Denver Law Review

Volume 34 | Issue 1 Article 4

May 2021

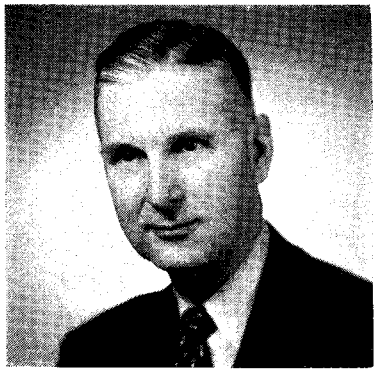
Marketable Title - What Certifiable Copies of Court Papers Should Appear of Record

Royal C. Rubright

MARKETABLE TITLE

WHAT CERTIFIABLE COPIES OF COURT PAPERS SHOULD APPEAR OF RECORD

BY ROYAL C. RUBRIGHT



Royal Rubright: Born in Denver, Colo.; graduated from Colorado University with B. A. and L. L. M.; instructor at Denver University and Colorado University on subject of Titles to Real Property; author of various articles on Real Property Law which have appeared in **Dicta** and the **Rocky Mountain Law Review**; member of Denver, Colorado and American Bar Associations; now a practicing attorney in Denver.

There is some variation in the requirements lawyers make concerning the recording of certified copies of court orders and decrees affecting real estate. Those with extensive real estate practice are in general agreement, but those who only occasionally encounter titles with court proceedings involved are often not certain as to what papers should be recorded.

While there are a few statutes which prescribe exactly what must appear of record, recording practice has largely evolved by common consent.[1] Some of the requirements have crystalized into Real Estate Title Standards, but many others are not sufficiently controversial to be included in the standards.

In discussing this subject, one guiding principal should be remembered. There is an observed, growing and sensible practice (this is intended for Denver lawyers, the lawyers in outside counties long ago adopted the practice) of relying upon the abstract and not pulling the books in the recorder's office to check the original instruments as recorded. In the light of this practice, it is increasingly imperative that the abstract of title disclose, in reasonable detail, enough of the court proceedings so that the attorney examining the abstract may approve the title without spending the extra unpaid time necessary to examine the records in the court house itself. This article will attempt to present a systematic outline of the commonly agreed documents that are necessary to be recorded.

1 For an analysis of statutes see Rubright, "Check Lists For Court Proceedings In Which Titles To Real Estate Are Involved," 23 Rocky Mtn. L. Rev. 371 (1951).

I. INHERITANCE AND ESTATE TAXES

In all cases where transfer of title is made following the death of an owner, it is necessary to record evidence of release of the Colorado inheritance tax lien.[2]

Although prior to April 26, 1943, there was no statutory requirement for recording a release of inheritance tax lien, it was well settled practice among lawyers, that if the estate was administered in one county, and the land was located in another, the receipt for inheritance tax must be recorded in the county where the land was situated. Otherwise, a fellow lawyer might suffer the expensive (because he usually cannot charge for such time) task of traveling to the county seat, for the sole purpose of finding the receipt among the court records. After 1958 this problem will no longer exist because the statute which requires the recording will then have been passed fifteen years ago.[3]

When the estate exceeds a certain size, a federal estate tax question arises. If the inventory or Colorado inheritance tax papers in the estate file indicate a gross estate of $60,000 or more, the federal statute requires that a federal estate tax return be filed. While it is true that if a wife becomes entitled to the full marital deduction, no federal estate tax will become payable unless the estate exceeds $120,000 yet the examiner of title must satisfy himself from an inspection of the federal estate tax return in any estate exceeding the $60,000 exemption whether a tax was incurred and if incurred, whether it was paid. To permit such inspection, and to keep available the evidence of nontaxability, it is almost imperative that the attorney for the estate place in the estate file in the county court a conformed copy of the federal estate tax return for inspection by future examining attorneys.

