DAKOTA HOMESTEAD

AGENT EDUCATIONAL

FALL 2015

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SAME-SEX MARRIAGE AND TITLE INSURANCE CONSIDERATIONS

RECENT HISTORY:

In the landmark United States Supreme Court Opinion of ***Obergefell v. Hodges*** (decided June 26, 2015), the Court held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Thus, this Decision: (1) struck down and overturned all state-level bans on same-sex marriages as being unconstitutional (like South Dakota's ban), (2) legalized all same-sex marriages in the United States and its territories, and (3) required all states to issue marriage licenses to same-sex married couples and to recognize such same sex-marriages validly performed and licensed in other jurisdictions.

Effectively now under the laws of the United States, there is no distinction between opposite-sex marriage and same-sex marriage. Each is legally valid and enforceable and all married couples are subject to the same federal and state benefits and burdens of married people. Opposite-sex marriage and same-sex marriage are now the same in the United States.

SOUTH DAKOTA'S IMMEDIATE REACTION:

"S.D. reluctantly accepts same-sex marriage" [June 29, 2015]
By John Hult, Reporter for the *Argus Leader*

The Supreme Court's decision legalizing same-sex marriage in all 50 states Friday marked a conspicuous shift in policy for South Dakota, a state that voted to ban such marriages less than a decade ago.

The full effect of the decision in Obergefell v. Hodges is yet to be defined for South Dakota.

Left open are questions of employment or housing discrimination against homosexuals, adoption rights, religious freedom protections for public or private citizens and the rights of inmates.

"You're going to have a lot of varying arguments in this evolving area of the law as a result of this decision," Attorney General Marty Jackley said.

Jackley advised state agencies less than two hours after the high court issued its 5-4 decision that same-sex marriage is the law in the state "effective immediately." Jackley stressed in his initial statement that he disagrees with the decision, but both he and Gov. Dennis Daugaard said the U.S. is a "nation of laws," and that the ruling will mean changes.

Many couples moved forward quickly — two women in Pennington County were issued a marriage license hours after the ruling. And by early afternoon, the state's Vital Records Department upgraded licenses statewide, replacing the words "bride" and "groom" with two fields bearing the gender-neutral term "spouse."

By next week, state employees in legal same-sex marriages will be eligible for the same benefits as those in opposite-sex marriages.

First same-sex marriages in S.D.

Tara Harvey and her fiancé, Kaitlin Drobny, planned to marry Saturday in Drobny's hometown of Yankton regardless of the Supreme Court's decision. They picked up a license Friday.

"We weren't expecting it, but it just happened to work out," said Harvey, who lives in Brookings and works at South Dakota State University, as does Drobny.

Both women now will enjoy legal status nationwide. They'll also have the full employment benefits of marriage as state employees. Daugaard's chief of staff, Tony Venhuizen, said Friday that the state intends to extend all benefits for state employees to legally-married same-sex couples, though it might take "a few days" to make the administrative changes necessary to make that happen.

"Same-sex couples that have a valid marriage license would receive the same type of benefits that married couples have now," Venhuizen said.

The state's constitutional amendment banning same-sex marriage need not be formally repealed, Jackley said, as the Supreme Court's ruling overrules it regardless of its existence on the books.

The right to marry came Friday, but legal questions remain. The decision did not recognize homosexuals as a protected class or create a test for determining whether that class has been discriminated against.

No protection in the workplace in S.D.

Because the state of South Dakota doesn't protect homosexuals from discrimination on the state level, most private employers will be free to fire gay employees.

"Unless you live in a place like Sioux Falls, where protections have been passed, you'll still be able to fire somebody without any trouble," said Tiffany Graham, associate dean of the University of South Dakota School of Law.

That the decision's language speaks clearly of dignity could play in the favor of those arguing for legal protections, Graham said, but those details probably will be hashed out in litigation. The ruling falls short of defining equal rights in adoption proceedings, too. "After today's decision, it's still a little murky," Graham said.

ALTA'S ISSUED STATEMENT ON SAME-SEX MARRIAGE RULING
(Press Release 06/28/2015)

The American Land Title Association (ALTA), the national trade association of the land title insurance and real estate settlement services industries, released the following statement today following the U.S. Supreme Court's 5-4 ruling in favor of same-sex marriages in Obergefell v. Hodges:

"The U.S. Supreme Court's decision in Obergefell v. Hodges today has a significant impact on property rights," said Michelle Korsmo, ALTA's chief executive officer. "Our nation provides numerous protections for married couples that own property. In addition, the Supreme Court's opinion gives same-sex couples the ability to take title to real property as tenants by the entirety, which is the strongest way to hold title and is reserved for married couples."

"Today's decision helps eliminate confusion on determining property rights of same-sex couples who move to a state that previously did not recognize same-sex marriages," Korsmo added.

FOR US, OUR JOB IS EASY
OTHER THAN SLIGHT TERMONOLGY ADJUSTMENTS, IT'S REALLY JUST "SAME OLD SAME OLD":

DHTIC anticipates that the SD Legislature along with other branches of state government will amend current relevant SD statutes, the SD Constitution, etc., (some amendment action has in fact already been taken as stated in the *Argus Leader* article above) in order for the laws of our state to agree in meaning, context, terminology, and affect with the ruling of the US Supreme Court in *Obergefell v. Hodges* (e.g., changing relevant SD statutes that speak in opposite-gender terms in connection with the definition of "marriage" or a "family" as being between or including a "husband and wife" to a legally compliant and general-neutral term in connection with the definition of "marriage" or a "family" as being between or including "spouses").

Even if SD never amended any of its statutes, etc. to conform to the ruling of the US Supreme Court in *Obergefell v. Hodges*, those statutory, etc. language disagreements would be legally unenforceable and disregarded in practice.

Therefore, for purposes of real estate title and title insurance, all real estate title rules regarding married people in South Dakota remain the same, but simply now regardless of the sex of a married person or the sex of that married person's spouse. *If someone is married, they are married, end of story, let's move on!*

The more things change, the more they stay the same … For example (just to name a few):

(1) Homestead protection extends to the spouse of an owner of real property used as a residence in South Dakota (regardless of the sex of that married person or the sex of that married person's spouse, *and regardless of how the current SD statutes on this issue might read*);

(2) In connection with homestead, the definition of a "family" in South Dakota includes, among possible others, the spouse of a married person (regardless of the sex of that married person or the sex of that married person's spouse, *and regardless of how the current SD statutes on this issue might read*); and

(3) All deeds and mortgages from an individual owner of South Dakota real property must recite that grantor's / borrower's marital status, and if that grantor / borrower be married, the deed or mortgage must include either:

(a) their spouse's execution, or
(b) a proper non-homestead recital

(regardless of the sex of that married person or the sex of that married person's spouse, *and regardless of how the current SD statutes on this issue might read*).

One new twist on all of this, however, will of course be the need for drafters of deeds and mortgages (and for those that review and/or insure such recorded documents) to ensure that in some instances a married couple is properly described and identified by: (1) taking the sex of a married person and the sex of their spouse into consideration, and (2) clearly identifying the spouse of that married person.

REVIEW & PRACTICE TIPS:

(1) In all cases when required, the marital status of a person should be plainly and accurately stated, and in some cases should plainly and accurately state to whom that person is married (nothing new here).

(2) In all cases, the default is and should always be (nothing new here):

(a) Unless erroneous, ambiguous, or legally insufficient, stay consist with how that married couple has been identified and described previously of record; and

(b) Unless erroneous, ambiguous, legally insufficient, or the prior record already controls, how a married couple wants to hold title and/or be identified and described in relevant record title documents ***IS THE PREROGATIVE OF THAT MARRIED COUPLE*** – check with and defer to them!

