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The Quill – August 2020



CORRECTIVE INSTRUMENTS

This month I wanted to focus on the different options available to “correct” errors in Deeds. I will be focusing on three options: (1) The Scrivener’s Affidavit pursuant to NCGS § 47-36.1, (2) the new Curative Affidavit for Legal Descriptions pursuant to NCGS § 47-36.2, and (3) Correction Deeds.

Scrivener’s Affidavit:

NCGS § 47-36.1 allows practitioners to provide notice of errors in recorded instruments. On its face, the statute applies to “non-material typographical or other minor errors.” The statute applies to deeds and other recorded instruments. The important thing to remember about this statute is that it is intended to be a Notice Statute. So, notwithstanding that the statute refers to the notice as a “Corrective Notice Affidavit”, it doesn’t “correct” anything. Rather, the intent is to put the public

on notice of something that they may have already discerned with a scrutinizing eye, i.e. that there was a typographical error in the instrument. A minor or typographical error is one that would not affect the respective rights of any party to the instrument. The way that I analyze a minor or typographical error is by assessing whether the document does what it intended to do, even with the error. A Deed of Trust that lists Jayce Smith as Grantor instead of Joyce Smith is an obvious typographical error, particularly when it is recorded after a Deed that lists the Grantee as Joyce. There is not very much law interpreting this statute, but there is one case that stands for the proposition that an error involving a legal description is very likely *not a minor or typographical error*.

The statute does not require the attachment of the original instrument with the error fixed. The one exception being that if the error relates to a notary acknowledgment, the notary that executed the initial instrument containing the error should affix a proper acknowledgment within the body of the Affidavit. Interestingly, the statute does not indicate *who* can file a Corrective Affidavit. Presumably, the original Drafter should file it, but we have seen attorneys representing owners later in the chain file them, as well as Buyers, Sellers and Lenders. Since the statute is silent, presumably all of these are proper parties.

Priority is generally unaffected by the filing of an Affidavit because it is not corrective in nature. Curiously, the statute indicates that if the Affidavit intends to make a correction that is inconsistent with the original instrument, that priority is measured *by the date of the Corrective Affidavit*. Since the Affidavit does not correct anything, our advice is that an endorsement to the policy is unnecessary. In our opinion, a Corrective Affidavit is not an insurable instrument in any event.

Curative Affidavit:

In 2019, the Legislature passed NCGS § 47-36.2 which by its terms allows an attorney to file an Affidavit that is curative in nature. The Affidavit must be executed by an “Authorized Attorney” (more on this below). The Affidavit is corrective in nature, meaning that once filed, unlike the Scrivener’s Affidavit discussed above, it will have the effect of *fixing the error*.

The Affidavit under NCGS § 47-36.2 must be prepared by an “Authorized Attorney”. That term, as defined by the statute, includes a North Carolina licensed attorney that is one of the following:

- I. The Attorney who drafted the Instrument containing the error;
- II. An Attorney for one of the following parties:
 1. Grantor in a Deed (Seller);
 2. Grantee in a Deed (Buyer);
 3. Mortgagor on a Deed of Trust (Borrower);

4. Mortgagee on a Deed of Trust (Lender);
5. Trustee of a Deed of Trust;
6. Beneficiary of a Deed of Trust (or Assignee);
7. Title Attorney (for either an Agent or a Carrier) insuring the transaction;
8. Title Attorney (for either an Agent or a Carrier) that will insure a new transaction that relies on the filing of a Curative Affidavit;
9. Catch All (includes any party whose right may be impacted by the instrument);

The error in the instrument must be for an “obvious error” AND it must be an error in the *legal description*. The statute lists the following as obvious errors in a legal description:

1. Internal inconsistencies in the Deed indicia (for example, an inconsistency between the Parcel ID and/or the legal description and/or address and/or the Plat Reference and/or the Back Deed reference);
2. Error in the courses and distances of a metes & bounds description;
3. Wrong Lot Number or Unit Designation;
4. A missing Exhibit A;

An obvious error in the legal description does NOT include the following:

1. Missing signatures;
2. Missing or defective acknowledgments;
3. Mistakes in the type of ownership interest;
4. Mistakes in the designation of survivorship;
5. Any error in the legal description that acts as a conveyance of an interest in real property that the Grantor owned at the time but did not intend to convey;

Prior to filing a Curative Affidavit, an Authorized Attorney must first provide notice to affected parties, by sending an unsigned copy of the Proposed Curative Affidavit. The Statute lists those entitled to notice, which includes:

1. Grantor on a Deed of Trust (Borrower);
2. Beneficiary on a Deed of Trust (Lender) (but not the Trustee on the Deed of Trust);
3. An Assignee of the Deed of Trust (if the Assignment is on record);
4. Any current Record lienholder (whether the encumbrance is a mortgage, Deed of Trust, UCC or Assignment of Lease)
5. The current record owner;

6. Attorney who prepared the initial Instrument that is being corrected;
7. Title Insurance Company which issued the policy for the transaction in which the error occurred;
8. Title Insurance Company which issued a policy for any subsequent transaction involving the real property affected by the error;
9. Title Insurance Company which will issue a new policy in reliance on the Curative Affidavit;
10. Owners of adjoining properties (if affected);
11. Record Holders of any mineral or timber rights (if affected);
12. Record Holders of any easement rights (if affected);
13. Catch all (any party whose rights might be affected by the filing of the Curative Affidavit)

The Authorized Attorney may file the Curative Affidavit if there are no objections made within 45 days. Notice shall be effectuated using the same rules as providing service of summons pursuant to Rule 4(j) or Rule 4(j5) of the Rules of Civil Procedure. The Statute provides an example of a suitable Curative Affidavit. While this form is not required, it's a really good idea to use the Statutory Form. The Statute does not require the attachment of the original instrument that contained the error that is being fixed.

Once the Curative Affidavit is filed, *priority relates back to the filing of the original instrument*. This is a very important aspect of the new Statute. The Statute provides for a one year statute of limitations for challenges to the legitimacy of a recorded Curative Affidavit (one year from the date of the recordation of the Curative Affidavit.) That SOL does not apply to an action for damages sustained by any party as a result of the wrongful or erroneous recordation of a Curative Affidavit.

If you find yourself in a situation where you are having to correct a legal description error using a Curative Affidavit under this statute, we recommend that you obtain an endorsement to the policy issued as part of the transaction asking that the Curative Affidavit, once recorded, be added as an insured instrument.

Correction Deed:

A Correction Deed is an instrument that is intended to correct a previously recorded Deed. It must be executed by the original Grantor. It should indicate that it is intended to be corrective in nature and to replace the instrument it purports to correct. In the case of a Correction Deed, priority is measured by the date of the Correction Instrument, not the original Instrument. Since the Correction Deed does *NOT* relate back, intervening matters may be an issue. Since a Correction Deed is corrective in nature, we recommend that you obtain an endorsement to the policy issued as part of the transaction asking that the Correction Deed, once recorded, be

added as an insured instrument. Since there is no relation back with a Correction Deed, we would ask you to update the public records before we agreed to do so.

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NOW OPEN:

ReelTime CLE is back
and it's Virtual!

Let's get HAPPY! Earn your CLE credits from the comfort of your own office this year. You can expect the same entertaining content from our friends at ReelTime and of course a giveaway or two. So, grab your coworkers and mark your calendars for Tuesday, 9/15, from 2pm-5:30pm. And instead of attending the Happy Hour we'll be bringing the party to you! The first 5 customers who register will receive a Happy Hour kit delivered to your office for the big day.

Click [HERE](#) to register!

BARRISTERS IS GOING BACK TO
SCHOOL

Check out a few of our sales team kiddos
on their first days back at school!

B&T Back-to-School

"Kendall is 10 and in 5th grade and Taylor is 12 and in 7th (and clearly doesn't care what her first day of virtual school outfit is)." -Christine Bruns



"Fischer is 4 and in preschool. Brynner is 8 and is just starting 3rd. This is the most cooperation I get out of them." -Landis Sinnett



"Hanks first day of kindergarten! He is 5. His computer set up where school lasted an hour!" -Jennifer Conrad



"Izzy heading into 5th grade pictured here with Maggie." -Sal Balsamo

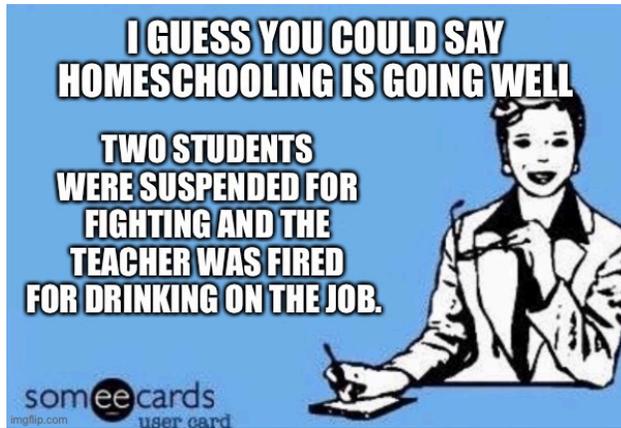
BARRISTERS TITLE ALL STAR:

DOYLE & WALLACE

The Law Firm of Doyle & Wallace is our BTS All-Star this month! Their Team that puts together and sends out the final title opinion packages is AMAZING. It's a rare occasion that we have



to follow up with them for any final documentations. Way to go D & W!



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