If the estate file indicates that the estate is subject to federal estate tax, and if the property is located in the county where the estate is being administered, lawyers do not require the recording of a certificate releasing the federal estate tax lien. The examining attorney inspects the court files and finds receipts showing payment of federal estate tax and also any deficiency tax which may have been paid. If the land is located outside the county where the estate is pending, the attorney requires a certificate releasing the federal estate tax lien on the particular land.

It is a frequent practice not to file a federal estate tax return until fifteen months from the date of death. The examining lawyer representing an original purchaser from the estate will normally rely upon a letter from the executor or the attorney for the estate that the federal estate tax return will be filed in proper time, will include the property under consideration, and the receipt for payment of the tax and any deficiency receipts will be placed in the estate file so that they may be inspected by examining lawyers. Since the executor is personally liable for the tax, this arrangement is realistic.

---

[2] See Real Estate Title Standards No. 14, 30 & 54, and statutes there cited.
[3] See Colo. Rev. Stat. Ann. § 138-4-36 (1953), and Real Estate Standard No. 76.

II. TITLES DERIVED THROUGH ESTATE PROCEEDINGS

(A) Sale of property from the estate of a minor or a mental incompetent, or from an intestate estate, or from a testate estate in which the will contains no power of sale.

Documents to be recorded:

(1) A good and sufficient executor's, administrator's, guardian's or conservator's deed, normally on a printed form containing a copy of the order of court confirming the sale certified by the clerk of the court.[4]

(2) Release of Colorado inheritance tax lien and in proper cases evidence of payment of federal estate tax.[5]

(3) If the sale is being made by an executor, or by an administrator with the will annexed under a will which has not conferred a power of sale, there is some difference of opinion whether or not the certified copy of the will and the order admitting it to probate should also appear of record. The better practice is that the will and the order of probate should be recorded since there is a statutory requirement[6] that other assets shall first be sold before resorting to certain classes of real estate.

(B) A mortgage or deed of trust from an estate is comparative-

4 Colo. Rev. Stat. Ann. § 152-13-26 (1953).
5 See Division 1 supra. If a guardian or conservator is selling the property, of course no Colorado inheritance or federal estate taxes are involved.
6 Colo. Rev. Stat. Ann. § 152-13-15 (1953).

ly rare, but almost the same documents should be recorded as in a sale. The mortgage or deed of trust will, however, contain a certified copy of the order of court authorizing the mortgage. There is no requirement that the mortgage be confirmed.[7]

III. PERPETUATION OF TESTIMONY

Proceedings to perpetuate testimony were often urged to establish the identity of the surviving directors of a corporation whose corporate existence had expired, when twenty years had not elapsed since the recording of the deed or other instrument reciting who the directors were.[8] Perpetuation is still used to establish marriage, divorce, birth, death, descent, or heirship, where a period of twenty years has not elapsed since the recording of some document in which those recitals are contained. In all the peceding situations, if twenty years have elapsed, the recitals are prima facie evidence without the necessity of a perpetuation of testimony.[9] In some sections of the state, lawyers apparently have adopted a custom of relying upon affidavits to furnish proof of identity and to reconcile variations in names. I have not the slightest desire to weaken that practice which has been adopted by local "ground rules" but the practice in Denver is more rigid in construing the statutes and perpetuation of testimony is the usual method. Where testimony is perpetuated, the document to be recorded is a certified copy of the testimony given in court and which contains the judge's certificate. If it is taken out of state the copy should contain the testimony and the certificate of the officer before whom the testimony was taken, the entire document being certified by the clerk of the court.[10]

IV. QUIET TITLE SUIT

It seems unnecessary to say that the only document normally recorded is a certified copy of the decree quieting title. Often a lis pendens is recorded. but so far as the examiner is concerned. the presence or absence of the lis pendens is immaterial unless liens or instruments have been recorded between date of beginning the suit and the date of the decree.

V. DETERMINATION OF INTERESTS PROCEEDING

Where more than one year has elapsed since the date of death of a decedent who died intestate, a determination of interests proceeding is quicker and cheaper than the administration of an estate.[11] The use of this method of determining heirs presupposes that all of the heirs are adults. under no disability and that a valid conveyance can be obtained from them.