(3) Regarding opposite-sex married couples, the usage of traditional language to identify and describe of record their marital status and to whom that person is married remain the same (nothing new here). For example, the customary use of "husband and wife", "wife and husband", "the spouse of", "a married couple" or some variation thereof is still acceptable and will be used often going forward.

(4) Regarding same-sex married couples, acceptable language to identify and describe of record their marital status and to whom that person is married would include "and spouse", "his spouse", "her spouse", "a married couple", or "married to each other".

(5) In all cases (opposite-sex and same-sex married couples) when the identification of a married person's spouse is relevant in a record title document, do not simply describe that couple (collectively) as "married" or that couple (separately) as "a married person" and "a married person" since those designations are insufficient to identify of record to whom they are actually / specifically married.

Thus, in all cases (opposite-sex and same-sex married couples) when the identification of a married person's spouse is relevant in a record title document, make sure the identification of a married person's spouse is clearly stated in the martial status recital as shown and suggested in paragraphs (3) and (4) immediately above.

A QUICK NOTE ON TITLE INSURANCE AND MARITAL STATUS.

Please be advised that a basic tenant of title insurance is that a title insurance policy does not (by default) insure nor purports to insure an insured's or stated vested owner's marital status. Schedule A of a Commitment or Policy can be accurately and rightfully completed without mention or reference to anyone's marital status. However, it is probably customary (often the local practice) in SD and other states to include reference to one's marital status in Schedule A of a Commitment or Policy. Lender's often require that the description of the insured mortgage in Schedule A of a Loan Policy include verbatim the names and marital status of the borrowers as show in the recorded mortgage. Keep in mind too that if we choose to include the marital status in Schedule A of a Commitment or Policy, that recital will likely be covered under the Commitment or Policy in the event a claim arises that results from any inaccuracies in such stated marital status.

That said, here are DHTIC's underwriting guidelines regarding the inclusion of a marital status recital in Schedule A of a Commitment or Policy.

(1) DHTIC discourages stating the marital status of proposed owner insured in the Commitment.

(2) It is acceptable to: (1) not show the marital status of the current vested owners in paragraph 4. of the Commitment; or (2) show the marital status of the current vested owners in paragraph 4. provided, however, such marital status recital is shown verbatim according to the current record.

(3) In regard paragraph 1. of an Owner's Policy, NAME OF INSURED, it is not necessary to and you should not include the marital status of individual insureds. Just state their name.

(4) In regard paragraph 3. of an Owner's Policy, TITLE IS VESTED IN, it is acceptable to: (1) not show the marital status of the current vested owners; or (2) show the marital status of the current vested owners provided, however, such marital status recital is shown verbatim according to the recorded vesting deed.

(5) In regard paragraph 3. of a Loan Policy, TITLE IS VESTED IN, it is acceptable to: (1) not show the marital status of the current vested owners; or (2) show the marital status of the current vested owners provided, however, such marital status recital is shown verbatim according to the recorded vesting deed.

(6) In regard paragraph 4. of a Loan Policy, THE INSURED MORTGAGE / ASSIGNMENTS ARE DESCRIBED AS, it is acceptable (and the lender's will likely require) to include verbatim the names and marital status of the borrowers as show in the recorded mortgage.

DECEDENTS' ESTATES – PROBATE BASICS

A. THE FUNDAMENTIAL RULE – real estate title passes to heirs / devisees upon decedent's death, but probate required to administer and prove it. At the moment a person owning title to real property dies, such title *instantaneously passes* to the decedent's heirs or devisees, subject only to the administration of decedent's estate through the statutory process known as probate (from the Latin "*probare*" (meaning "*to prove*")).

> **29A-3-101. Devolution of estate at death; restrictions.** The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to the person's property are subject to the restrictions and limitations contained in this code to facilitate the prompt settlement of estates. **Upon the death of a person, that person's real and personal property devolves to the persons to whom it is devised by will** or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate**, or in the absence of testamentary disposition, to the heirs**, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, **subject to homestead allowance, exempt property and family allowance, rights of creditors, elective share of the surviving spouse, and administration.**
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> **SDTS 15-05. Authority of personal representative.** Upon the death of a person, the real and personal property devolves to the heirs or devisees, subject to claims and the administration of the estate, which includes the authority of the personal representative to convey. **Authority:** SDCL 29A-3-101.

Thus, the only way to prove and transfer of record the title to a decedent's real estate, aside from perhaps a quiet title action, is through the process of probate.

B. TESTATE vs. INTESTATE.

When a person dies "testate", that person dies with a valid will. Thus in a testate estate, the will of the decedent will control the disposition of their assets and to whom, the "devisees".

When a person dies "intestate", that person dies without a valid / no will. Thus in an intestate estate, the laws of "intestate succession" will control the disposition of their assets and to whom, the "heirs".

Whether testate or intestate, the decedent's estate must be probated in order for their assets to be properly administered, disposed, and transferred to heirs or devisees.

C. Commencement of Estate Administration through Petition and Order to Probate, Appointment and Acceptance of PR, and issuance of Letters of PR.

A probate of decedent's estate is commenced upon:

(1) the making and submission of a Petition to the Clerk or Court by an interested person to probate the decedent's estate (and to appointment a Personal Representative (PR));

> **29A-3-301. Informal probate or appointment proceedings--Application--Contents.** (a) An informal probate proceeding is an informal proceeding for probate of a decedent's will with or without an application for informal appointment. An informal appointment proceeding is an informal proceeding for appointment of a personal representative in testate or intestate estates. Applications for informal probate or informal appointment shall be directed to the clerk of court, and verified by the applicant to be accurate and complete to the best of the applicant's knowledge and belief as to the following information …
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> **29A-3-401. Formal testacy proceedings--Nature--When commenced.** (a) A formal testacy proceeding is a proceeding conducted before the court to establish a will or determine intestacy. A formal testacy proceeding may be commenced by an interested person filing a petition as described in § 29A-3-402 requesting that the court …

(2) an Order from the Clerk or Court declaring the decedent's will to be valid, if there is one, approving the Petition, and submitting the estate to probate;

> **29A-3-102. Necessity of order of probate for will.** Except as provided in § 29A-3-1201, to be effective to prove the transfer of any property or to nominate a personal representative, a will shall be declared to be valid by an order of informal probate by the clerk of court, or an adjudication of probate by the court.

(3) Order of Appointment of Personal Representative (PR), acceptance, and issuance of Letters of PR.

> **29A-3-103. Necessity of appointment for administration.** Except as otherwise provided in chapter 29A-4, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the court or clerk, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters.

D. INFORMAL vs. FORMAL PR appointment and probate proceedings.

Informal PR appointment and informal probate proceedings:

- Are administered and completed *without court involvement* and all probate documents are submitted to and approved and filed by the Clerk of Courts only.
- Are *uncontested and non-litigious.*
- PR (generally) may act without a Court Order (but always and only as allowed or restricted by their Letters);
- Informal probate proceedings may be conducted to administer the estate of testate or intestate decedent.
- MOST PROBATES ARE COMMENCED AND COMPLETED INFORMALLY.

Formal PR appointment and formal probate proceedings:

- Are judicial, administered and completed *with court involvement and via Court Orders based upon submitted Motions, etc.*
- Are *contested and litigious.*
- PR (generally) may act only with a Court Order (but always and only as allowed or restricted by their Letters);
- May be conducted to administer the estate of testate or intestate decedent.
- A MINORITY OF PROBATES ARE COMMENCED AND COMPLETED FORMALLY.

