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Monroe McDonough Goldschmidt & Molla
Attorneys at Law

SOUTHERN ARIZONA'S REAL ESTATE LAW FIRM

MONROE McDONOUGH GOLDSCHMIDT & MOLLA

Welcome to the MMGM Newsletter

This Holiday Season, clothe yourselves with tenderhearted mercy, kindness, humility, gentleness, and patience.

P.E.A.C.E. Award

Our very own Carolyn Goldschmidt was awarded the inaugural P.E.A.C.E. Award presented by the Southern Arizona Chapter of the Community Associations Institute at the Nov. 7, 2012 annual membership meeting. P.E.A.C.E. stands for Promoting Education and Community Excellence and the award is the Chapter's effort to recognize those who go above and beyond to improve community association living in Southern Arizona. Carolyn won the Business Partner P.E.A.C.E. Award and has been an active member of the Chapter since 1995. She currently leads the Southern Arizona Chapter's delegation to the Arizona Legislative Action Committee (LAC), which monitors and contributes to state legislation that affects community associations in Arizona.

Another CAI honor for MMGM's HOA Division went to Mike Shupe as he was elected to a three-year term on the Chapter's Board of Directors.

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®

WHAT IS YOUR PLAN? *By Michael J. Monroe, Esq.*

Estate planning is a subject that most people are very satisfied putting at the bottom of their lifetime "To Do List". It reminds me of an old Irish superstition rooted in reality. The Irish have been notorious for postponing estate planning because the fear is that once you prepare a will – you die! There was a strong hint of reality to that since the Irish put off doing their will until they were on their death bed. Guess what – they did their will and sure enough, they died shortly thereafter. Perhaps there is a wee bit too much 'Guinness' mixed in to that tale. But for sure, waiting until you are on your death-bed is not the ideal way to do your estate planning!

Having done a lot of real estate law over the years it is surprising how often we are called upon to rescue transactions that are caught up on situations that are a problem due to a lack of estate planning. We receive panic calls from real estate agents with clients who have a transaction ready to close escrow when it is discovered by the title company that someone did not do something in terms of estate planning that will now cause the transaction to be hung up due to a lack of foresight by the owner/seller.

A common situation is where a person has a will, a general power of attorney, a living will and a medical power of attorney so they feel they are ready for any eventuality. The person, for some reason is no longer able to act on his/her own behalf – often due to a terminal condition – perhaps he/she is in hospice. The person named as the general power of attorney is trying to complete a real estate transaction already in progress. The title companies in Tucson normally will not recognize a general power of attorney to close a real estate transaction. The title company usually will insist upon having a special or limited power of attorney which is specific to the real estate transaction in progress. That's a problem since there is not such a limited power of attorney and the person who needs to provide it is not mentally or physically able to do so!

Many times there is a situation where a husband and wife owned a property. One of the spouses dies and there is no probate. The surviving spouse claims to be the owner of the property and lists the property for sale. At time for closing it is discovered there is need for a probate. This can be accommodated and most probates can be dispatched with rather quickly resulting in only a short delay (a week or two) in the closing. Other times, it may delay a closing for months.

In certain cultures properties are just "handed down" generation to generation without doing any checking on the title and without any probate. It is believed that since mom and dad, who owned the property, are now deceased, the kids now have a right (and title) to the property. This can go on for several generations until someone decides they want to list or sell the property. Then it may take several probates to clear up the title.

The moral here is to have an up to date estate plan which meets your unique needs. For a given family situation a simple will may be inadequate to deal with the particular situation presented. There may be a special needs child who should have some unique planning. There may be a child with an addiction which presents some difficult and careful planning. There may be that one child that is wayward and will cause issues for the other children. There can be a myriad of facts which require careful consideration.

Even if you did all the correct planning a number of years ago you ought to consider a review of your plan to see if it is still timely. People's situations change rather substantially, more than we think, over a span of five to seven years. It is good to take out your estate planning documents and see if they fit your current needs. More often than not after five to seven years most people need to tweak their estate planning documents to fit their current reality.

We are beginning to see that boomers are facing some harsh realities with their children. Their children have not turned out exactly the way parents planned or one or more or their children have extraordinary needs due to the economy or health or other considerations. Sometimes the "poor man's will" of putting property in joint tenancy with the "kids" may not prove to be a wise decision. Sometimes the children no longer get along. We often see children inheriting property and they don't and won't speak to one another. Unfortunately, we find that in such situations the problem is so severe it takes a lawsuit to untangle the title to get the property sold and proceeds divided appropriately.

