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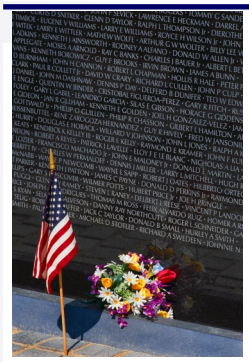
Monroe McDonough Goldschmidt & Molla
Attorneys at Law

MONROE McDONOUGH GOLDSCHMIDT & MOLLA

SOUTHERN ARIZONA'S REAL ESTATE LAW FIRM

Welcome to the MMGM Newsletter



Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe to assure the survival and the success of liberty.

-John F. Kennedy

Have a safe and happy Memorial Day.

MMGM WELCOMES CERTIFIED LEGAL ASSISTANT PATRICIA CABILONDO
By Sally Myers, Office Administrator

Patricia Gabilondo has joined MMGM as the firm's newest legal assistant/ paralegal working with Carolyn B. Goldschmidt and Michael S. Shupe in the HOA division.

Patty came to us from the Tucson firm of Gibson, Nakamura & Green, PLLC where she spent eleven years of her career working in bankruptcy matters, including an extensive background in litigation. She obtained her Associates Degree of Applied Science from Pima Community College's Board Certified Legal Assistant Program where she excelled as an honors graduate.

Patty is a very warm and friendly addition to our firm and we look forward to her continuing her legal career with us.

When away from the office, Patty enjoys spending time with her 3-year old grandson and likes working in her yard, keeping her garden growing year 'round. She is looking forward to July, when her family will welcome a new granddaughter.

Welcome, Patty, to MMGM!

Monroe McDonough Goldschmidt & Molla

Tucson Association of REALTORS®

National Association of REALTORS®

Tucson Women's Council of REALTORS®

Green Valley Association of REALTORS®

Southeast Arizona Association of REALTORS®

Santa Cruz County Board of REALTORS®

TERMINATING A JOINT TENANCY

By Michael J. Monroe, Esq.

Joint tenancy with right of survivorship ("joint tenancy" or "JTWROS") is just one of numerous ways multiple persons can hold title to real property. Different forms of holding title among multiple owners have differing legal ramifications, especially upon the death of one or more of the co-owners. Arizona adopted a new form of title called community property with right of survivorship. The latter acts the same as a basic joint tenancy except that it can exist only between a husband and wife in Arizona. The latter was authorized by the Arizona legislature to permit the benefits of community property to coexist with the benefits of joint tenancy title.

Joint tenancy is often referred to as the 'poor man's will'. The reason for that characterization is because when two or more people hold title as joint tenants the title held by the deceased joint tenant will automatically pass to the surviving joint tenant(s) without the necessity of a probate. Thus the costs and delays of probate are avoided. For instance, if a husband and wife own their house as joint tenancy, when the first spouse dies the title automatically vests in the surviving spouse. It is important to understand that a person's written will has no effect on how property titled in joint tenancy will "pass" upon the death of a joint tenant. Joint tenancy operates separate and apart from one's Will.

Here's the catch. In the example just above where husband and wife ("H&W") own their house in joint tenancy and the first spouse dies, the title does, in fact, vest in the surviving spouse. But, on the public record the only document that shows up is the original deed conveying the title to H&W as joint tenants. So what happens when the surviving spouse want to liquidate his or her interest in the house? The title company will search the public record and will want the other (the deceased) spouse to sign off on the paperwork selling the property. The surviving spouse will indicate that his or her spouse is deceased. But, what proof is there to evidence that fact on the public record? The answer, at that point, is there isn't any. So, how can the title company insure that the "surviving spouse" is in fact the surviving spouse?

The answer to that question requires that upon the death of a joint tenant a document be prepared called an Affidavit Evidencing Termination of Joint Tenancy. It is a rather simple document indicating who the joint tenants were and that one of the joint tenants has died. A certified copy of the death certificate is attached to the Affidavit. That Affidavit, together with the death certificate is recorded with the county recorder's office. Now the public record is cleaned up. The title now shows the surviving joint tenant(s) as the sole or remaining owner of the property. It's quick and easy; no probate is required.

Joint tenancy may also be terminated by a joint tenant conveying his or her interest to himself or herself or a third person in some other form of title. For instance, if a brother and sister hold title to a rental property as joint tenants one of them may secretly convey her interest to her children. That conveyance breaks the joint tenancy. Or, the one joint tenant may secretly convey his interest to himself as a tenant in common. That too breaks the joint tenancy. Upon death the property will now go according to the written Will of the former joint tenants, if they have a Will. If they don't have a Will, then it will go according to what the law mandates for distribution of one's estate.

There are many advantages to using joint tenancy. But there are also many disadvantages using a joint tenancy title which will be the subject of another article. Before jumping to the conclusion that joint tenancy is the quick and easy panacea, one should absolutely understand the pros and cons of placing a title in joint tenancy or community property with right of survivorship.