E. Estate Liabilities.

The decedent's estate is generally chargeable with the payment of:

(1) Claims of creditors.

(2) Statutory allowances in favor of the surviving spouse, if any, and unmarried minor children, if any.

(3) State inheritance taxes and federal estate taxes (depending on the value of the estate).

F. CREDITOR CLAIMS OF AN ESTATE.

A primary purpose of the probate process is to pay the outstanding debts a decedent owes creditors. Except for certain exemptions and statutory allowances, all property of the decedent, both real and personal, are liable for the debts of a decedent / the claims of creditors.

As part of the probate process, the PR is charged with notifying creditors of the decedent by publication (unknown) and/or by written notice (known) so that the debt owed to such creditors may be paid by the estate. ***One such potential creditor required to be delivered notice is the SD Department of Social Services (DSS). See more on this below.***

However, do not confuse all creditor claims of an estate with LIENS against the real property of the decedent. Liens against real property, of course, will be recorded or filed against the real property of the owner / decedent, which upon a title search of the property will be disclosed and reported like normal.

The claims of creditors who are simply owed money (and had no lien against the decedent's real estate prior to the decedent's death) DO NOT become liens against the decedent's real property – how could they?

SECURED CLAIMS. A "secured" creditor claim means that when the decedent died, a creditor held a previously existing lien, mortgage, pledge or other enforceable security interest in some assest(s) of the decedent, i.e. "encumbered assets". From a real estate title / title insurance perspective, these secured claims are:

(1) Ordinary liens (recorded mortgage, judgment lien, tax lien, etc.) that you will find, report, take exception to, and require to be released like normal, when you search the property's title for purposes of a Commitment (and regardless of the probate process);

(2) The only type of claim we really care about and will deal with directly anyway through the normal course of what we do – search title, report liens, require liens to be released (and regardless of the probate process).

(3) FYI:

> **29A-3-809. Secured claims.** Payment of a secured claim is upon the basis of the amount allowed if the creditor surrenders the security; otherwise payment is upon the basis of one of the following: (1) If the creditor exhausts the security before receiving payment (unless precluded by other law), upon the amount of the claim allowed less the fair value of the security; or (2) If the creditor does not have the right to exhaust the security or has not done so, upon the amount of the claim allowed less the value of the security determined by converting it into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise, or litigation.
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> **29A-3-814. Encumbered assets.** If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or convey or transfer the assets to the creditor in satisfaction of a lien, in whole or in part, whether or not the holder of the encumbrance has presented a claim, if it appears to be for the best interest of the estate. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration.

UNSECURED CLAIMS. "Unsecured" creditor claims are simply debts / money the decedent owes a creditor and are not liens against the decedent's real property. From a real estate

title / title insurance perspective, we really don't care about these types of creditor claims because they are not liens against the decedent's real property.

So what about the DSS? The DSS has the ability to obtain and record a lien against a debtor's real property under various SD statutes. If DSS, however, does this, you, via a title search of the property, will of course find it, report it, and require it to be released just like in any other case.

However, if the DSS has not recorded a lien against the decedent's real estate prior to the decedent's death, the DSS will essentially be treated as an unsecured creditor in a decedent's estate.

The SD Probate Code requires the DSS to receive written notice from the PR of an estate regarding the death of the decedent so that the DSS may present a claim to the estate for unpaid DSS related debt the decedent incurred. Evidence that such notice to and payment to the DSS, if applicable, is required to be produced before a probate estate may be closed. But again, any such DSS claim and debt is NOT a lien against the decedent's real estate. The DSS will only have such a lien against the decedent's real estate if it recorded one, which you will find, report and require to be released.

G. Estate assets, including real estate, may be sold by the estate to pay creditor claims, statutory allowances and taxes.

Lien or no lien, the decedent's estate is chargeable with the payment of creditor claims, statutory allowances and taxes. **(But if there is a lien, you will find it, report it, and require it to be released just like always.)**

This means that real estate in an estate often will be sold to a third party purchaser in order to pay such obligations. In certain instances, this may also include specifically devised real property of a decedent.

It is the fiduciary obligation to the PR to ensure proper notice to all creditors, and to pay such creditor debts as provided and limited by SD statute.

It is also the fiduciary obligation to the PR to ensure that all state and federal inheritance taxes be paid, if due.

F. THE PERSONAL REPRESENTATIVE and the sale of estate real property.

The appointed PR of an estate, as established by their order of appointment, acceptance, and Letters of PR, is charged with administrating the decedent's estate pursuant to the terms of the decedent's will, and subject to the payment of creditor claims, applicable taxes, and statutory allowances.

Under the SD Probate Code, the PR, subject to any limitations stated in the Letters of PR, ***has great power, authority, and leeway to administrating the decedent's estate***, including the sale of estate real property to a third party purchaser in order to pay estate obligations.

> **29A-3-711. Powers of personal representatives--In general.** Until termination of an appointment, **a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate.** This power may be exercised without notice, hearing, or order of court.

29A-3-715. Transactions authorized for personal representatives--Exceptions. (a) Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in § 29A-3-902, a personal representative, acting reasonably for the benefit of the estate, may properly:

(1) Retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment;
(2) Receive assets from fiduciaries, or other sources;
(3) Perform, compromise, or refuse performance of the decedent's contracts that continue as obligations of the estate, as the personal representative may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:
    (i) **Execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land;** or
    (ii) Deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement;
(4) Satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances;
(5) Invest and reinvest the funds of the estate in accordance with the standard of prudence as specified in chapter 55-5;
(6) Acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale; and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;
(7) Make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, raze existing or erect new party walls or buildings;
(8) Subdivide, develop or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; or adjust difference in valuation on exchange or partition by giving or receiving considerations; or dedicate easements to public use without consideration;
(9) Enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the period of administration;
(10) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;
(11) Abandon property when, in the opinion of the personal representative, it is valueless, or is so encumbered, or is in condition that it is of no benefit to the estate;
(12) Vote stocks or other securities in person or by general or limited proxy;
(13) Pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims;
(14) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the personal representative is liable for any act of the nominee in connection with the security so held;
(15) Insure the assets of the estate against damage, loss, and liability and the personal representative against liability as to third persons;
(16) Borrow money with or without security to be repaid from the estate assets or otherwise; and advance money for the protection of the estate;
(17) Effect a fair and reasonable compromise with any debtor or obligor, or extend, renew, or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge, or other lien upon property of another person, the personal representative may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien;
(18) Pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate;
(19) Sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
(20) Allocate items of income or expense to either estate income or principal, as permitted or provided by law;
(21) Employ persons, including attorneys, accountants, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;
(22) Prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of the personal representative's duties;
(23) Sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash, credit, or for part cash and part credit, and with or without security for unpaid balances;
(24) Continue or participate in the operation of or incorporate any unincorporated business or other enterprise of the decedent;

(25) Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate;
(26) Satisfy and settle claims and distribute the estate as provided in this code.
(b) Not less than fourteen days prior to the closing of any sale of real or personal property of the estate for which the fair market value is not readily ascertainable, the personal representative shall provide written information of the intent to sell to the persons who have filed a demand for notice under § 29A-3-204. The written information shall contain a description of the property to be sold, the name of the purchaser, the sale price, the terms of payment, and the nature of the security if the payment of any portion of the purchase price is to be deferred

THUS, unless certain real property of the estate has been specifically devised pursuant to a decedent's will or the estate is subject to litigation, the PR will be able to sell estate real property to a third party purchaser pursuant to their powers authorized under the will or Code or both – and without a court order.