Right now we are experiencing a situation where a surviving parent placed a property in joint tenancy with a child as an estate planning tool – when the father would die it would automatically go to the daughter without a probate. Sounds like a good plan on the surface. But the father knew there were issues with the daughter. Now, the client, in his eighties, needs to sell the rental property to pay for medical bills. Unfortunately, the child, who technically is on the title due to the joint tenancy, won't agree to convey the property back to her father and won't agree to have the property sold. It is a harsh and sad reality for the father. A trust could have dealt with this situation much more effectively.

Where do you sit in relation to your "plan"? Are you satisfied you have done the best you can or should you give it some more thought? The first step is to have a plan. Then you need to see if your legal documents will carry out your plan effectively. This is especially important with your real estate. Attorneys are great at "what ifs": coming up with various "what if this happens and did you consider the consequence if that happens" situations that you may not have considered. Give it some thought – soon! Call us if you want some assistance in figuring out what is the best estate plan given your unique situation.

BUYER BE WARY. *By Carolyn Goldschmidt, Esq.*

The typical home buyer is very focused on the details of the particular home, townhome or condominium he or she is buying. Since most prospective homes are in a common interest development — an HOA —a whole new layer of considerations is added to pre-purchase investigation. It is important for the buyer to be guided to review the governing documents, finances and culture of the community before the inspection period expires.

Governing Documents. All buyers should review the Declaration of Covenants, Conditions and Restrictions ("CC&Rs") and Rules of the community with a particular eye toward the use restrictions that might preclude an important facet of the buyer's expected lifestyle. One family bought a large house with the intention of operating a day care center in the house as their means of livelihood. The CC&Rs clearly prohibited business uses of homes in the community, which the Board enforced as soon as signs of business operations occurred, and the house went back on the market, causing an unnecessary financial loss to the family. Other areas of interest are restrictions on pets, parking, RVs, boats and other recreational equipment, age restrictions, and yard sales.

Architectural Control. Most CC&Rs have a provision requiring any exterior modification to be approved by the Association before construction or installation. If a buyer intends to build an addition or undertake other remodeling that is apparent from the exterior, it is prudent to assure that the Association would be inclined to approve the project if the plans and specifications are acceptable. There may be setback restrictions or other CC&Rs provisions that would preclude the new owners from their desired modification.

Finances. Arizona's Condominium Act and Planned Communities Act require an Association in a community of 50 or more units, to provide specified information to a prospective buyer upon request. Unfortunately, most buyers obtain this disclosure very late in the escrow process — almost always too late to adequately assess them. Therefore, it is important for buyers or their agents to assure that the information is requested and received during the due diligence period. The disclosure available to the buyer includes the current operating budget of the association, the most recent annual financial report of the association, and a copy of the most recent reserve study of the association, if any. If there are substantial assets that the Association owns and/or maintains (like roads, tennis court, swimming pool, clubhouse, building exteriors), then it is important that adequate reserves have been funded. Otherwise, the new owner may be surprised with a sizable special assessment soon after purchase. The budget will show whether there are any problem areas in the Association. For example, a condominium with failing roofs or construction deficiencies will have line items for maintenance and repair that are far higher than typical.

Maintenance. The CC&Rs generally elucidate the Owner's maintenance responsibility. With a condominium or townhouse, the Association often is responsible for exterior maintenance, which is the basis for higher assessments than communities with single family homes. In any event, the buyer should be clear on what amenities and services are covered by the assessments that the Association levies and collects.

Culture of the Community. I always recommend that a buyer reviews at least one year's worth of Board meeting minutes and newsletters and determines whether the Association is involved in any litigation. An HOA does not need to provide these documents to a prospective buyer; however, an Association member (i.e., the seller) has the right to review and request copies of all Association records that are not privileged. Therefore, the purchase contract should include as a condition the production of minutes and newsletters. It also is a good idea to determine whether the Association sponsors any social events for its members. An Association Board that is committed to community building is demonstrating positive leadership values and a commitment to fostering good community relationships.

These documents will alert you to special unit or building issues, such as restrictions on short-term rentals or pets, insurance issues, building construction quality and all the rules you'll need to live by.