---

7 Id. § 152-13-26.

8 The 1955 session laws achieve the same result by making an acknowledgment containing recitals of such fact prima facie evidence and thus avoiding perpetuation of testimony proceedings. Colo. Sess. Laws 1955 c. 235 at 722. Parenthetically, this is another good example of the fact that the legal profession voluntarily and unselfishly obtains passage of laws which make transfer of title to real estate cheaper and less expensive—and deprives lawyers of business as a result.

9 Colo. Rev. Stat. Ann. § 118-6-7 (1953); see also Real Estate Title Standard No. 19 for evidence of change of name by marriage.

10 Colo. Rules Civ. Proc. 27.

11 It is necessary to wait a year because creditors have one year from date of death to apply for administration. Colo. Rev. Stat. Ann. § 152-7-2 (1953). From the title standpoint therefore, in any such administration the real estate could be sold for the payment of debts due creditors.

Documents to be recorded:

(1) A certified copy of the Decree determining the heirs and present owners of the property, and

(2) Release of Inheritance Tax Lien if the decedent died within fifteen years from the date when the examination of title is being made.[12]

VI. PROCEEDINGS TO DETERMINE HEIRSHIP DURING THE ADMINISTRATION OF AN INTESTATE ESTATE

This proceeding is used when an estate is administered and real estate is owned by the decedent which it is not necessary to sell or mortgage during the course of administration. Upon closing administration the record title to the real estate will be vested in the decedent's heirs at law. This procedure may be regarded as the normal situation, whereas the determination of interests proceeding mentioned in the preceding section of this article is available only under somewhat unusual circumstances.

Documents to be recorded:

(1) Certified copy of a Decree of Heirship, naming decedent's heirs,[13]

(2) Certified copy of the Order of Final Settlement Discharging the Administrator, and

12 See Division I supra.

13 Prior to 1907 there was no statutory provision for a decree of heirship, but the court, in ordering distribution made a finding listing the heirs. Occasionally this situation existed after 1907 If any decree names the heirs and has remained of record longer than 9 years, it is good and title derived by conveyance from the heirs is marketable. Colo. Rev. Stat. Ann. § 118-7-11 and 12 (1953). It is also good after 20 years of record. Id. § 118-6-7.

(3) Release of Inheritance Tax Lien.[14]

VII. TITLE DERIVED BY DEVISEE UNDER A WILL

Documents to be recorded:

(1) Certified copy of the will and of the order of court admitting it to probate,

(2) Certified copy of the Order of Final Settlement and Discharge of the executor, and

(3) Release of Colorado inheritance tax lien.[15]

(a) Occasionally, title becomes vested in a trustee under a testamentary trust so that when the administration of the estate is completed, and the executor discharged, the testamentary trustee will thereafter deal with the property. In this situation the same three documents, mentioned in the preceding paragraph, are necessary, and an additional document will become necessary if the property is sold by the testamentary trustee while the testamentary trust is still in existence. The first question the examiner must determine is whether or not the testamentary trust remains under the jurisdiction of the county court. It is quite common that the testators provide in their wills that the administration of the trust estate shall not be continued by the court after the probate administration is closed, but at that time the assets should be turned over to the testamentary trustee without further control of the court. In this event the court must make a finding that it was not the intention of the testator for the court to continue the administration.[16]

(b) If the court does not make a finding, the statute says that the testamentary trustee shall have the powers and be subject to the liabilities and duties of executors and the court shall retain jurisdiction until the trust is fully executed. If this latter provision is in effect, and if the testamentary trustees convey before the trust is terminated, in addition to the three documents mentioned above, a certified copy of Letters of Testamentary Trusteeship should be recorded, and the testamentary trustee's deed, should

14 See Division I supra.
15 See Division I supra.
16 Colo. Rev. Stat. Ann. § 152-14-11 (1953).

recite specifically the power in the will which permits the testamentary trustees to sell without court order.[17]

(c) If, however, the testamentary trust has been established and remains under the control of the court, and the trust is terminated before the real estate has been conveyed, then in addition to the documents in subparagraph (b) above, a certified copy of the order of discharge of the testamentary trustee should also be recorded. This is not a common situation and such an order should be carefully tailor-made and should contain a court order specifically finding that the events have occurred which terminate the trust. If, for example, it was to terminate when a life beneficiary reached a given age, or died, the court order should specifically find that the beneficiary had attained that age, or that the beneficiary had died, giving the date. The examining lawyer may then determine from the face of the order that the trust had terminated. It is probably unnecessary, in most wills, for the trustee to actually execute a conveyance to the beneficiary, but it might be of some precautionary advantage for the trustee to execute such conveyance and record it with the other papers necessary to terminate the testamentary trusteeship. There is ample authority, however, in Colorado for the proposition that when the event has occurred which terminates the trust so that it is no longer active but becomes passive, that the Statute of Uses operates to vest title in the beneficiaries, presumably without any affirmative act of the trustees.[18]

VIII. TITLE DERIVED THROUGH COURT FORECLOSURE OF A MORTGAGE OR DEED OF TRUST

Because the Colorado Public Trustee Statute offers a speedy and economical method of foreclosure, not too many deeds of trust are foreclosed through court proceedings. In certain instances they must be. For example, when a private trustee is named instead of the public trustee,[19] or perhaps when property is in two counties and there are some procedural difficulties in having a public trustee in only one county make sale, or when there is some defect in the

17 Under the statute cited in the preceding footnote, a somewhat simplified and abbreviated statutory sale proceeding may be followed by a testomentary trustee.
18 See, e.g., O'Reilly v. Balkwill, 297 P. 2d 263 (Colo. 1956).
19 Colo. Rev. Stat. Ann. § 118-3-1 (1953).

title or in the encumbrance, court foreclosure may be resorted to, combined in some instances with a suit to quiet title against the defects. It is a well known fact that many attorneys, because their clients compete for loan business, occasionally are impelled to pass titles for loans which they would be reluctant to pass for owners. This attitude is probably valid because in prosperous times very few loans are foreclosed. If, however, the chickens come home to roost in a particular situation, and the lender is required to foreclose, the lawyer, slightly rueful over his liberality in passing the matter in the first instance, will probably decide as a matter of prudence to foreclose the deed of trust in court and quiet the title against the defect which he fears might be objected to by some prospective purchaser.

The following discussion is off on a tangent but it is justified because it is "hot news" and good news. It was formerly necessary to foreclose through court proceedings in all cases where the United States had recorded a tax lien subsequent in priority to the trust deed being foreclosed.[20]

The Federal government is to be commended on their recent tendency to eliminate red tape and to cooperate with attorneys in solving title problems resulting from such liens. In a recent Technical Information Release,[21] the District Directors of Internal Revenue were authorized to issue "Conditional Commitments to Discharge Certain Property From Federal Tax Lien." Application for such commitments is made to the Special Procedure Section of the office of District Director of Internal Revenue on a form designated: DIR:DEN:C:D:SPS:#81. & #59. Rev. 1956. If it appears that the encumbrances having priority to the United States exceed the value of the property then the Special Procedure Section will issue a "Conditional Commitment to Discharge Certain Property From Federal Tax Lien" on a form designated DIR:DEN:C:D:SPS:#80. July 1956.

Assuming the property is sold at foreclosure sale for only the amount of the delinquent loan plus interest and costs and is bid in by the mortgagee, he should have no trouble obtaining prompt release of the lien based upon the Conditional Commitment by exhibiting the public trustee's certificate of purchase showing the amount the property brought at the sale.

This new procedure should enable a lawyer to bring a public trustee foreclosure relying upon the Conditional Commitment, whenever a federal tax lien is involved. He thus can avoid the additional trouble, delay, expense and one year redemption period otherwise required under a court foreclosure process. A word of caution to any third person bidding at the foreclosure sale. Any sum in excess of the total indebtedness due under prior encumbrances would have to be paid to the United States to secure release of the federal lien. Since the very choice of the public trustee method of foreclosure is predicated upon the fact that a release will

20 28 U.S.C. § 2410 (1952) (the United States had 60 days to answer and one year from date of sale to redeem.)