29A-3-704. Personal representative to proceed without court order--Exception. A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a supervised personal representative, shall do so without adjudication, order, or direction of the court, but the personal representative may invoke the jurisdiction of the court, in proceedings authorized by this code, to resolve questions concerning the estate on its administration.

In cases of a specific devise or probate litigation, the PR would ordinarily only be able to sell such estate real property to a third party purchaser pursuant to a Court Order authorizing that sale.

Distributions to heirs / devisees may be "in kind" or "in cash equivalent". Please be advised that unless a devisee has been specifically devised real property pursuant to a decedent's will, the heirs and/or devisees of a decedent only have a claim to the assets of an estate OR TO THE PROCEEDS DERIVED FROM THEIR SALE, if any (and after creditors, taxes, and statutory allowances have been paid first).

29A-3-709. Duty of personal representative--Possession of estate. Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, the estate in the personal representative's possession. The personal representative may maintain an action to recover possession of property or to determine its title.

29A-3-906. Distribution in kind--Valuation--Method. (a) Unless a contrary intention is indicated by the will, the distributable assets of a decedent's estate shall be distributed in kind to the extent possible through application of the following provisions:
(1) A specific devisee is entitled to distribution of the thing devised, and a spouse or child who has selected particular assets of an estate as provided in § 29A-2-402 shall receive the items selected.
(2) Any homestead or family allowance or devise of a stated sum of money may be satisfied in kind provided:
  (i) The person entitled to the payment has not demanded payment in cash;
  (ii) The property distributed in kind is valued at fair market value as of the date of its distribution; and
  (iii) No residuary devisee has requested that the asset in question remain a part of the residue of the estate.
(3) The residuary estate shall be distributed in any equitable manner
(4) For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable manner, including the employment of qualified appraisers, even if the assets may have been previously appraised.
(b) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset to be received, if not waived earlier in writing, terminates if the distributee fails to object in writing within fourteen days after the mailing or delivery of the proposal but only if the proposal informed the distributee of the right to object and of the applicable time limit.

29A-3-907. Distribution in kind--Evidence. If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring, or releasing the assets to the distributee as evidence of the distributee's title to the property.

29A-3-908. Distribution--Right or title of distributee. Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the decedent and the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper.

G. ESSENTIAL TITLE DOCUMENTS FOR AN ESTATE'S SALE OF LAND.

In all cases of an estate selling property, a duly executed and acknowledged **PR's deed** (reciting the PR's Letters remain unrevoked in an full force and effect) to the purchaser must be made along with a **certified copy of the Letters of PR** attached thereto and recorded along therewith.

F. SPECIFIC DEVISE OF REAL ESTATE UNDER WILL.

A specific devise under a decedent's will bequeaths a specifically identified asset(s) to a specific person(s). 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, an undivided one-third (1/3) each."

Please be advised that specifically devised real property under a decedent's will must be conveyed by the PR to the specific devisee(s), unless there is a Court Order allowing the sale of that specific property to a third party or the estate is subject to pending litigation.

As opposed to a general devise or residual estate devise which are generally described estate assets bequeathed to a person or general groups of people. For example:

"I hereby devise the rest, remainder and residual of my estate, both real and personal, to my children, should any of them survive me, share and share alike."

Generally and as discussed above, such generally devised property may be sold by the PR to a third party purchaser without a Court Order, and the devisees entitled to a portion of the proceeds of the sale.

G. CLOSING THE ESTATE – THANK THE LORD!!

Once the PR has fully administered the decedent's estate, i.e. all creditor claims, statutory allowances, and taxes have been, all assets sold to third parties or conveyed and/or distributed to heirs / devisees, the PR will formally close the estate by a sworn statement in informal probate proceedings or by an Order of Complete Settlement by the Court in formal probate proceedings.

29A-3-1003. Closing estates--By sworn statement of personal representative. (a) Unless prohibited by order of the court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court no earlier than four months after the date of original appointment of a general personal representative for the estate, a verified statement stating that the personal representative or a previous personal representative, has:

(1) Determined that the time limit for presentation of creditors' claims has expired or has made a diligent search for the creditors of the estate and affirms to the best of the personal representative's knowledge, information, and belief that all known creditors have been paid in full and if there are other creditors of

the decedent, they are unknown to the personal representative and could not, with reasonable diligence, be ascertained;

(2) Determined that all inheritance taxes and state estate taxes due from the estate have been duly determined and are fully paid;

(3) Fully administered the estate of the decedent by making payment, settlement, or other disposition of all claims that were properly presented, expenses of administration and other charges, except as specified in the statement, and that the assets of the estate have been distributed to the persons so entitled. If any claims remain undischarged, the statement shall state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees or state in detail other arrangements that have been made to accommodate outstanding liabilities; and

(4) Sent a copy of the statement and a full accounting to all heirs and devisees who are entitled to distribution of and from the remaining assets of the estate and to all known creditors and other claimants whose claims are neither paid nor barred.

(b) If no proceedings involving the personal representative are pending in the court one year after the closing statement is filed, the appointment of the personal representative terminates.

(c) Any accounting required under this section may be waived if the persons entitled to a copy consent in writing.

29A-3-1001. Formal proceedings terminating administration--Testate or intestate--Order of general protection. (a) The administration of an estate being administered in supervised proceedings may be concluded by an order of complete settlement, and the administration of an estate being administered in unsupervised proceedings may be concluded by an order of complete settlement if the court grants a petition therefor. The personal representative may petition for an order of complete settlement after four months from the appointment of the original personal representative, and any other interested person may petition after one year from the appointment of the original personal representative. The petition of the personal representative shall be granted as a matter of course, but other petitions shall be granted only if there is good cause.

(b) The petition shall request the court to approve the account or to compel and approve an accounting, to determine the decedent's testacy status and heirs, if not previously determined by the court or if one or more heirs or devisees were admitted as parties in, or were not given notice of, a previous formal testacy proceeding, and to adjudicate the final settlement and distribution of the estate.

(c) After notice to all interested persons and hearing, and the filing of proof that a copy of the accounting was mailed to the heirs and devisees entitled to distribution of and from the remaining assets of the estate, and to all known creditors and other claimants whose claims are neither paid nor barred, the court may enter the appropriate orders, terminate the personal representative's appointment, and discharge the personal representative from further claims or demands.

(d) Any accounting required under this section may be waived if the persons entitled to a copy consent in writing.

(e) An order of complete settlement shall be conclusive as to the matters determined on all persons given notice, subject only to being reversed, set aside or modified on appeal.

DECEDENT'S PROBATE ESTATE & TITLE INSURANCE CONSIDERATIONS

Exceptions and Requirements Review

SCHEDULE A OF COMMITMENT:

Where it appears from your local, other actual knowledge, or via a title examination that the owner of proposed insured real property is deceased, and a 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 OF COMMITMENT:

Please remember that each probate you encounter will be factually different, will not be one size fits all, and will require you to construct the Commitment accordingly. In any event and as a matter of standard practice, you may, nonetheless, want to always include all of the exceptions and requirements detailed below in all cases.

PROBATE LEGALLY REQUIRED TO PROVE (INSURE) TRANSFER OF TITLE. Please remember that 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.*" DHTIC, therefore, requires the proper probate administration of the decedent's estate in order to insure (without exception) the title of such real property of a decedent.

Therefore, in the vast majority of cases, DHTIC will not accept something short of the proper commencement and completion of a South Dakota probate, like an "Affidavit of Heirship" or (a) deed(s) from (all) heirs, etc., to insure the title of a decedent owning title to South Dakota real property.

