

Escrow & Evidence of Title

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Chapter 13

Escrow

- Escrow acts as a neutral third party.
- Hawaii's Escrow Act of 1967:
 - Maintain a minimum net capital or obtain bonding.
 - Be a corporation.
 - Subject to annual audit.
 - Deposit money to client trust fund.
 - No rebates or referral fees.

Escrow May Be Rendered by:

- ▶ Lenders
- ▶ Trust Companies
- ▶ Insurance Companies
- ▶ Hawaii Attorneys
- ▶ Hawaii Real Estate Brokers representing a party to the escrow.

Escrow Performs Such Duties as:

- Hold trust funds and documents.
- Clerical work & calculate prorations.
- Arrange for title search and title insurance.
- Hire attorneys to prepare documents.
- Obtain necessary signatures.
- Record documents.
- Disburse funds.

Hawaii's Good Funds Act

- ▶ Escrow can not close until all checks (certified or cashiers) have cleared or;
- ▶ Until lender's funds (cash or wired transfers) are on deposit.
- ▶ Many escrow companies in Hawaii require buyer's and lender's funds 2 days prior to recording date.

Evidence of Title

- ▶ Evidence of title is found at Bureau of Conveyances in Honolulu.
- ▶ There are two departments at the Bureau:
 - ▶ Regular System = Documents are Recorded
 - ▶ Land Court = Documents are Registered
- ▶ Double System

Grantor / Grantee Index

- ▶ Books are indexed by year, in order:
 - ▶ by the grantor in the Grantor Index;
 - ▶ by the grantee in the Grantee Index.
- ▶ Type of instrument.
- ▶ Date of transaction.
- ▶ Location of property.
- ▶ Document number containing complete information.

Evidences of Title

- ▶ Abstract of Title
- ▶ Certificate of Title
- ▶ Transfer Certificate of Title
- ▶ Title Insurance

Abstract of Title

- ▶ Not used in Hawaii.
- ▶ Historical summation by licensed abstractor.
- ▶ No guarantee to the state of the title.
- ▶ Buyer should have abstract examined by an attorney.

Certificate of Title

- Documents recorded in sequential system.
- Year-document number.
- Land Court documents numbered consecutively.
- Opinion of a title insurance company.
- Based on a search of the public records.

Off Record Risks:

- ▶ Competency of the parties
- ▶ Forgeries
- ▶ Fraud
- ▶ Undisclosed heirs
- ▶ Matters not revealed by a recorded document.

Protection for these through Title Insurance

Land Court TCT – Torrens System

- ▶ How to enter property into Land Court?
- ▶ Transfer title with deed and TCT.
- ▶ Lien Letter, title search in Land Court.
- ▶ Registration is the act that transfers title in the Land Court
- ▶ Must use full names no initials.
- ▶ Deed describes land by lot, map, TCT not metes and bounds.

Advantages of Torrens System

- Once title is searched any future search covering the same period is unnecessary.
- A subsequent transfer is speedy.
- Title is superior to an abstract or title policy that merely insures title defects and does not seek to eliminate them.
- Expense of subsequent transfers is less.

Critics of Torrens System:

- Original registration is slow and difficult.
- Original registration is expensive.
- Court approval required for removal.
- Upon owner's death, a petition must be made to the court to transfer to heirs.
- Problems with indefeasible title.
- Some property may not be registered.

Title Insurance

- ▶ A policy of title insurance is a comprehensive contract of indemnity under which the title company agrees to reimburse the insured for any loss he sustains because of defects in title, except those specifically excluded.

Defects Covered:

- Those of public record plus:
- Forgery
- Undisclosed heirs
- Incompetency
- Mistaken legal interpretation of wills
- Marital status
- Misfiled documents
- Unauthorized acknowledgements
- Confusion arising from similarity of names
- Incorrectly given marital status
- Mental incompetence

ALTA Extended Coverage Policy

- ▶ American Land Title Association requires:
 - ▶ Complete search of public records
 - ▶ Competent survey
 - ▶ Physical inspection of the property
- ▶ Insurable title is marketable title.

Owner's Policy:

- ▶ Not transferable or assumable.
- ▶ Protects the buyer from defects prior to buyer's ownership.
- ▶ One time fee based on purchase price.
- ▶ Additional coverage added by endorsement.
- ▶ Coverage remains in effect indefinitely, even after sale of the property.