Demand statement. This will tell you whether there are any unpaid HOA fees, unit violations that may need to be resolved, etc.

Reserve study. This will tell you how much money is saved for paying for long-term repairs. Your HOA fees cover operating expenses and savings for roofs, streets, painting, etc. The reserve study tells you how much the community should have saved for those capital repairs and replacements and how much is actually saved. Usually, less is saved than what the reserve expert says should be, so when the bill comes due, all the HOA unit owners may split the costs in a special assessment.

Financial statements and budgets. This will show you whether the HOA is collecting enough money to pay its bills and whether it is putting away money for reserves.

Insurance master policy binder. This will tell you what the HOA insurance covers. You should take this to your insurance agent to see what is not covered, so you can get the proper coverage for yourself. By the way, always have an HO-6 interior unit policy in place, whether a personal residence or rental property. Discuss this with your agent.

Use the Internet. A few Internet searches might alert you to financial and other issues you need to know. Type the address and community name into a search engine and see what you find.

Related:

3 Types of Costs on Good Faith Estimates

The Ins and Outs of Homeowner's Insurance

Should You Review Title Report Before Purchasing?

IMPORTANT NUANCES OF THE ANTI-DEFICIENCY STATUTE

By D. Rob Burris, Esq.

Just about everyone in Arizona has heard of, or is somewhat familiar with, Arizona's anti-deficiency statute. However, there are two common, and very important, misconceptions about the extent of the anti-deficiency protections afforded to borrowers.

Many people believe that the anti-deficiency statute applies to vacant land or single-family residences that are intended to be strictly investment properties. Yet, this is not always the case.

The pertinent part of Arizona's anti-deficiency law, A.R.S. s 33-814(G), provides:

If trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or a single two-family dwelling is sold pursuant to a the trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and any interest, costs and expenses.

In essence, the lender cannot pursue a borrower for a deficiency on a purchase money mortgage for a property consisting of 2.5 acres or less and which is utilized for single-family residence.

A common misconception is that the exemption includes vacant land as long as its 2.5 acres or less. Raw land is not covered by the anti-deficiency statute. A recent Appellate Court case, *M&I Marshall & Ilsley Bank, v. Mueller*, 228 Ariz. 478, 268 P.3d 1135 (2011), made clear that the borrower must actually break ground before the borrower will be afforded anti-deficiency protections. So, while vacant land alone is not covered, if the borrower begins construction of a single-family residence, the anti-deficiency statute will apply. It does not matter that the residence has not been completed and/or occupied so long as the borrower intends to occupy the residence upon its completion.

Another misconception is that the deficiency statute applies to commercial ventures. In *Mid Kansas Federal Savings and Loan Association of Wichita v. Dynamic Development Corporation*, 804 P.2d 1310, 167 Ariz. 122 (1991), the Arizona Supreme Court ruled that residential properties held strictly for resale do not fall within the anti-deficiency statute. The Court focused on the language of the statute which requires that the property be "limited to" and "utilized for" a single-family dwelling. Thus, borrowers must actually *intend* to occupy the property as a single-family residence. Properties that are unfinished or have never been lived in, and which are being held solely for resale to its first occupant by an owner who has no intent to ever occupy the property, are not covered by the anti-deficiency statute. Thus, whether the borrower is a homeowner, developer or speculator, it makes no difference. The key is that the borrower must actually *intend* to occupy the home as a single-family residence.

RED LIGHT, GREEN LIGHT OF CONTRACT LAW: "Get it in Writing"

By Karl MacOmber, Esq.

In the case of Rudinsky v. Green Light Realty, the Arizona Court of Appeals has upheld the dismissal of a lawsuit by a real estate saleswoman who sued Green Light Realty for breach of an alleged oral agreement to pay her commissions. Rudinsky testified that she was entitled to commissions on all sales to buyers whom she introduced to Green Lights' developer/customers. Rudinsky alleged that this agreement included not only 'first generation' buyers, but also second or third generation buyers, those buyers referred by her original buyers. The Court of Appeals agreed that because this agreement was not in writing it was not enforceable. Of the types of contracts that must be in writing under Arizona's Statute of Frauds, this alleged oral agreement violated the provision that oral contracts which cannot be completed within one year must be in writing to be enforceable. Because this contract, according to Rudinsky, would go on indefinitely into the future, so long as she was able to trace the 'genealogy' of the buyers back to her, it was not a contract that could be performed within one year and because it was not in writing, her claim was dismissed.

Private Sector Employers Beware: Employment Law Changing Dramatically with the Empowerment of the NLRB. By Heidi Rib Brent, Esq.

For decades in Arizona it has been the best legal advice and practice to declare in employment handbooks and hiring letters that employment is ***at-will*** (employment terminable without cause) and that no representative of the company had the authority to change that at-will status. Now, the national Labor Relations Board ("NLRB"), in the spirit of protecting and furthering collective bargaining, has stated that such a policy violates the National Labor Relations Act ("NLRA"), inhibiting collective bargaining to improve the employees' status. This applies even in Arizona and in regard to employers who have never had a history of union activity. To prevent such a violation and, therefore, invalidation of the at-will clause, at-will policies should now include language that the at-will status can only be altered if signed in writing by the appropriate corporate or company officers or directors.

While you are re-visiting employment policies, in the last year the NLRB issued a flurry of decisions regarding social media policies. Employees cannot be prohibited from concerted activity to improve their situation in the workplace. They can, however, be prevented from unilaterally disparaging the employer or co-workers. So employees' Facebook posts complaining about their employer to their Facebook world would not be protected, but a post directed to other employees alleging unfair treatment at work is protected. In a recent court decision, where the employer had a number of policies in place that prohibited harassment and disparagement of co-workers, an employee was denied unemployment benefits, having been appropriately terminated for Twitter comments disparaging co-workers, including that his work environment was "toxic," his co-workers were "morons," and his administrative assistant was "dysfunctional," "psychotic," and "schizophrenic." These recent decisions make social media policies all the more important. Properly stated, social media policies can support employer's decisions to take employment action, while the absence of policies or improperly crafted policies can be invalidated and subject employers to violations of the NLRA.

We are happy to assist you with a review and update of your employment handbooks!

MARK YOUR CALENDAR—Tucson December Events

7-8—Arizona Wildcats Hockey

7-9—4th Avenue Winter Street Fair

7-9—Luminaria Lights at Tucson Botanical Gardens

8-9—Tucson Marathon

8-9—Christmas Lessons & Carols by Candlelight

1-16—Marie Antoinette: The Color of Flesh

1-23—Zoo Lights at Reid Park Zoo

1-31—Gaslight Theatre: Scrooge

13—Meteor Mania at Kitt Peak

15-29—Winterhaven Festival of Lights

15-16—A Southwest Nutcracker

15—Tucson Boys Chorus Holiday Concert

16—Celtic Woman: A Christmas Celebration

27–31—USTA Junior Nat'l Winter Tennis Championships

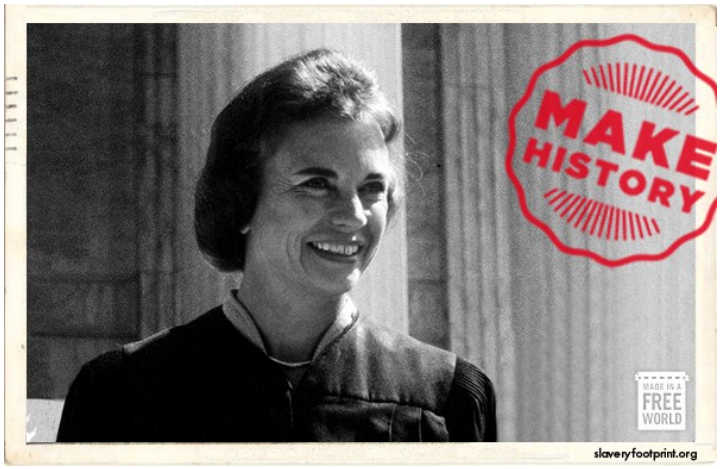
31—New Year's Eve Arizona Inn Moveable Musical Feast

31—Tucson Jazz Society New Year's Eve Gala

HAVE A SAFE AND ENJOYABLE HOLIDAY SEASON AND MAY THE NEW YEAR BRING MUCH JOY AND HAPPINESS TO YOU AND YOUR FAMILY

ARIZONA FASCINATING FACTS

Sandra Day O'Connor, the first woman appointed to the U.S. Supreme Court, grew up on a large family ranch near Duncan, Arizona.



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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

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