Thus, where it appears from your local, other actual knowledge, or via a title examination that the owner of proposed insured real property is deceased (and no probate proceedings have been commenced IN SOUTH DAKOTA as far as you know), you should require some version of the following in any Commitment:

> **The Company requires a South Dakota probate administration of the estate of John Smith, deceased, be commenced and completed in South Dakota and that a Personal Representative be appointed by a competent South Dakota Clerk or Court along with Letters of Personal Representative issued empowering him/her to act on behalf of the decedent in connection with the proposed real estate transaction under this Commitment. The Company will be unable to insure title to the subject real property until all relevant South Dakota probate procedures necessary for said proposed real estate transaction of the decedent's estate have been followed.**

And, where it appears from your local, other actual knowledge, or via a title examination that the owner of proposed insured real property is deceased and probate proceedings have been commenced in South Dakota, you should make the following exception in any Commitment:

Pro. No. 15-578 regarding the probate administration of the Estate John Smith currently pending in the Circuit Court of Turner County, South Dakota.

NOTES:

(1) **Review Probate file.** Just like a mortgage foreclosure file, etc., and in addition to the "routine" probate requirements discussed herein, you should make all efforts to obtain and review at length the subject probate file in connection with determining any issue or the application of any of any potential exception discussed herein. 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 at length. If the decedent's estate is being/has been probated in a different County or State, however, reviewing the probate file may be impossible, but you may, nonetheless, and should require, certified copies of all relevant probate discussed herein for your review.

(2) **Foreign Probates – SD probate still required.** Even if a decedent that owned SD real estate lived died in another state and a probate has been commenced in that other (some other) state for that decedent, a ***South Dakota*** probate, *ancillary or otherwise*, must still be commenced and a Personal Representative appointed by a South Dakota Clerk or Court along with Letters of PR issued in order for such PR 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 under law.*

> **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.

REQUIRE SUBMISSION OF THE PETITION AND ORDER TO PROBATE, APPOINTMENT AND ACCEPTANCE OF PR, AND LETTERS OF PR FOR REVIEW. For purposes of the Commitment, in event you do not have access to the subject probate file, or just as a matter of standard practice, please make the following requirements:

> **Regarding the Estate of decedent at issue in this Commitment, the Company requires the submission of complete copies of: (1) The Petition for Probate, (2) the Order submitting the decedent's will or estate to Probate signed by the Clerk or Court, (3) the Order appointing the Personal Representative along with the Personal Representative's Acceptance, (4) issued Letters of Personal Representative.**
>
> **Upon the Company's review of the same, the Company reserves the right to make additional exceptions and requirements to this Commitment.**

NOTE: You need not make the requirement if you have access to the decedent's probate file. Regardless of how you obtain the above documents, it is important you review them in order to identify any potential issues and/or compliance with these underwriting guidelines.

REQUIRE SUBMISSION OF DECEDENT'S WILL FOR REVIEW, AND REQUIRE PR's DEED TO THE SPECIFIC DEVSIEE OR PURCHASER BE MADE AND RECORDED ALONG WITH CC's OF LETTERS OF PERSONAL REPRESENTATIVE.

For purposes of the Commitment, we must 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 real property to specifically identified person. 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 access to the decedent's will, or have otherwise have cleared the following issue, you should require:

> **The Company requires the submission of 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 devisee(s) identified in the decedent's Will (with certified copies of the Personal Representative's "Letters of Personal Representative" attached thereto); followed by (a) properly executed, acknowledged and recorded deed(s) from such specific devisee(s) for the subject real property to the Purchaser; or**
>
> **(2) A Court Order from the Circuit Court in Pro. No. 15-578 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.**
>
> **In the event the decedent's Will makes no specific devise of the subject real property, the Company will require a properly executed, acknowledged and recorded Personal Representative's Deed for the subject real property to the proposed purchaser along with certified copies of the Personal Representative's "Letters of Personal Representative" attached thereto.**

NOTE 1: If you already know that the decedent died without a will or the will does not make a specific devise of the subject real property, you would only need to require what is stated in the last paragraph immediately above, which would be amended to state:

> **The Company requires a properly executed, acknowledged and recorded Personal Representative's Deed for the subject real property to the proposed purchaser along with certified copies of the Personal Representative's "Letters of Personal Representative" attached thereto.**

NOTE 2: 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). AND BE SURE TO REVIEW BOTH THE PR's DEED AND THE LETTERS OF PR TO ENSURE THE LETTERS OF PR WERE IN EFFECT. The Letters MUST be in effect at the date the Personal Representative executed the Personal Representative's Deed and the PR's Deed should recite that the Letters of PR remain unrevoked and in full force and effect.

In regard to the above, a PR's Letters may become ineffective / revoked in cases of: (1) a subsequently appointed / substituted PR, or by the "early dismissal" of the PR (e.g., estate has been closed and the PR accordingly dismissed and Letters of PR 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 PR's deed in order to get the property out of the estate, but fails to get the PR reappointed and relies only on the already extinguished Letters of PR.

TAKE EXCEPTION TO POSSIBLE STATE INHERITANCE AND FEDERAL ESTATE TAX LIENS. DHTIC does not expect or require you to know or determine if the estate is subject to state inheritance or federal estate tax liens. But in all cases, please take exception to the existence of such tax liens as follows:

> **Any claims or liabilities arising from possible existence of lien for South Dakota inheritance taxes.**
>
> **Any claims or liabilities arising from possible existence of lien for Federal Estate taxes.**

NOTES:

SDTS 15-08. South Dakota inheritance tax liens The 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. **Authority:** Former SDTS 7.1; SDCL 10-41-81 and Art. II, § 15, South Dakota Constitution. **Note:** The repeal of the inheritance tax does not affect the estate tax liens imposed under SDCL ch. 10-40A. **Cross Reference:** Exemption of State of South Dakota, SDCL 43-30-13.

SDTS 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.

REQUIRE AN AFFIDAVIT FROM PR OR THE ATTORNEY OF THE ESTATE REGARDING PAYMENT OR INAPPLICABILITY OF CREDITOR CLAIMS, STATE INHERITANCE AND FEDERAL ESTATE TAXES.

> **The Company requires an Affidavit from the Personal Representative or from the Attorney of the Estate of the decedent that swears, verifies and confirms that:**
>
> **(1) all debts and creditor claims against the decedent's estate have been paid, have been time barred, or are not due at all; and**
>
> **(2) all federal estate taxes and state inheritance taxes have been paid, have been time barred, or are not due at all.**

SHOW AS EXCEPTIONS ANY LIEN ATTACHED TO THE SUBJECT REAL ESTATE AS DETERMINED FROM YOUR TITLE SEARCH LIKE NORMAL, e.g., mortgages, judgment liens, tax liens, etc.

Reoccurring Issues with Plats

Below is just a very brief review of issues you should be looking for when you are reviewing plats as part of your title search. This is not an exhaustive list of all the issues out there and how to address them, but more a checklist of things to keep in mind.

Things to Look For:

- Did everyone sign the plat who needs to:
    - All parties who have an interest in the property being platted (compare against your title search)
    - All necessary government officials and offices
- Are there any easements being shown on the plat or the owner's certificate
    - Are those same easements found in some other recorded document or just the plat
    - Is there an issue with merger
- Is there legal access to all of parcels
- Is this a new plat or a replat of a prior plat
    - If the land has previously been platted, is there property vacation language in the new plat
        - Is the plat to be vacated properly described, including its book and page
        - Are the vacating the prior plat in whole or just in part

Issues and Fixes

- Not everyone signed the plat who needed to prior to the plat being approved and recorded
    - Fix – need to record a new plat that is properly executed and acknowledged by all of the parties. The prior, incorrect plat should be vacated. Just recording an affidavit or something else that is not a new plat is insufficient to fix the problem.
- Boundaries of the platted properties are wrong

- Fix – need a new plat signed by everyone establishing the new boundaries. May need to get deeds between the parties properly establishing the correct ownership of each property.

- Private easement shown on plat but fails because of merger
  - When there is no longer going to be common ownership, the easement will need to be created in a separately recorded document. Cannot rely on the plat to create that easement.
  - An exception should be shown for this as there could be an issue with legal access if part of the platted property not connected to a public right of way was ever sold to someone else.

Surveyor's Affidavits

It is important to note that while SDCL 43-18-11 (see below) does allow for the surveyor to record an affidavit to correct errors and omissions in a recorded plat, such an affidavit can ONLY be used for "typographical errors or omissions of data." It cannot be used to change the boundaries of the property or anything else not authorized by statute. Thus such an affidavit cannot be used to fix the issues described above.

> 43-18-11. Affidavit describing and correcting an error or omission in recorded plat--Filing--Restriction--Approval. If any typographical error or omission of data is detected on a recorded plat, the original land surveyor shall record an affidavit confirming the error or omission. If the original land surveyor is deceased, is not licensed as a land surveyor pursuant to chapter 36-18A, or cannot be located, two licensed land surveyors may record an affidavit confirming the error or omission. The surveyor or surveyors shall file an affidavit describing the nature and extent of the error or omission and the correction or addition to the recorded plat. The surveyor or surveyors shall also note the document reference number or recording information of the recorded plat on the affidavit. The register of deeds shall stamp on the plat of record, the word, corrected, and note the document reference number or recording information on the recorded affidavit. A copy of the recorded affidavit shall be filed with the director of equalization and shall be mailed by the surveyor or surveyors to any owner of record. No affidavit of correction may be used to change or modify the plotted or recorded property lines as originally monumented. This affidavit of correction does not require prior approval by any governing body.

2012 South Dakota Statutory Procedure to Discharge Civil Judgments (and Liens) Discharged in Bankruptcy

GENERAL REVIEW:

Although related, a judgment and a lien are two different things.

(1) A civil / money judgment is simply a court imposed personal obligation of a debtor to pay debt owed to a creditor.

(2) This personal obligation, though enforceable against the debtor on its own by certain statutory methods, may also and consequently become enforceable as a lien against the real property of the debtor if and when the judgment is properly docketed in or subsequently transcribed to counties where the debtor owns or subsequently acquires real property.

(3) Thus, for purposes of real estate title and title insurance, we are only concerned about valid LIENS that affect title to proposed insured real estate and not judgments that affect a person.

Please be advised that a debtor's discharge in Bankruptcy only removes the debtor's personal obligation to pay the debt / terminates the judgment against the debtor, it does NOT remove or terminate a pre-petition judgment lien from a debtor's non-exempt real property.

In the South Dakota Bankruptcy context, the only ways to remove a pre-petition judgment lien from a debtor's non-exempt real property are:

(1) Filed release from the creditor;
(2) Bankruptcy Court Order avoiding the lien or authorizing the sale of the real property free and clear of the lien;
(3) A debtor's claimed and sustained exemption as to the purported encumbered real estate; and
(4) The post-Bankruptcy discharge 2012 statutory process of SDCL 15-16-37 through 15-16-43.

SUMMARY OF SDCL 15-16-37 – 15-16-43:

(1) Purely a South Dakota state law procedure (has nothing to do with federal Bankruptcy law or jurisdiction).
(2) This new statutory process replaces in total the previous and untenable SDCL 15-16-20 (Order Discharging Judgments Discharged in Bankruptcy).
(3) Only applies to debtors who have first received a discharge in Bankruptcy (that included the judgments at issue).
(4) Only applies to general judgment (liens) which judgment was previously discharged in debtor's bankruptcy (no application or effect as to specific or special liens).
(5) **Successful application and completion of the procedure will: (a) terminate the judgment of record against the debtor; and (2) terminate the judgment lien against the real property of the debtor, if there was one.**

THIS STATUTORY PROCEDURE IS AS FOLLOWS:

15-16-37. Application for discharge of civil judgment debt discharged in bankruptcy. Any person who has secured a discharge of a civil judgment debt pursuant to United States Code, Title 11, and any person interested in real property to which the judgment attaches may submit an application for a discharge of the judgment to the clerk of court in which the judgment was entered or transcribed.

15-16-38. Contents of application--Service on judgment creditors. An application under § 15-16-37 shall be sworn under oath and identify each judgment to be discharged, shall state that each judgment sought to be discharged was listed on the debtor's bankruptcy schedules, that no judgment sought to be discharged is nondischargeable under 11 USC § 523 or no order was entered by the bankruptcy court declaring any of the judgments nondischargeable, shall be accompanied by a certified copy of the judgment debtor's bankruptcy discharge, shall state the time the judgment

creditor has to object as specified in § 15-16-39 and the grounds for objection as specified in § 15-16-40 and shall be served at the expense of the applicant on each judgment creditor either:

(1) In the manner provided for the service of a summons in a civil action accompanied by an affidavit of service; or

(2) By certified mail to the judgment creditor's last known address as it appears in the court record accompanied by an affidavit of mailing.

15-16-39. Clerk to discharge judgment--Exception--Objection to discharge--Service. The clerk, without further notice or hearing, shall discharge each judgment except a judgment in favor of a judgment creditor who has filed an objection to discharge of the judgment within ten days after service of the application on the judgment creditor. Service shall be deemed effective from the date deposited in the U.S. mail or from the date of actual service. An objection to discharge of a judgment shall be served on the judgment debtor in the same manner as an answer in a civil action.

15-16-40. Motion and order for discharge except to extent that debt not discharged in bankruptcy. If a judgment creditor objects to the discharge of a judgment, on motion of the judgment debtor, the judgment creditor, or other interested party, the court shall order the judgment discharged except to the extent that the debt represented by the judgment was not discharged by the bankruptcy discharge.

15-16-41. Form of application for discharge of judgment. The application shall be in substantially the following form:

APPLICATION FOR DISCHARGE OF JUDGEMENT(S)

In the Matter of the Application of: [Judgment Debtor(s)] PLEASE NOTICE, the undersigned, acting for the judgement debtor(s) applies for the discharge of the following judgment(s) entered in [Name of County]: [List judgments, including case number, creditor(s), date of docketing, and amount.] A certified copy of the judgment debtor's bankruptcy discharge and an affidavit of service for each judgment creditor is attached.

Creditors Please Note: Pursuant to §§ [....], the clerk will discharge the judgment(s) listed within ten days after service of this application unless an objection to discharge is served on the judgment debtor(s) and filed with the clerk. Creditors may object to discharge if the debt represented by the judgment was not discharged by the bankruptcy discharge.

Dated:
[Signature]
Judgment Debtor,
Person Interested in Real Property or Attorney for Debtor or Person

15-16-42. Judgment ceases to be lien upon discharge. Upon the discharge of a judgment by the clerk pursuant to § 15-16-39, a judgment shall cease to be a lien on any real property that the person discharged in bankruptcy owns or later acquires.

15-16-43. Applicability to general judgment liens only. Nothing contained in §§ 15-16-38 to 15-16-42, however, may be construed to apply to any judgment which constituted a valid lien upon any specific property of such judgment debtor, as distinguished from the general judgment lien on real property.

DHTIC UNDERWRITING REQUIREMENTS REGARDING REMOVAL OF PRE-PETITION JUDGMENT LIENS VIA SDCL 15-16-37 – 15-16-43:

(1) The application for discharge of judgments must be filed with the applicable Clerk of Courts and reviewed for content compliance / disclosures as required by SDCL 15-16-37, SDCL 15-16-38 and SDCL 15-16-41 above.

