Button, Button, Whereâ??s the Button?

Description

The following is a story commentary about good practice. â??Button, button, whereâ??s the button,â?• the kindergarten game, is a childhood memory for me. I could not have guessed in kindergarten that I would ever recall the game as a dirt lawyer many, many years later. But, itâ??s the first question that comes to my mind in any analysis of a complete failure of title, and very often, itâ??s the question someone didnâ??t ask in the previous examination or underwriting process. There will always be examples of cases where the source of title has been ignored. After all, by convention, we continue to shoot ourselves in the foot by adopting short searches on faith that somewhere someone asked the question. Why be redundant? Itâ??s only risk! To illustrate, hereâ??s an instance thatâ??s a little off center factually, but right on point. Iâ??m relating only the most salient facts, legal issues and the outcome of the matter for the sake of economy. I filed and concluded the case in one of our circuit courts. My purpose was to resolve a claim on a loan policy for complete failure of title. Basically, for the insurer, the challenge was to find and fix or pay the policy limit. I prefer not to disclose the case caption, county, parties, or the insurer. â??Anneâ?• and â??Bobâ?• are fictitious names. However, if anyone has a similar matter, on request, I will be happy to provide a redacted copy of my motion and argument for summary judgment and the final order.

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In 2014, a reputable national reverse mortgage lender accepted an application from Anne, an elderly lady who had lived her entire life in a tiny Piedmont community. She married and survived Bob, a very fine citizen and also a life-long resident of the community. They lived happily in a little house on acreage with one boundary following the center of a clear, cold, fast running stream. The little house had been Bobâ??s lifelong home. Anne remained in the little house after Bobâ??s passing believing that she had taken title to the homeplace on Bobâ??s death. Her mortgage application was approved, and the reverse mortgage was referred to the Maryland office of a nationally based settlement enterprise for title work, closing and a loan policy.

Apparently, the search commissioned by the settlement company took the abstractor back to 1983 before anything of record turned up. There, he found a probate file with a list of heirs and first and final accounting filed by Anne as Bobâ??s sole heir at law. Whether the abstractor attempted to take Bob back any further is not clear, but he would have found nothing of record unless he checked everything indexed under Bobâ??s last name â?? which would not have been a major undertaking. In any event, he reported title to be vested in Anne on the strength of the list of heirs. Whoever then underwrote title, in a super abundance of caution, required two â??heirshipâ?• affidavits from disinterested persons attesting that Bob had no heirs other than Anne. In fact, in 1983 she did not have any other heirs at law, but the real question should have been where title was vested at Bobâ??s death â?? â??whereâ??s the button?â?• Of interest, Bobâ??s mother, likewise a lifelong resident of the community, also survived him in 1983 and lived for another 22 years. That fact may have had some effect on a later mentioned decision with respect to a sale the property versus a foreclosure.

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On the assumption that Bob was in title at his death and title had passed to Anne by course of descents as supported by the list of heirs and the two affidavits, the transaction was closed.[1] Anne executed and delivered the appropriate HECM note and deeds of trust in accordance with the commitment requirements. Her purpose was to ensure the availability of funds for her care and maintenance, which ultimately included a brief but expensive stay in a nursing facility where she passed away in 2016. She was assisted in obtaining the reverse mortgage by her niece who acted as her attorney-in-fact in closing and execution of the documents. On notice of Anneâ??s death, the reverse mortgage holder after discussion and mutual pecuniary analysis with Anneâ??s niece, determined to foreclose the HECM deed of trust. Anneâ??s niece reports that had she had considered the sale of the property and payoff of the note but had been advised by counsel that there likely would be significant problems with Bobâ??s motherâ??s descendants that could turn a sale by the estate upside down financially.[2] Ultimately, the decision was made to abandon any plan to sell and repay, and the foreclosure ensued.

The foreclosure process did not raise any title issues, and the mortgage holder bought the property in and then sold it through its REO people. Foreclosure practices differ somewhat, but Va. Code Â§ 55-59, *et seq.* does not contain any requirement that title be examined in the foreclosure process. The third-party contract purchaser, a local resident, selected a locally based settlement operation whose more imaginative abstractor thought it would be well to look for some actual evidence of title. He searched Bobâ??s last name back to 1941, where he found the deed mentioned above, coming out of Bobâ??s mom and dad conveying the little house to a friend and neighbor as trustee and setting up a trust for Bobâ??s sole benefit. Bob was then 13 years old. The language made clear that the purpose of the trust was to keep the homestead away from their son, Bobâ??s father, whose character they appear to have affectionately regarded as somewhat less than exemplary. The deed made no provision for revocation, successor trustee, distribution of the corpus or termination of the trust.

A title report ordered in conjunction with the sale and purchase was issued stating that that title was not vested in the buyer at foreclosure. The report did not suggest where title resided. The sale was abated, and a claim was filed on the loan policy. A little digging in the community confirmed that Bob had lived in the property virtually all his life believing that he was the owner of the fee and that when Bob and Anne were married, their family, friends, and neighbors all assumed they owned the little house. The land records and the records of the commissioner of accounts, revealed no activity by the trustee who died in 1954, or by any other party. It was irrefutably clear that Anne always believed that Bob was the owner of the little house and passed title to her at his death. At the time of her death, none of the remaining family knew anything about the 1941 trust, only that she and Bob had always treated the property as their home.

Two side issues worth mentioning were discussed in the claims administration process and communicated to this writer. Concern was raised that the circumstances possibly gave rise to a rule against perpetuities issue, and a quiet title action was suggested as the appropriate remedy to resolve the title issue. First, for there to be perpetuities issue, the trust instrument would have had to create a contingent or future interest with respect to the property. It did not. Legal title vested immediately in the trustee, and Bob took an immediate and present beneficial (equitable) interest by becoming the *cestui que trust*. Second, quiet title is a common law action wherein a party asserts his own title against a defendantâ??s claim or assertion of title. In this case, there is no basis on which the reverse mortgage holder could claim title. Anne was never vested in title, and her conveyance to the trustee of the HECM deed of trust consequently had no effect. Title remained in the trusteeship.[3] The remedy, then, was to find a means of moving title from the trusteeship to the reverse mortgage holder. Quiet title couldnâ??t do that. Fortunately, since 2005, there is a clear and concise set of statutory tools that specifically address the issues and the objectives here.[4] Fortunately, also, is the absence of any claim of interest on the part of Anneâ??s heirs at law, of which there were five.

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Preliminary to moving to the consideration of VUTA, I should mention that the beneficial interest under a trust is a property right or interest inheritable at common law.[5] We can therefore say with confidence that Anne inherited Bobâ??s beneficial interest under the trust even though she did not inherit legal title. From there, by deduction, we can conclude that Anne would have been entitled to the benefit of the trusteeâ??s (had there been one) execution of the HECM loan and deed of trust. Such act would have been entirely consistent with the express purposes of the trust. Reason dictates that the absence of language in the trust addressing revocation, successor trustee, distribution or termination of the trust was an oversight in drafting, and that it is likely that the grandparents intended that Bob should take fee simple title on his majority. Further, it can be reasonably inferred that Bobâ??s grandparents could not have foreseen, that their generous act of providing for their grandson would someday result in circumstances that would derail the good faith transaction entered into by their granddaughter-in-law for the purpose of easing her financial burden caused by age and failing health. There was absolutely no indication in this story that either Anne or the reverse mortgage lender was acting other than in absolute good faith. Mindful of the foregoing, it is quite likely that a court, particularly in the absence of opposition, would be sympathetic to the reverse mortgage holder. For me, the circumstances were a matter of pure good fortune â?? not typical in my experience.

As an aside, an effective and efficient way to deal with the heirs (who are necessary parties) is to make use of Va. Code Â§ 8.01-286.1, *et seq.* under which a defendant may waive service of process and all later service and notifications by executing, acknowledging, and delivering to the Court FORM CC-1406 (Supreme Court Forms)[6] and Va. Code Â§ 64.2-707(C) which recognizes waiver of notice. I

employed a detailed letter to the heirs explaining the facts and issues of the matter, including the forms and requesting that each heir execute, acknowledge and return the forms to me. For good measure, I also included a quitclaim deed for each heir which they executed and delivered. With relatively few questions, all of the heirs were friendly and cooperative. They all had some minimal knowledge of Anneâ??s age issues and the reverse mortgage. Obviously, this not always the case.

The courtâ??s subject matter jurisdiction derives from VUTA, as does its power to intervene, gain power over the trustee (or in effect over the deceased trusteeâ??s spirit) and appoint a successor trustee and provide direction to the trustee.[7] The matter was presented and argued on a motion for summary judgment, a procedure that I very much favor. When properly used, it generally saves the insurer substantial expense. The motion was thoroughly briefed with attached exhibits tabbed and indexed in a binder for the court. I had back-up testimony from Anneâ??s niece teed up and ready to go if needed. The Court was attentive and had obviously studied the brief. The judge ruled from the bench, appointing a successor trustee with direction to execute and deliver a proffered deed to the reverse mortgage holder, record the same, transfer and grantorâ??s tax having been previously paid, and to file a first and final accounting with the Commissioner of Accounts.

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There were many more interesting details in this matter; for example, the local church cemetery and local undertaker were fruitful resources and saved me an enormous amount of time in establishing identities, relationships, and dates of death. Obviously, I have been harping on a most basic premise of real property practice â?? that we should always keep our eye on the button in examining or underwriting title. The button in this case is now in its proper place after many years.

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[1] Sometimes, it is lost on underwriters that affidavits, whether lists of heirs or otherwise, are simply expressions of knowledge by the affiants, and the knowledge is not always reliable despite the formality of the oath. Good underwriting should take into consideration the particular risk and any flags that may be present by circumstance. Typically, there is no other record evidence of title, so it may not be the appropriate place to start.

[2] There appears to have been confusion with respect to Bobâ??s date of death and the effect of Va. Code Â§ 64.1-1, *Courses of Descents.* The Legislature reenacted that section in 1982 replacing surviving parents with the surviving spouse. It appears that counsel was possibly misinformed or otherwise confused as to the date of death.

[3] The land records, as indexed, subsequent to 1941 and the records of the Commissioner of Accounts reveal nothing related to the property. The 1983 probate file does not identify the property.

[4] Va. Code Â§ 64.2-700, *et seq.*, Virginiaâ??s version of the Uniform Trust Act (VUTA) expands upon and clarifies, but not to supplant the common law principles.

[5] Va. Code Â§ 64.2-701 defines â??propertyâ?• as anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein, restating the common law.

[6] Available on the website of the Supreme Court of Virginia, http://www.courts.state.va.us/courts/scv/forms.html

[7] *See* Va. Code Â§Â§ 64.2-710, 711, and 712(B).

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