FAILURE TO DISCLOSE THE EXISTENCE OF A SEX OFFENDER: CAN YOU BE HELD LIABLE? *By D. Rob Burris, Esq.*

A recent Arizona case shed new light on a sensitive issue – whether or not a seller and a broker can be held liable for failing to disclose to a buyer that a sex offender lived in the vicinity.

In *Lerner v. DMB Realty, LLC, et al,* 294 P.3d 135 (2012), the Arizona Court of Appeals found that a seller can be held liable for fraudulently misrepresenting the reason for selling the home. In addition, the Appellate Court found that a broker who represented both the seller and the buyer can also be held liable for failing to disclose the existence of a sex offender unless the clients specifically agree otherwise.

The sellers in *Lerner* sold their home because their neighbor was a convicted sex offender. When asked why they were moving, the sellers informed the buyers that they wanted to move closer to friends. The sellers made no mention of the sex offender living next door even though the sellers knew the buyers had small children. The real estate broker who represented both the buyers and the sellers was also aware of the existence of the sex offender. Nevertheless, the broker did not disclose this fact to the buyers.

Arizona Revised Statute § 32-2156(A)(3) relieves a seller from any requirement to disclose the existence of a sex offender in the vicinity of the subject property. In addition, most Residential Seller's Property Disclosure Statements contain language notifying the buyer that the seller is not legally obligated to disclose the existence of a sex offender in the area. As such, there is no affirmative duty on the part of the seller to inform a buyer that a sex offender lives next door. However, if asked specifically, a seller must be honest and must inform the buyer of the existence of a sex offender in the vicinity. Likewise, a seller is not permitted to misrepresent such information to the buyer.

In *Lerner*, the Appellate Court found that the sellers had no affirmative duty to inform the buyers that a sex offender lived next door even though the sellers likely knew this information would have been material to the buyers. However, the Appellate Court found that the sellers' representation that they were moving to be "closer to friends" rather than the truth, because a sex offender lived next door, could be considered fraudulent and therefore the sellers were not afforded the protection of A.R.S. §32-2156(A)(3).

The Appellate Court also confirmed that the real estate broker owes fiduciary duties to his/her clients and thus is held to the highest ethical standards of fairness and honesty. As such, a broker is required to disclose material facts or information he/she has reason to know that his/her client would wish to know. The broker's fiduciary duties are not diminished by the fact that the broker may represent both the buyer and seller. However, a broker may legally contract with his/her clients to reduce the scope of his/her fiduciary duties so long as the client knowingly and willingly consents to such.

In *Lerner*, the Appellate Court determined that the real estate broker owed a fiduciary duty to the buyers to disclose material facts. The real estate broker knew that the sellers' neighbor was a sex offender and also that the buyers had small children; therefore, the real estate broker knew or should have known that such information would have been material to the buyers. Thus, on its face, the broker was required to disclose this information to the buyers.

However, the broker had the buyers and sellers sign a dual representation agreement. The representation agreement contained a clause which stated that the parties understood and agreed that pursuant to A.R.S. §32-2156, the broker was not obligated to disclose to either party that the subject property was located in the vicinity of a sex offender. The Appellate Court determined that because both parties willingly and knowingly signed the representation agreement, the broker was relieved of any legal obligation to notify the buyers of the existence of a sex offender.

The *Lerner* case contains lessons to be learned on all sides of any residential real estate transaction. Sellers must be mindful that while they may not be legally obligated to disclose certain information, they are not permitted to misrepresent material facts. Buyers must not forget that they have affirmative duties to investigate on their own all facts surrounding a pending purchase which are material to them. And, agents must ensure that they uphold their ethical and legal duties unless their clients expressly, knowingly and willingly agree otherwise.

ELECTRONIC COMMUNICATIONS (E-MAILS) AMONG HOA BOARD MEMBERS *By Carolyn B. Goldschmidt, Esq.*

There is no disputing that e-mail is a convenient and easy means of communication. Many homeowners association board members email each other between meetings, to share information and to discuss Association business or governance issues. E-mail should be used only to disseminate information and not to discuss Association business or issues. This is because e-mails are generally discoverable in lawsuits and because e-mail deliberation or discussion on Association matters defeats the intent of Arizona's opening meeting law.

Litigation: After a lawsuit is filed, each party is entitled to "discover" evidence held by the other side. This typically involves the production by each party of copies of records and other documents. In the case of a homeowners association, the pertinent records would include, among other things, correspondence to and from the board and between board members; financial records; board and owner meeting minutes; enforcement records; reserve studies; and delinquent account information. In today's world, most of these records are in the form of emails, texts, databases and other electronically stored information ("ESI").

It has become common practice in a lawsuit for the lawyers to focus on ESI and to diligently seek it out both prior to and after the filing of a lawsuit. Once an association's board becomes aware that the Association has been or is likely to become involved in litigation, it has a legal obligation to preserve all evidence, including ESI.