(2) Please note that the applicable judgments sought to be discharged must be specifically stated and described in the application.

(3) Please also note that the required notice / service to affected judgment creditors as evidenced by an affidavit of service or mailing to each affected creditor must accompany and be attached to the application.

(4) The Clerk must discharge the judgments of record, whether such discharge is based upon passage of applicable time without creditor objection or based upon court order following creditor objection.

(5) Only if and when all of these steps have been completed (and reviewed for compliance) may you remove and / or not show such judgment liens as exceptions in any issued commitment or policy.

REMEMBER TO SEARCH *PACER* IN YOUR NORMAL COURSE OF BUSINESS

Specific Questions from DHTIC Issuing Agents

Quit Claim Deeds in the Chain of Title / Adequate Basis to insure Title?

Unlike a warranty deed, a quit claim deed provides no warranties of title whatsoever. Regardless, our obligations under the terms of the commitment and policy are the same no matter what. If a quit claim deed was used either in the current transaction or somewhere further back in the chain, the ability of person to make a claim on the warranties of title would be severed at that point. Having said that, it does not change our liability. Dakota Homestead has never specified a distinction between warranty deeds and quit claim deeds as a basis for doing anything different. You should still be searching, showing exceptions, and insuring transactions the same.

Having said that, if a quit claim deed is being used to convey the property out in the new, insured transaction, the question you should thinking and asking is WHY. Outside of a very few transactions, like a deed from a lender after foreclosure, most transactions use warranty deeds as a matter of course. If a quit claim deed is being used in the new transaction, you should probably ask the parties why and confirm that is what they want.

Contract for Deeds and Vendee's Judgments

At the time a contract for deed is entered into, both the vendor (seller) and the vendee (buyer) have some interest / and estate in real property. Thus judgments against either party will attach to the real property. The only exception to that is a properly setup deed held in escrow, pursuant to an escrow agreement, that was all signed and entered into at the same time as the contract. Even then, that only limits vendor judgments from attaching, not vendee judgments.

If something happens and the vendor is going to take title back to the property and they want it free and clear of any of the vendee's liens, they are going to have to do so through judicial action. It will

not work to remove the vendee's liens by just receiving a deed back from the vendee. Rather an action like a Contract for Deed Foreclosure under SDCL 21-50 or a quiet title action is needed to properly remove everything that attached to the vendee's interest.

Asking Questions

Whenever you have a question, especially when it is underwriting related, there are a couple of things that we need to know in all situations. While most of your do not need to use Dakota Homestead's Policy Approval Form anymore, it does a great job of highlighting those key areas. A copy of the Form is attached for reference. Below is a brief checklist of the information that Chris and Eric are looking for in all cases:

- What are being asked to insure:
    - Owners and/or Lender's Policies:
        - Standard or Extended Coverage;
        - How much;
    - What kind of property is it (house, bare land, commercial, ag, ect.);
    - Have we previously insured this property;
- What is the issue;
    - If we have previously insured this policy, have we shown this exception as an issue before;

Submit by Email

REQUEST FOR POLICY APPROVAL

Email to policyapproval@dakotahomestead.com or Fax to 605-336-5649; Must attach copy of Commitment!

AGENCY: _____

FILE NUMBER: _____

Pursuant to the Issuing Agency Agreement and Dakota Homestead's practices and procedures, request is hereby made for approval to issue the following form of title insurance:

____Owner's Policy, $_____, Endorsements: _____ | Ext. Cov. ☐ Yes ☐ No

Proposed Insured _____

____Loan Policy, $_____, Endorsements: _____ | Ext. Cov. ☐ Yes ☐ No

Proposed Insured _____

_____Policy, $_____, Endorsements: _____ | Ext. Cov. ☐ Yes ☐ No

Proposed Insured _____

ALL OF THE FOLLOWING QUESTIONS MUST BE ANSWERED:

1. Are any previous or prior title policies used as a start? Yes ☐ No ☐

   If competitor's policy, competitor name: _____;

   Date of Prior Policy _____ Amount of Liability _____

2. Length of title search: _____

3. Condition of Land. ☐ Unimproved (i.e. bare land, ag land, etc.) ☐ Improved (i.e. residential, commercial)

   ☐ Construction (i.e. new construction on the current premises)

   Describe existing or proposed improvements _____

4. This transaction involves: ☐ Sale, ☐ Lease, ☐ Construction Loan, ☐ Refinance, ☐ Purchase Price Loan

5. Will mechanic's lien coverage be required? Yes ☐ No ☐

6. Will we be able to obtain priority? Yes ☐ No ☐

7. Are there wetlands, lakes or rivers on the property? Yes ☐ No ☐

8. Do current underwriting practices require that an inspection or survey be made? Yes ☐ No ☐

9. Did the survey inspection disclose any problems? Yes ☐ No ☐ N/A ☐

10. Is there access to **ALL** parcels? Yes ☐ No ☐

11. Are any matters being eliminated or written over in reliance on an Indemnity Agreement? Yes ☐ No ☐

12. **Are any matters being eliminated or written over without proper documentation**? Yes ☐ No ☐

13 Are the priorities of any liens involved being altered by Subordination Agreement? Yes ☐ No ☐

14. Has this title been turned down by another underwriter? Yes ☐ No ☐

15. Special risks, affirmative coverages or other considerations: _____

_____

(If the answer to *any* questions other than *nos.4, 5, and 7* is "*yes*," please explain and provide documents if necessary.)

By:_____ Date:_____

****

The above request is approved, subject to:_____

_____

DAKOTA HOMESTEAD TITLE INSURANCE COMPANY

By:_____ Date:_____

GENERAL INSTRUCTIONS, REQUIREMENTS AND TERMS OF APPROVAL:

1. All requests for approval must be accompanied by a Report or Commitment (together with all supplements or amendments thereto) relative to the proposed transaction and should include a plat showing subject land.
2. Approval for issuance of the herein described title insurance is subject to the terms hereof and the provisions of the underwriting contract. Such approval in no way alters the liability of the parties as set forth in the underwriting contract as to the losses or claims arising out of issuance of such title insurances.

Dakota Homestead Agency Topics and Issues

Emailing Copies of Final Policies

STARTING WITH SEPTEMBER'S FINAL POLICIES, DAKOTA HOMESTEAD IS REQUIRING THAT AGENTS EMAIL A COPY OF EACH FINAL POLICY ISSUED THAT MONTH TO DAKOTA HOMESTEAD WHEN THE PREMIUM IS REMITTED.

Signing Jackets

As a reminder, all Dakota Homestead jackets need to be signed by an authorized person before going out. This is required both by the agency agreement and state law. The Paperless Policy System does NOT automatically fill that signature in.

Title Company Topics

Incorrect Legal Descriptions on Orders / Purchase Agreement Issues

This is one of the most common issues out there that every office sees – an order comes in from a bank, realtor, home owner, ect. with a quickly scribbled down legal description on it. Aside from the legibility issues those purchase agreements, often the legal description on them is incorrect or has some error compared to what you find when during your search. The question becomes – what should you do?

The best solution is probably **to get the person who ordered the title work to approve/amend the order with the correct legal description**. That can be done by amending their order, putting a new order in, or even just getting an email confirming that yes, we want the correct legal description searched. All of those approaches are designed to address this potential issue – providing a commitment with a legal description different than what was ordered.

