Transfer of property topic: Recording a real estate deed

(Or: A funny thing happened on the way to the courthouse)

In the grand scheme of things, recording a real estate deed scarcely registers on most real estate agents' radar as an important item. After all, this is something that happens after closing, so by that time one would think the screaming, crying, fist-shaking and wild accusations (also known by some as "the real estate transaction") are over.

Unfortunately, that's not always the case.

Granted, in most states recording a real estate deed is not a problem. If someone commits an error along the way, generally the parties involved are pretty mellow about correcting it. However, Texas is one state where it's in everyone's best interest to make sure this is done correctly. We're not picking on Texas (however, the huge cars with horns on the front are kind of funny); several other states – Delaware, Louisiana, and North Carolina are also states where some extra vigilance in deed recording is worthwhile.

"But wait," you say. "My buyers have closed and have an executed deed. So do they own the place or not?"

Yes. Well, unless they don't. In general, once a correctly executed deed has been delivered to the buyer, things are good, even if the deed hasn't been recorded at the county clerk's office. You see, recording at the county clerk's office essentially tells the world that the transfer has occurred (Facebook declarations of this fact don't count). However, if the deed hasn't been recorded, there is one big potential problem; the seller can potentially sell the property to another buyer.

What?

Yep. Granted, the chances of a seller pulling this off are pretty slim, but it has been known to happen. This also invokes a legal rule known as "The race to the courthouse." It works like this:

Mr. Brady buys a property from Mr. Pritchett and receives an executed deed. On his way to the county courthouse to record the deed, the attorney for ACME Title Company is hit by a bus. In the subsequent uproar no one thinks to follow-up on the deed recording. In the meantime, Mr. Brady decides not to take immediate occupancy of the house he has bought and instead goes on an extended vacation to Hawaii with his family.

Along comes Mr. Whipple. Now, Mr. Whipple doesn't realize the house has already been sold. He lives nearby and notices the "For Sale" sign is gone from the front yard and that the house appears empty. He contacts Mr. Pritchett, who is still showing up in official records as the owner, and asks if the property is still for sale. Mr. Pritchett, a very unethical chap, realizes what has happened and agrees to sell the house to Mr. Whipple. They quickly complete a sales contract and close the deal at Great Title Company. However, this time, the attorney for Great Title Company makes it safely to the county clerk's office and records the deed. He has just "won the race to the courthouse."

Mr. Brady returns from his vacation to find Mr. Whipple living in his house. Upon investigation, he finds that since his deed was never recorded with the county clerk, he is considered an owner, but in a secondary position to Mr. Whipple. Basically, Mr. Brady just paid a lot of money for nothing. Lawsuits ensue.

And Mr. Pritchett? He deposited all the funds from both transactions in a bank account in Grand Cayman and moved to Croatia, which has no extradition policy with the U.S. (though in a Karmic twist, he met his demise six months later in a freak bungee jumping incident in Plava Laguna).

The moral of the story? Call the title company the day after closing and verify that the deed was successfully recorded. It's one phone call you'll be glad you took the time to make.

Question 1:

Mr. and Mrs. Smith have recently married and are about to buy their dream home together. Mr. Smith has a son from a previous marriage and wants to leave his half of the home to his son Brian upon his death; Mrs. Smith simply wants to leave her half of the property to her husband upon her death. In this scenario, which of the tenancy options below would be their BEST choice?

1. Mr. & Mrs. Smith should take possession of the property as joint tenants with right of survivorship, and Mr. Smith should use a will to leave his ownership share to Brian.
2. Mr. & Mrs. Smith should each take 50% possession of the property as tenants in common, and Mr. Smith should use a will to leave his ownership share to Brian.
3. Mr. Smith, Mrs. Smith and Brian should take possession of the property as joint tenants with right of survivorship, with each taking 33.3% ownership of the property.
4. Mr. Smith, Mrs. Smith and Brian should take possession of the property as tenants in common, with Mr. Smith taking a 60% ownership interest, Mrs. Smith a 40% ownership interest, and Brian a 10% ownership interest. In this case, Mr. & Mrs. Smith should complete a special addendum at closing indicating the reason for their ownership percentages.

Answer key:

1. **Incorrect**. However, we'll give you a nod for this choice because it *could* work if Mrs. Smith dies before Mr. Smith. However, if Mr. Smith dies before Mrs. Smith, all property ownership would revert to Mrs. Smith (despite the will). And since Mrs. Smith has secretly disliked Brian since the "pool table incident," she may choose not to share any ownership of the property with Brian.
2. **Correct**. FTW! In this case, Brian would receive 50% ownership upon Mr. Smith's death. Clean, simple, straightforward. We like it like that.
3. **Incorrect**. In this scenario Brian would own 1/3 of the property from the beginning; after his father passes away he would own 2/3 of the property, not half. Big score for Brian, but Mrs. Smith would be one unhappy camper.
4. **Incorrect**. In this scenario, like answer number three, Brian would end up owning more than half of the property upon the death of his father. A win for Brian, but another loss for Mrs. Smith. Any addendums about this would be irrelevant.

Question 2:

A very low offer was submitted on one of your listings, and to date there have been three counteroffers between the buyer and seller. The buyer has left town for a week, and has indicated through their agent that they will make another counteroffer upon their return. During this one week period, you unexpectedly receive two additional offers on the property, including one for more than the asking price. According to the National Association of Realtors Code of Ethics, you MUST do one of the following:

1. Nothing; it is your fiduciary duty to continue working on the existing offer from the buyer that is out of town.
2. Submit the new offers that you have received to the seller and let them decide what to do.
3. Inform all agents that a multiple offer situation has occurred, and that their buyers should come back with their highest and best offer.
4. Contact the buyer's agent for the existing offer and inform them they have 24 hours to ratify the seller's current counteroffer. If not, the new offers will be presented to the sellers in the order in which they were received.

Answer key:

1. **Incorrect**. Your fiduciary duty is to the seller, not the buyer. In this scenario, no executed contract exists, so the property is still available for sale. There's a reason for the phrase "you snooze, you lose."
2. **Correct**. The very first thing a Realtor must do is submit all offers, written or verbal, to the seller. The seller is the only one who has the power to decide what course of action should be taken at that point. Hey, it's their property.
3. **Incorrect**. While this is a popular scenario on HGTV, the sellers may decide they are happy with one of the offers as submitted and accept it outright, especially if they're in a hurry to get out of Dodge.
4. **Incorrect**. As mentioned above, the seller's agent has no obligation to the first buyer since no executed contract exists. However, to keep the peace in a crowded field, you probably would want to let the other agent know what happened as soon as possible and be prepared for an earful of complaining.