21 Technical Information Release No. 10, July 11, 1956; see 1956 Std. Fed. Tax Rep. § 6578.

be forthcoming, it is important for a prospective bidder to determine whether such a federal lien exists and to make certain that any excess sum is paid to the government so that the lien will be released.

When a court foreclosure is made, the abstract will ordinarily show a lis pendens as the first document initiating the foreclosure. It will be followed by a decree of foreclosure. There are two cautions which should be observed in connection with the proceedings:

(A) A great number of loans are made by mortgage brokers who later sell them. The deed of trust names the broker company as beneficiary. If the ultimate purchasers of the loans are local institutions, they usually rely upon the well settled Colorado doctrine that the endorsement of the note carries the security. Seldom do they record an assignment of the deed of trust in the public records. In the event of foreclosure it is important, however, either that the original beneficiary of the deed of trust be joined as a party defendant or that an assignment of the deed of trust be recorded. Otherwise, the abstract shows a deed of trust, we will say, to the Lendalot Loan Company, whereas the foreclosure is brought by the Buyalot Mortgage Company. If there is no recorded connection between the two, the mere assertion of an assignment in the complaint is probably not binding upon the Lendalot Loan Company which has an interest of record but is not named as a party in the suit.

CLASSIFIED ADVERTISING

Classified Advertising 50c per line. Minimum $2.00 per ad.

HERE'S A DEAL! Take my set of CJS. Pay me something for my equity. Assume $520.00 balance in monthly payments of your choosing. Also, I will sell Corpus Juris—$50. Write A. B. Logan at P. O. Box 4, Colorado Springs, Colorado.

Send your Classified Advertising to Dicta, 16 Acoma St., Denver 23, Colo., or call RAce 2-4747.

(B) The other common difficulty in the foreclosure decree is that it refers to the indebtedness and the encumbrance "described in the complaint." Since the complaint is not of record, a foreclosure decree of this type, when recorded, is certainly not revealing to the next examiner of the title. After nine years, he would normally make no investigation of the court files, but his abstract shows an apparently unreleased deed of trust and then a dangling foreclosure decree which is not tied to the recorded deed of trust. Sometimes the lis pendens, by referring to a particular book and page of the deed of trust bridges this gap. The better practice is to be vigilant in drafting the foreclosure decree to refer specifically to the book and page of the deed of trust which is being foreclosed.

The sheriff sells the property pursuant to the foreclosure decree and issues a sheriff's certificate of purchase, after six months and any other applicable periods of redemption have elapsed, the sheriff issues the sheriff's deed.

The documents to be recorded:

(1) Lis Pendens (so far as the title is concerned, its presence or absence is not important),
(2) Certified copy of the Decree of Foreclosure,
(3) Certificate of Purchase, and
(4) Sheriff's Deed.

IX. JUDGMENT LIEN FORECLOSURE

Not too common is the title derived through foreclosure of a judgment lien. A judgment creditor obtains a judgment against an owner of property and records a transcript of it which then becomes a lien.[22] If the owner of the property does not pay the debt, the judgment creditor may then cause execution to be issued upon his judgment and the sheriff records a certificate of levy under the execution. He then proceeds to sell the property at a sheriff's sale and unless it is redeemed within the redemption period, he eventually issues a sheriff's deed. The documents which are recorded under those circumstances are:

(1) The Transcript of Judgment,
(2) Sheriff's levy,
(3) Sheriff's Certificate of Purchase, and
(4) Sheriff's Deed.

Perhaps a brief digression is appropriate here. Frequently the owner of property pays the judgment after the transcript is recorded; in which case a Certificate of Satisfaction is obtained from the clerk of the court and when recorded satsifactorily disposes of the lien created by recording the transcript.