As we move into this new area of greater consumer protection and lender practices, you will want something that you can save as part of your file showing an order for the specific legal description in your commitment in case someone ever asks to review the file. It is probably no longer the best course of action to just issue the commitment with the correct legal without getting something in writing to address the issue.

The same can be said for other issues in the purchase agreement. Generally speaking, we do not care about whether or not the terms in the purchase agreement were complied with from a title perspective. BUT we do care from the closing side of things because the parties typically require that the terms of the purchase agreement be complied with as part of the closing instructions. Some of the more common examples of issues with the purchase agreement (aside from the legal description) include (1) not all of the parties signing the purchase agreement that have an interest in the property; (2) the closing take place on a different date than the agreement specifies; (3) someone (the realtor) holding onto the

escrowed earnest money rather than bringing them to closing; and (4) the prorations or other splits changing on some items.

As a closing agent, if you are being asked to comply with the terms of the purchase agreement and something has changed making it impossible to comply with some terms in the agreements, then I would recommend getting something in writing either approving the change or approving you to ignore that part of the purchase agreement. This can be an actual purchase agreement addendum or amendment or it could just be something signed prior to or at closing by the parties.

As the title agent, if you find during your title search that some party has failed to sign the purchase agreement (like a spouse or other co-owner in title) then you should specifically list all the parties that need to sign as a requirement AND you should probably put a note in the commitment as to who failed to sign the purchase agreement. That way everyone is aware of the issue.

Discussion Items

- Lenders ordering title insurance on mortgage and then recording multiple mortgages at the same time;
- Issues with closings handled by someone other than your office;
- Title search orders and master agreements with vendors;

CFPB – TRID Pointers

On the next page is a brief TRID checklist of things to keep in mind when orders are placed. It is not meant to address every situation or question, but rather as a highlight of some of the questions that should be asked when you first learn about a transaction.

The most important thing to remember as the regulations go into effect is – COMMUNICATION. While there are plenty of new rules that will change how things are handled, those will become the new routine over time for everyone involved. The most difficult part will likely be adopting to each lender having a different process for consumer mortgages. Finding out early what is needed on each transaction will help in determining what you all will need to do along the way.

If the lender is going to handle the preparation and delivery of the Closing Disclosure form, then it is your job to make sure they have all of your fees and information in sufficient time to get everything put together and sent out to the consumer. It sounds like most of the larger banks are going this route. The biggest downside is that they are all likely to use different platforms for it, so it will take getting used to each of their own systems. The other thing to remember is that if the lender is handling the Closing Disclosure preparation, they will need to be notified of any changes that happen up through the time of closing.

If you are going to handle putting together and delivering the Closing Disclosure, it is important that you work with everyone involved so that they get you the information as soon as possible and let you know of any changes well in advance of closing. Ideally, at least a 10 to 15 days before closing, you should start receiving the numbers and figures so that you can get the approval of the Closing Disclosure that will be sent out to the consumer, which needs to happen at least a week before closing if you are using the mailing rule.

TRID Order Checklist

- Date order is placed:
    - Who placed order:
- When did the loan application start – before or after October 3:
- Who is preparing the Closing Disclosure:
- Who is sending out the Closing Disclosure
    - If YOU:
        - What is the address for the consumer:
        - Who will be getting you the rest of the information:
            - When will you be receiving it by:
        - What day does it have to go out by:
        - Who does the Closing Disclosure need to be sent out to:
    - If NOT YOU:
        - Who do you need to send everything to:
        - When do they need it by:
- Contact Information For:
    - Consumer:
    - Seller:
    - Lender:
    - Realtor:

Bonds and Insurance

It is a reality of the world we live in today that proper liability coverage is almost as necessary of an item as the computers in our office. Pillar 6 of ALTA's Best Practices specifically addresses the issue of maintaining appropriate professional liability and fidelity coverage. While the assessment guide for Pillar 6 asks if you have coverage for professional liability, cyber security, and fidelity bonds and insurance, it does not do a great job of explaining the differences between them and why you may or may not want such coverage. Below is just a very brief discussion as to some of the options out there.

Errors & Omissions Policies

This one should be familiar with everyone it. It provides coverage for errors or omissions of the insured in the course of their jobs. The example would be coverage for a missed item, like a prior judgment, that the title company is responsible for and has to pay to fix. It is designed to protect and cover against client claims that the agent was professional negligent or failed to perform their professional duties. At its core, it is the "mistakes happen" policy, with the E&O insurer helping to cover the costs of defending or correcting the mistake.

What it does not cover is intentional acts. This includes things like fraud or theft. While it might be difficult to prove something was intentionally left off a commitment, the definition of terms like fraud are intentionally worded in the insurer's favor.

Fidelity / Crime Insurance or Bond

Unlike an E&O policy, a fidelity bond or insurance (sometimes called crime bonds) specifically covers the insurer for losses caused by the fraudulent acts of some specifically covered individuals. The insured has to list who those covered individuals are as part of the policy. There are both first-party fidelity bonds, which cover the actions committed by employees of the insured business, and third-party fidelity bonds, which cover intentional acts by listed third-parties, like sub or independent contractors.

The important thing is that they cover the "intentional acts" of the covered persons. Thus if the employee intentionally tries to take the money or property from the insured, it would be covered. They do not typically cover the unintentional acts of a covered employee, only dishonest acts that exhibit the intent to cause the insured's loss. Further, the coverage is limited only to the people listed, it does not provide protection against all intentional acts, by all people.

Cyber-Liability Insurance

Cyber-liability policies are designed to protect against loss because of data or security breaches of the company's computers. They have been around for the last 10-15 years, but have not received much attention outside of the IT security professional context until the recent high profile data breach cases. The policies are typically designed to cover both the loss of property (your data) and the liability that comes from that loss. Information protected typically includes what we would think of as NPI, Social Security Numbers, credit card and bank information, ect. that was stored on the protected device and network.

The other area that cyber-liability policies can help with is data breach notification requirements. As of right now, South Dakota is one of the few states that has no requirements or obligations to notify customers / consumers if a data breach occurs. That puts in the extreme minority position as almost every other state has some sort of requirement or another. If South Dakota ever adopts such regulations, it may make a great deal of sense to add something like cyber-liability insurance which takes the notification job off of the company's shoulders for the most part.

As with any other type of coverage, the specific terms of the policy are very important. Typically cyber-liability policies only cover cyber-thefts or breaches. Such policies typically exclude non-hacking or security breach losses, like theft or fraudulent checks. Thus someone using a bad check deposited into your trust account would not be covered by a cyber-liability policy.

Escrow Security Policy

This is a relatively new type of coverage which focuses solely on the protection of escrowed funds. Typically they cover: (1) employee theft of escrowed funds; (2) third-party theft of escrowed funds; and (3) underwriters when something happens to the underwriter's premium. Some underwriters are requiring this type of coverage, Dakota Homestead is not, though it does encourage our agents to look into it if they want. If you do add an escrow security policy that would cover Dakota Homestead's funds, please let us know in advance so we can provide any information to have as added.

Crime Insurance Policy

This is slightly different than a fidelity bond or coverage (which often are called crime bonds) because it covers not only actions of the listed employees, but third-party, outside action as well. This is the type of coverage that would typically cover things like check or wire fraud, theft of property, and forgery. It typically excludes coverage for any acts committed by the owner of the business, losses because of negligence, and some professions (attorneys and those in the financial industry).

Conclusion

The biggest thing for all these different types of insurance and bonds out there is what do the specific terms of each say. There is no such thing as universal or standard policy. Each company has slightly different terms for each which can drastically change the amount of coverage. It is important to not only carefully review the terms yourself, but to likely have someone else review it as well to give you an independent opinion of it.