or governmental.**

So what's it not fixed? (Usually, if an Affidavit of Possession doesn't work to cure something, it's not because of the following, but because either or both of the prerequisites of obtaining the benefits of recording an Affidavit of Possession, color of title and an unbroken 23 year chain of title, cannot be established.)

43-30-12. Exceptions to application of chapter. **This chapter shall not be applied to bar the rights of any lessor or his successor as reversionary of his right to possession on the expiration of any lease by reason of failure to file the notice herein required, the rights of**

any remainderman upon the expiration of any life estate or trust created within twenty-three years prior to the date of an affidavit made and recorded as prescribed by § 43-30-7, right founded upon any mortgage, trust deed, or contract for sale of lands which is not barred by the statute of limitation, or conditions subsequent in any deed.

43-30-13. Right, title, or interest of state or United States unaffected by chapter. **This chapter shall not be deemed to affect the right, title, or interest of the State of South Dakota, or the United States in any lands in South Dakota.**

43-30-14. Right, title, or interest in land owned by public utility unaffected by chapter. **This chapter shall not apply to the right, title, or interest in any land owned by any railroad or other public utility corporation or any lessee, trustee, or receiver thereof; nor shall it apply to claims, liens, titles, or rights of action founded upon mortgages or trust deeds executed by any such corporations or the lessees, trustees, or receivers thereof.**

43-30-15. Existing statutes of limitations and recording statutes not affected by chapter. **Nothing contained in this chapter shall be construed to extend the period for bringing any action or doing any act required under any existing statute of limitations, nor to affect the operation of any existing acts governing the effect of the recording or the failure to record any instrument affecting lands.**

4. “Arms Length Transaction Affidavit” & Short Sale Closings.

DHTIC *Thanks* Special Guest Presenter: Ms. Nancy Aas from First Dakota Title – Watertown.

Please see handout for discussion / notes below: