

DENTAL LEGAL UPDATE

Death by Deed Restriction:

A Dearth of Due Diligence Could Derail Your Practice Sale

by Jeanine Lehman, Attorney

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**An ounce
of
prevention
is worth a
pound of
cure.**

On a lovely Texas spring day, Dr. Les Paine is savoring his upcoming dental practice and office building sale. After many years of providing exemplary care and hard work, he will finally be able to retire. A well-qualified young dentist, Dr. Mordryl, is buying his practice and building and will take good care of Les’ patients. Les and his wife are planning a biking trip in Ireland, followed by a long trip to Europe. Then, his doorbell rings and that all changes. The mail carrier has a certified letter for him.

The letter is a title objection letter from Mordryl’s attorney. The letter lists title objections to Les’ dental building real estate. First, there are deed restrictions that prohibit health care businesses. Second, another person is listed as being a co-owner of the real estate, apparently, Les’ ex-wife. The letter indicates that these matters need to be cleared up in the next 15 days. The objection letter reserves the right to raise additional objections if the updated title commitment or survey reveal more objectionable matters.

Deed Restrictions. Les’ response to the deed restrictions is that “no one told me about the deed restrictions. We used a title company when my ex-wife and I bought the building many years ago.”

Generally, real estate transactions are *Caveat Emptor*, or in English, “Buyer Beware”. It is up to the buyer to perform due diligence before purchasing real estate. Part of that due diligence is to hire a knowledgeable, experienced attorney to represent the buyer in the real estate purchase.

The title company does not have the responsibility to advise a buyer about the content of the deed restrictions. However, in the title commitment, the title company does provide a list of deed restrictions and other public documents found in the real property records, which affect the real estate being sold. The title company will also provide a copy of such documents to the buyer and seller and their respective attorneys along with the

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Speaking Requests

For **Jeanine Lehman** and her colleagues to speak to professional and business groups on legal and practice management topics, please contact Jeanine Lehman at **(512) 918-3435** or jeanine@jeanine.com



Deed Restrictions

Deed Restrictions

Website Favorites

Law Offices of
Jeanine Lehman P.C.
www.jeanine.com

Capital Area Dental Society
www.capitalareadental.org

Texas State Board of
Dental Examiners
tsbde.texas.gov

Texas Dental Association
www.tda.org

Texas Academy of
General Dentistry
www.tagd.org

American Dental
Association
www.ada.org

U.S. Dept. of Labor
www.dol.gov

Death by Deed Restriction (cont.) --

title commitment. The title commitment is the basis on which the title policy is issued.

Title policies insure title to real property for the buyer and the buyer's lender. For background – many types of insurance are prospective. For example, vehicular insurance is purchased to cover an accident that occurs in the future. By contrast, title insurance is retrospective and covers title defects that may already exist on the effective date of the policy.

Therefore, the title insurance company searches title to look for defects or other matters that the title insurance company will not cover. These items that are excluded from title insurance coverage are listed as exceptions in the schedules to the title commitment. Therefore, prior to purchase, the buyer should have the title commitment, exceptions to insurance coverage, and the documents described in the exceptions to insurance coverage carefully reviewed by his attorney, to determine if the exceptions affect the dentist's use and ownership of the property. Les decided not to hire an attorney when he bought his building. Since it was so easy to buy the building, he thought he could also sell the building and his dental practice without an attorney.

Unfortunately for Les, his property has deed restrictions that prohibit operation of a healthcare business

on the property. Now, Les is scrambling to find a knowledgeable, experienced attorney on short notice to address major title problems with very tight deadlines.

Sometimes, health care usage is prohibited along with other types of "nuisance" uses, such as bingo parlors, bars and strip clubs. Part of the reason for some such prohibitions include the impact on parking. That said, if health care usage is prohibited, in order to sell the building, the deed restrictions will need to be addressed. It is possible, but is an onerous and expensive process to obtain amendments to the deed restrictions from all the beneficiaries of the deed restrictions, which are usually the neighbors. Les needs a knowledgeable, experienced attorney to advise and assist him.

Divorce – Missing Spouse Deed.

When Les and his ex-wife divorced many years ago, the divorce decree provided that Les was to receive the dental office building and their home and his ex-wife was to receive their lake house and cash. To actually transfer such real estate and protect the recipient spouse, there needs to be a deed and the deed needs to be recorded in the county clerk's records. Sometimes, the divorce attorney prepares the deed and gives it to the client, with direction to the client to record the deed.

What often happens is that the client never records the deed.

The danger of not having a deed is that the actual ownership of the real estate is not transferred. Also, if the deed is not recorded, there is risk that liens may be placed on the dental office building or home, due to liens being filed against the dentist's former spouse. Examples are federal tax liens and judgment liens. A title issue, such as a missing deed, can hold up or crater a dental practice and building sale.

Les is now checking his divorce file and scrambling to locate his ex-wife. Again, Les needs the assistance of a knowledgeable, experienced attorney to assist him on a fast-track basis with sorting out the matter of the missing spousal deed.

If you, the reader of this article, were to have received or transferred real estate as a part of your divorce, check now that the deeds of the real estate were in proper form, signed and recorded, and that you have a copy of such recorded deeds. An experienced dental attorney, knowledgeable in real estate, can assist with this process. This due diligence should be handled now, so it does not blindside you or your heirs when in the midst of selling your dental practice or dental office real estate – or for that matter, when you are in the midst of selling your home.

Survey – Utility Easement Encroachment.

While scrambling to handle the title objection letter, Les' doorbell rings again! Lo and behold, the mail carrier has another certified letter. This one is from Mordryl's attorney with a supplement to the first title objection letter.

There is a problem with the survey. A wing of Les' dental office building is built on a utility easement.

Some years ago, when his practice expanded, Les had his brother-in-law build a wing on the building to accommodate more operatories. His brother-in-law gave him a good deal and Les paid cash for the addition. They did not have title work or a survey done. No one complained, until now.

Now, the survey issue of the encroachment on the utility easement needs to be handled. The encroachment will be an involved matter to address and (again) requires the services of a knowledgeable, experienced attorney.

There is one more major title issue to address, namely, Rights of First Refusals.

Rights of First Refusal. Real estate may be subject to rights of first refusal, including for sale or lease of the real estate. These rights of first refusal may arise in a number of circumstances, including but not limited to, being in condominium association documents, deed restrictions, or leases. A right of

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Death by Deed Restriction (cont.) --

first refusal for a sale means that when you have an offer to sell your real estate, for example, your dental office building, before you can proceed with the sale you need to give the holders of the right of first refusal the opportunity to buy on the same terms. There are also rights of first refusal to lease. For rights of first refusal, in the governing document, typically there is a process to present the offer to the holders of the rights of first refusal so that they can choose to buy (or lease), or waive their rights of first refusal.

Handling the rights of first refusal in a real estate sale is an involved process and an experienced attorney with knowledge of both real estate and dental law should assist you in navigating the process from the beginning. Coordination is necessary with the title company, the buyer, the buyer's attorney, the buyer's lender, and the condominium association for condominium properties, as well as the parties holding the rights of first refusal.

Handling the rights of first refusal to lease has great risk. If you plan to keep your dental office

real estate, sell your dental practice, and lease your dental office real estate to the purchasing dentist, great care must be taken in handling a lease right of first refusal. If one of your neighbors exercises his right of first refusal to lease and ends up leasing your dental office, it will crater your dental practice sale. An attorney experienced in real estate and dental law should be involved from the beginning.

Conclusion. Commercial real estate is complex. Having a knowledgeable, experienced attorney represent you from the start is a wise investment. As Benjamin Franklin said, "An ounce of prevention is worth a pound of cure."

Fictional Characters. Dr. Les Paine and Dr. Mordryl are fictional characters. That said, I have seen variations of all the title issues in this article during my years of practice, as well as other title issues.

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to receive future
issues.**

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newsletter with
your dentist
colleagues, office
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advisors.**

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Law Offices of Jeanine Lehman P.C. is a Texas law firm headquartered in Austin with a state-wide health law practice, including representation of Texas dentists and physicians. Our health law practice is focused on business law, transactional aspects of individual and group practices, such as practice sales/purchases/buy-ins, contracts and incorporations, office/facility leases, building sales/purchases/condos, build-to-suits and real estate law, employment agreements, financing, and consultation concerning the day-to-day legal concerns of running a health care practice. The firm is owned by Texas Attorney **Jeanine Lehman**. Jeanine has over 25 years experience as a Texas attorney. She has had one book and over 70 articles published. She speaks to professional and business groups concerning legal topics. Jeanine is blessed to have one dentist and three dental hygienists in her family. Contact us at (512) 918-3435, jeanine@jeanine.com or PO Box 202211, Austin, TX 78720, and visit our website at www.jeanine.com