Lender's (Mortgagee's) Policy

- ▶ Protects lender
- ▶ Is assumable
- ▶ One time fee based on loan amount
- ▶ In Hawaii, Buyer's premium for standard coverage title insurance
 - ▶ 60% paid by Seller
 - ▶ 40% paid by Buyer

Standard Policy Doesn't Cover:

- Defects in boundaries and survey
- Encroachments
- Unrecorded easements
- Unrecorded mechanics liens
- Taxes & assessments not yet due.
- Zoning & government regulations
- Water & mining claims
- Rights of parties in possession
- Adverse possession

Deeds

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Three Ways to Transfer Title

- ▶ Will when a person dies
 - ▶ Testate (with a will)
 - ▶ Property transferred according to will
 - ▶ Intestate (no will)
 - ▶ Transferred by operation of state law to heirs
- ▶ Voluntary Alienation
 - ▶ Gift or Sale
- ▶ Involuntary Alienation
 - ▶ Adverse Possession, Condemnation, Tax Sale, Foreclosure, Escheat

Wills – Decedent Dies Testate

- ▶ Testator executes a will that becomes effective upon decedent's death.
- ▶ Testator appoints a personal representative (executor) to carry out the provisions in the will.
- ▶ Have the will prepared by an attorney.
- ▶ Holographic wills not generally valid in Hawaii.

Descent – Intestate - No Will

- ▶ Administrator is appointed by the court to perform functions of distributing the decedent's assets.
- ▶ Title reverts to the next of kin.
- ▶ If no heirs are found within 15 years the property may revert to the State.
- ▶ This is called escheat.

Uniform Probate Code

- ▶ The right of election has replaced dower and curtesy.
- ▶ The surviving spouse has an automatic right to a percentage of the estate based on the length of the marriage:
 - ▶ 15% = Marriage of 5 years
 - ▶ 30% = Marriage of 10 years;
 - ▶ 50% = Marriage of 15 years or more;

Voluntary Alienation

- ▶ The common means of transferring title to real property, from one person to another, by gift or by sale is a voluntary transfer.
- ▶ The instrument used for this purpose is a deed.

Deed

- ▶ The deed is a written legal instrument, duly signed and delivered, whereby the owner of the land (grantor) conveys to another (grantee) some right, title or interest in the real estate.
- ▶ When the property is leasehold, the conveyance instrument used in place of a deed is an Assignment of Lease.

Major Types of Deeds:

- ▶ General Warranty Deed
 - ▶ Most protection for grantee
 - ▶ Most liability for grantor
- ▶ Special Warranty Deed
 - ▶ Grantor only responsible while on title
- ▶ Quit Claim and Bargain & Sale Deed
 - ▶ Grantor transfers his interest, if any

Covenants in a Deed

- Seisin
- Against Encumbrances
- Quiet Enjoyment
- Further Assurance
- Warranty Forever

Deeds Classified by Purpose:

- Gift Deed, no enforcement of warranties
- Executor's Deed
- Administrator's Deed
- Commissioner's Deed in Foreclosure
- Commissioner's Deed in Partition
- Guardian's Deed
- Sheriff's Deed, used to satisfy a judgment
- Trustee's Deed

Elements of a Deed

- **Written instrument**
- Date
- **Grantor legal capacity**
- **Grantee identified**
- **Recital consideration**
- **Words of conveyance**
- **Legal Description**
- Habendum Clause
- Exceptions and reservations
- Warranties/Covenants
- **Grantor's signature**
- **Delivery / acceptance**
- Acknowledgement
- Recording

Conveyance Tax

- ▶ All documents transferring an interest in real property.
- ▶ Includes commercial leases of five years
- ▶ Paid by grantor within 90 days of closing

Exempt from SCT

- ▶ Property received through probate
- ▶ Gift under laws of descent
- ▶ Death of a joint owner
- ▶ Consideration is a nominal amount
- ▶ Satisfaction of an Agreement of Sale