A party's attorney has the right to a forensic study of the hard drives of potential witnesses. This means that home computers, work computers or personal email accounts are all subject to discovery. This will invariably provide access to information, either personal or otherwise, that a board member assumed was private or confidential but is now being subject to the scrutiny of lawyers and courts. A computer technician can duplicate all information on individual computers and computer systems, including attempts to delete or change information. As a result, board members should avoid using personal email accounts to conduct Association business and should limit the content and subject matter of email communications. (Ask yourself if you would feel comfortable having a particular email read to a judge or a jury.) It is a good idea to establish a separate e-mail address and mailbox for association business if you are a board or committee member. This is especially true if you share an e-mail address with your spouse. Association information that you receive should be kept confidential.

It is important to remember that no matter how many times you press the "delete" button on your computer, nothing ever really goes away and it may be able to be retrieved by sophisticated software and a persistent lawyer.

Open Meeting Law: An e-mail discussion is not a meeting. However, deliberations via email defeat the intention behind the open meeting law. This law was first included in the Arizona Planned Communities Act in 1994 to assure transparency in the operations of the association, and to give members the opportunity to hear the deliberations of the board members. If board members discuss association business issues via email, by the time they get to the board table, their minds are often made up and the deliberations are abbreviated. The less transparency in board operations, the more your members are given a basis to believe that you are hiding something. Thus, e-mails should be used to distribute information to prepare board members for meetings and not to decide or deliberate issues. The only time e-mail should be used to accomplish board business is when action is being taken without a meeting. According to the Arizona Non-Profit Corporations Act and most associations' bylaws, a board of directors can take action without a meeting if the board unanimously agrees in writing to the action. Approval by email is written approval of the action.

TITLE INSURANCE COULD HAVE SAVED THE DAY!

By Karl MacOmber, Esq.

In *Kaz Construction, Inc. v. Newport Equity Partners*, Division Two of the Arizona Court of Appeals ruled in favor of a construction company at the expense of a secured lender. Steve Vanderholm conveyed title to 56 lots in a subdivision in Cochise County to a trust he created at Title Security Agency. Vanderholm then borrowed $2 million from the Strobachs to finance the development of the subdivision, giving the Strobachs a deed of trust against the lots. Vanderholm then hired Kaz Construction to do the work.

After not being paid, Kaz served a preliminary lien notice on Vanderholm, but not Strobach, because Vanderholm had signed the deed of trust, not TSA, the Trustee. In the subsequent lawsuit to foreclose his lien, the trial court ruled that the Strobach deed of trust was invalid because it had not been signed by the TSA Trustee. Although under ordinary Trust principals, a beneficiary, (such as Vanderholm) retains sufficient interest in a Trust to be able to encumber Trust property, the trial court ruled that the language of this Trust precluded that. The Court of Appeals agreed and noted that there was nothing in the record indicating that the Strobachs had obtained a lender's policy of title insurance which would have put them on notice to obtain the Trustee's signature.

The moral of the story is to obtain title insurance whenever an interest in real property is being conveyed or encumbered and read the documents that are being used. Not every Trust or deed of trust has the same language.

MARK YOUR CALENDAR—Tucson May Events

1-31—Natural Seductions

1-31—Arizona Smith & the Relic of Doom

17,24,31—Reptile Rumble

18—2nd Annual Motorcycle Poker Run

18—The Centurions Ball

18-27—Arizona Restaurant Week

18—The British Invasion

18-19—Willcox Wine Country Festival

24—Sullivan's Gatsby Gala

24—DEVO at the Rialto

24-31—Padres Baseball

24-27—Spacefest V

24-31—Summer Safari Nights

25-27—Wyatt Earp Days

25-31—SkyNights at Mount Lemmon

25—All Breed Horse Competition

26—Hero's Salute Memorial Day Concert

25—Gabriel Ayala

27—MusicPalooza Children's Museum

28—El Con Jazz Club Series

ARIZONA FASCINATING FACTS

Petrified wood is the official state fossil. The Petrified Forest in northern Arizona contains America's largest deposits of petrified wood.

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EXPERIENCE THE DIFFERENCE

MMGM is a real estate and business law firm. The attorneys and staff at Monroe McDonough Goldschmidt & Molla believe that each client must experience the difference that genuine care and concern can make. We strive to achieve the client's objectives while delivering unwavering personal service in an honest, aggressive and comprehensive manner. We refer to this as our Clients for Life program. MMGM provides outstanding counsel and unparalleled representation in the following areas of the law:

Real Estate Law - Personal Injury
Appeals - Arbitration and Mediation Services
Business Law and Entity Formation
Civil and Commercial Litigation - Construction Defect
Contracts - Estate Planning—Probate Law
Homeowner Association (HOA) Law
Motor Vehicle Warranty Defense
Product Liability - Transactional Law

HONEST AGGRESSIVE PROFESSIONAL