Preparing your home and title for the future

CLOSING THOUGHTS

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What is home?

Home is where the heart is, says Pliny the Elder. Home is where one starts from, according to T.S. Eliot. Home is that place where, when you have to go there, they have to take you in (this one, by Robert Frost, is my favorite). And of course we hear Bing Crosby croon each year that we want to be home for Christmas, if only in our dreams.

While many of us share these sentiments about our home, we might also think of it the way a boater thinks about his or her vessel. That is, a hole into which you throw money.

Your home may ultimately be the source of payment for your long-term care costs, unless you take steps to achieve some other outcome. In the past some have looked askance, at seniors who engage in planning to avoid this outcome. But I think that perception is changing as we develop a deeper understanding of the equities that attend these issues.

For example, there are armies of professionals employed by the well-to-do to take advantage of the laws allowing one to minimize exposure to income taxes and estate taxes; few people, if any, think that is wrong. As to health care costs, many patients find that their out of pocket costs for an expensive operation are modest after Medicare coverage or supplemental insurance is applied.

However, if you suffer from an incurable condition for which custodial long term care is required, such as dementia, you'll be on the hook for a lot of money. Unless you have purchased long-term care insurance—and few people do, in part because of the cost involved—you will need to privately pay for medical expenses. These costs may reach $12,000 or more per month, and you can only seek Medicaid when you become impoverished.

It is no wonder that more and more seniors are exploring ways to pass their homes on to their children in such a way that they do not need to be liquidated to pay for the costs of long-term care. No one should think less of any person who seeks to achieve such a goal by following the laws that allow such planning.

CLOSING DOCUMENTS

Parties arriving at real estate closings are understandably anxious that no eleventh hour issues arise. In my experience, they politely listen as their lawyers shove a number of documents in front of them, and then they generally sign without any questions.

Most of the focus by the buyer and seller will be on the closing statement, the amount of the checks to be issued, and any issues that may have arisen in the pre-closing walkthrough. Other documents get less attention, but can lead to real problems if they are not given sufficient thought, preferably in advance of the closing.

One of these documents is called the "owner's affidavit." Sellers are required to sign this document so that buyers can obtain a policy of title insurance to ensure their interests (an "owner's policy"), and also pay for a policy to insure their lender's interest (a "lender's policy"). Those insurance policies protect the buyer, and their lender, from any number of possible ills.

A lender financing the purchase of a property wants to have a policy of title insurance so that it will be protected if it is ever asserted that it does not hold a first mortgage lien on the property. In that event, it can go to the title insurance company to defend its interests, and be paid for losses it may suffer.

The buyer has similar but not identical interests to the lender. First, the lender's policy will be in the amount of the loan made by the lender, which may be much less than the purchase price paid by the buyer. And the lender's interest is focused on the defense of its mortgage, and any actual losses it may suffer. While the buyer's interests may not rise to the level of the lender suffering a monetary loss, there are still areas they would prefer a title insurance company to address at its cost.

So what does the owner's affidavit say? It has become the practice in my office, and I imagine among other attorneys, to send the form of owner's affidavit to the seller in advance of the closing. We then talk to the seller about the form before the closing, to bring to light any problems that might exist so they can be dealt with ahead of time.

Among other things, the affidavit calls upon the owners to swear whether there have been any materials delivered to the property or any work done at the property within the 90 days prior to the closing. If either situation has occurred, the seller's attorney needs to take special care to be able to assure the buyer's attorney—and, by extension, the buyer's title insurance company—that there is not the potential for any materialmen's or mechanics' liens to be filed against the property after the closing.

Connecticut has a public policy to protect materialmen and laborers for the benefits they have bestowed upon a property by allowing them to place a lien on the property to secure payment for the work they have done or the materials they have delivered. The relevant statutes say that a contractor can file a lien in the land records within 90 days of completion of the work. The priority of that lien will date back to the time when the contractor commenced working on the project.

A few minutes of reflection can show that the transfer of property from one person to another, and the placing of a mortgage upon it, might occur after work was done but before the expiration of the 90-day period. If any work has been done or materials delivered within that period, steps must be taken so that the closing can proceed without delays or surprises.

The attorneys at closings will generally ask their clients two different questions when they sign documents, and the signatories should appreciate the difference between them. First is the question of whether they have signed a document as their "free act and deed." It is intended to establish that the person signing the document is acting voluntarily and not under any duress.

The second question is whether the person signing the document "swears that the statements made in the document signed are true to their knowledge and belief." So this is an affidavit and can give rise to charges of false swearing and other consequences if the signatory does not truthfully answer the questions in the document. This question is asked of those signing the owner's affidavit, for instance.

Another key document at a closing is the deed, whereby the seller conveys title to the buyer. In these "warranty deeds," the seller warrants and represents to the buyer that they own the property free and clear of any and all claims and interests, except those which may be disclosed. This document also promises that the seller will defend the title for the buyer if any party claims that the seller did not have clear title.

Sometimes sellers will give buyers "quit claim deeds," which will usually be provided by a bank if it is selling a property it foreclosed upon. In a quit claim deed, the seller is only saying that it is giving the buyer such interests as it may have in the property, without making any promises as to what that interest may be.

There is another kind of deed signed at closings which is called a "mortgage deed." The buyer will give this document to the party lending it money. This is perhaps the most interesting document, as it has the buyer convey the property's legal title to the lender and retain what is called equitable title and the right to possession.

When the lender brings a mortgage foreclosure action, it is foreclosing out the owner's "equitable right of redemption." Once that right is extinguished—that is, once the owner's equitable title in the property is foreclosed out—the lender has both the legal and the equitable title to the property and can seek possession.

Jim Young is a partner in Andrews & Young P.C., which has offices in Waterford and Groton, and has been serving the southeastern Connecticut area since 1987. The statements made in this particular column are not intended to be taken as legal advice for any particular fact situation. Consult with an attorney.