State Conveyance Tax Rate

If Purchaser is Eligible for Homeowner Exemption

- \$.0010 if sales price is less than \$600,000.
- \$.0020 if \$600,000 to less than \$1 Million
- \$.0030 if \$1 Million but less than \$2 Million
- \$.0050 if \$2 Million but less than \$4 Million
- \$.0070 if \$4 Million but less than \$6 Million
- \$.0090 if \$6 Million but less than \$10 Million
- \$.0100 if \$10 Million or more

State Conveyance Tax Rate

If Purchaser is Not Eligible for Homeowner Exemption

- ➔ \$.0015 if sales price is less than \$600,000.
- ➔ \$.0025 if \$600,000 to less than \$1 Million
- ➔ \$.0040 if \$1 Million but less than \$2 Million
- ➔ \$.0060 if \$2 Million but less than \$4 Million
- ➔ \$.0085 if \$4 Million but less than \$6 Million
- ➔ \$.0110 if \$6 Million but less than \$10 Million
- ➔ \$.0125 if \$10 Million or more

Mortgage Recording Fee

- ▶ Currently suspended
- ▶ Hawaii Hurricane Relief Bill of 1993
- ▶ Rate is 10 cents per \$100. Mortgage
- ▶ Exemptions:
 - ▶ Cash purchases
 - ▶ Agreement of Sale
 - ▶ Purchase Money Mortgages

Review

- ▶ The Specimen Deed in the textbook;
- ▶ Conveyance Tax Certificate in textbook

Acknowledgements, Recording & Constructive Notice

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An Acknowledgement

- ▶ A formal declaration, by a person signing a document (in front of a notary public), where he acknowledges that he is genuinely the person whose signature he has just signed (I.D. Required), and that the signing was done freely and voluntarily.

Acknowledgements

- ▶ The notary attests to the signing.
- ▶ Documents in Hawaii must be acknowledged in order to be recorded.
- ▶ Recording a document gives constructive notice of its existence.
- ▶ Notaries must retain detailed records.
- ▶ A foreign acknowledgement is done at the US Consulate office.

Recording

- ▶ Recording is the process of writing or entering certain documents into the public records, thereby giving notice of their existence.
- ▶ It protects unknowing purchasers against unrecorded instruments.
- ▶ It assumes all that deal with real estate do so with full knowledge of recorded instruments

Documents to be Recorded:

- ▶ Deeds
- ▶ Mortgages
- ▶ Assignment or Release of Mortgage
- ▶ Leases of more than one year
- ▶ Assignments of lease
- ▶ Judgments

Constructive Notice

- ▶ Any instrument that has been recorded is available for examination by the public, and therefore, any purchaser of real estate is doing so with full knowledge and constructive notice of all recorded instruments dealing with the real estate in question.
- ▶ Possession of property also gives constructive notice.

Settlement Statements

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Rules & Custom in Computations

- ▶ Prorations in Hawaii commonly use:
 - ▶ 360 days year
 - ▶ 30 days month
- ▶ Alternative is 365 day year
- ▶ Items paid in arrears are normally a debit to the seller and a credit to the buyer.
- ▶ Prepaid items are normally a credit to the seller and a debit to the buyer.

Items Usually Charged to Buyer:

- ▶ 40% of Standard title policy
- ▶ Extended coverage title policy
- ▶ Cost of drafting mortgage & note
- ▶ Cost of obtaining Buyer's consents
- ▶ Buyer's notary fees
- ▶ Recording fees, except those to clear seller's title
- ▶ 50% of escrow fee
- ▶ Condo transfer fee
- ▶ Loan points
- ▶ Client trust fund (CTF) generally 2 months taxes and insurance.

Items Usually Charged to Seller

- ▶ 60% of Standard coverage title insurance
- ▶ Drafting of conveyance documents
- ▶ 50% of escrow fee
- ▶ Existing mortgage payoff & interest
- ▶ Conveyance tax
FIRPTA & HARPTA
- ▶ Broker commission
- ▶ Leasehold consent fee
- ▶ Termite inspection
- ▶ Unpaid assessments
- ▶ Unpaid taxes

Review

- ▶ Learn the proration formulas in the textbook
 - ▶ 1st Day of Unpaid Period
 - ▶ Closing Date
- ▶ Review Closing Checklist
 - ▶ Learn which column to enter each item on the checklist
- ▶ Review HUD-1 Statement