Occasionally, however, the debtor does not pay until after the creditor has initiated specific proceedings to sell the property and has caused a Certificate of Levy to be recorded by the sheriff. Because this situation is infrequent, there seems to be some disagree-

[22] Colo. Rev. Stat. Ann. § 77-1-2 (1953).

ment about the documents necessary to be recorded, to clear the record, after the debtor has paid. I have been unable to find express statutory support for the most widely used method by which the sheriff releases the levy at the request of the plaintiff's attorney. As a matter of practice, everyone seems agreed that this is a successful method of disposing of the lien, at least if a transcript of judgment has not been recorded. Since the transcript of judgment is a lien itself, it could be released only by recording the certificate of satisfaction from the clerk of the court, mentioned above. In still more rare cases, a certificate of levy is recorded based upon an attachment, prior to judgment. If the case proceeds in normal course, the abstract will show a certified copy of the decree, the sheriff's certificate of purchase, and the sheriff's deed. If the debtor, however, pays, there is again a little disagreement about whether the marginal release of levy by the sheriff, at the request of the plaintiff's attorney, should be sufficient, or is a dismissal of the action sufficient? It would seem that either should be enough to evidence of record the termination of the suit and the fact that the property is free from any further claim under the court proceedings.

X. MECHANIC'S LIEN FORECLOSURES

These are more numerous than some of the other court proceedings we have been discussing. The abstract will disclose documents recorded as follows:

(1) Mechanic's Lien,
(2) Lis Pendens to foreclose the lien,
(3) Decree of Foreclosure of Mechanic's Lien,
(4) Sheriff's Certificate of Purchase, and
(5) Sheriff's Deed.

Quite often the proceedings terminate before foreclosure sale is reached, and there is some question about which documents should be recorded to free the title from the lien. It depends on when the owner of the property is able to make his peace and settle the litigation. If he settles it prior to entry of the decree the abstract will show a Certificate of Dismissal of the action and a release of the mechanic's lien. At any stage of the proceedings there is another alternative, provided all of the mechanic's lien

claimants are in court and represented by counsel. A stipulation signed by counsel for all the lien claimants, referring specifically to the mechanic's liens and to the lis pendens, and a court order entered pursuant to the stipulation, dismissing the action, would sufficiently evidence the fact that the entire litigation had terminated. If the decree has been entered, and if several mechanic's liens are involved, it may be cheaper to record the decree authorizing foreclosure, and to record the clerk's certificate of satisfaction which will dispose of the mechanic's liens without specific releases.

XI. RECEIVER'S SALES

Quite rarely is property conveyed by a receiver appointed for an insolvent owner of property. Usually the owner has made a voluntary conveyance of the property to the receiver and the receiver has sold it after a court order obtained in a proceeding in which all of the owners of record, and creditors holding unrecorded claims against the owner have been made parties. The examiner of titles is concerned only that those who hold recorded interests have been properly joined and have been served with notice of the proposed sale.

Documents to be recorded are:

(1) The deed to the receiver,

(2) Evidence of the appointment of receiver, either an order appointing him or recitals in the Receiver's Deed that he was so appointed,

(3) A certified copy of the court order confirming the sale by the receiver, and

(4) Receiver's Deed pursuant to court order.

XII. BANKRUPTCY

Many real estate titles become involved in bankruptcies. Normally these are incumbered by one or more mortgages. If, however, the owner has an equity in the property, title is conveyed by deed from the trustee in bankruptcy. In the usual case the owner files the petition in bankruptcy and when the trustee is appointed, the title to the real estate vests in the trustee. The appointment of the trustee is evidenced by an order approving his bond which is usually recorded. The trustee conveys by a trustee's deed. The recorded documents are:

(1) Certified copy of order approving trustee's bond,

(2) Trustee's deed pursuant to court order, and

(3) Certified copy of order of court confirming the trustee's sale.

CONCLUSION

It is hoped that the listing of the necessary documents has accurately presented the requirements made by the majority of lawyers. We all desire to require the necessary documents and not to require recording of any that can properly and safely be omitted.