



THE NC CONNECTION

An Investors Title Publication

We Know North Carolina.



The Joys of Being Human: Correcting Mistakes in Recorded Documents

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As humans, mistakes are a part of life. Just last night I forgot to buy milk at the store. The expiration date had come and gone on the old carton, and my wife called me twice to remind me. Mistakes are also a part of the practice of law. They happen despite our best intentions and hard work. We all make them. In a real estate practice, mistakes can be limited by putting in place and following a closing checklist and by instituting a procedure in which documents are reviewed several times before they are recorded. But mistakes will still happen and careful thought and analysis should always be put into how to address the error so as not to compound the problem.

If a mistake is found early, it can usually be fixed or corrected fairly easily. The longer you put off addressing the error, the bigger headache a fix can become. The fix may cost you time and recording fees, but not usually to the extent of a deductible under your errors and omissions policy. To correct most errors in a legal document, you will need to have the appropriate original

“If the mistake is found early, it can usually be fixed...”

parties re-sign and re-acknowledge the document and then update title before recordation. There seems to be a myth that is prevalent among practitioners that a closing attorney can simply file a scrivener’s affidavit¹ and make a lot of mistakes go away. This myth implies that the closing attorney has the ability to go back in time and correct documents, adding parties, terms, and in many cases legal descriptions; and then by filing said affidavit, change the terms of the recorded documents and sometimes their erroneous recording order. That is not the case. A Superior Court Judge or fictional character in a Harry Potter novel might have that ability, but not the closing attorney. A scrivener’s affidavit provides notice that a mistake was made, but it does not fix anything. It can clarify what was meant, but it can not change the document. The affidavit is the legal equivalent of sitting at the breakfast table and saying: “Honey, I forgot to buy milk, but don’t worry, I marked through the old expiration date and put in a new one.” The milk is still spoiled, and you are going to eat dry Corn

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Flakes unless you run back out to the store and buy new milk.

As a closing attorney, you are better served to work under the default rule that a scrivener's affidavit will not fix the error. Let's more closely examine why I say this. First, at a basic level, before you get to the register of deeds to record, there are certain requirements that must be met for a person to transfer real property. There are also certain requirements that must be met before a document can be considered of record and thus winning the race to the courthouse and registry. North Carolina is a pure race state. We are not a notice state. This fact affects valid corrective documents and the race to the registry.

Requirements for a Valid Transfer

The basics for a living person to transfer real property, by deed or deed of trust, are that the document must be in writing, signed, and delivered.² There are essential factors in the deed (and deed of trust): "(1) a competent grantor; (2) A grantee capable of holding title to land; (3) a sufficient description of the property; (4) operative words of conveyance; (5) proper execution by the grantor; (6) proper delivery; and (7) an acceptance by the grantee that is adequate at law."³ These are the bare

minimum requirements so a missing party, a missing legal, and/or a missing signature all mean the conveyance will fail to convey real property. In North Carolina, a conveyance of real property by deed or deed of trust is an act by the party or parties and that act is memorialized in the writing. Think of the writing as a snapshot of the transaction. If it is missing important essentials, it does not work as a conveyance, and editing or photo-shopping the picture does not make it correct. It needs the correct act and a new photo to work properly.

Requirements Before Recording

A deed or deed of trust, in order to be effective against lien creditors or purchasers for value, must be recorded in the register of deed(s) in the county or counties where the property is located.⁴ Essential to the race to the courthouse is the proper acknowledgement of a document before it can be recorded.⁵ Acknowledgement has been described as the personal appearance of the grantor of the document before a proper official and there stating to said official the fact of the execution of the document as a voluntary act.⁶ Registration of an improperly acknowledged or defectively probated deed imports no constructive notice and the deed will be treated as unregistered.⁷ Thus, in order to correct a mistake in the acknowledgement, the document must be

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re-acknowledged in order to be re-recorded. If that is not possible, a new document must be drafted, signed, acknowledged, and recorded.

A document that is altered after recording to correct a mistake, by adding or subtracting property, or by adding or subtracting other terms, is not of record unless it is re-signed and re-acknowledged as a separate document. Re-recording a corrected document without a new signature and acknowledgement will not put that document of record. The correction will not be considered notice to lien creditors or purchasers for value as it is not properly of record. The courts have consistently held altered property descriptions of deeds invalid and have held that adding a legal description to a deed of trust after execution does not properly convey property.⁸ The best way to fix documents, without judicial oversight and decree, is to have them re-drafted, modified, or amended, and then have the changes re-executed, re-acknowledged, and re-recorded.



North Carolina's Race Statute

North Carolina's race statute has some important practical implications that become apparent after a mistake. For example: If the deed did not

convey the proper legal description, but the purchase money deed of trust recorded immediately after the deed had a good legal description and was placed of record, both conveyances fail. The bank never got title as the grantee of the deed did not have it to convey to the bank. When a corrective deed is later recorded, the deed of trust must also be recorded again or a register of deeds' certified copy of the deed of trust must be recorded in order to correct the race to the courthouse.

Our recording statutes create a chain of title that starts with the recordation of a deed, probate of a will, or other act that conveys title. The attorney or title examiner examines conveyances after the chain starts, or deed is recorded, not before. So in our example the bank does not have a lien because the deed never conveyed title and the out conveyance, the deed of trust, is not of record to a title searcher as it is outside the race. There are certainly estoppel arguments to be made based on warranties in the conveyance, but as to purchasers for value and creditors, the race protects them.⁹

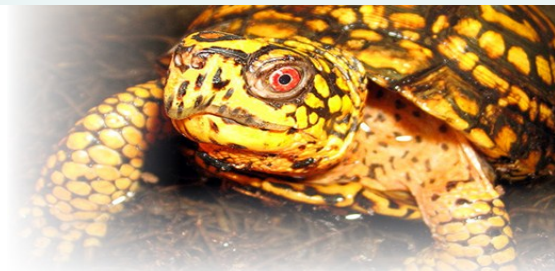
Correction to documents by the drafter or a party thereto to change or add terms, parties, and property is not possible once they are recorded, unless they are re-drafted, re-executed, re-acknowledged, and re-recorded. There is no special affidavit that can be filed to correct major omissions and mistakes; such an affidavit can only provide notice of the mistake. The best cure for mistakes is prevention. Develop and put a system in place where all parts of the closing process are checked and double checked. Each time a deed or legal description is drafted or changed, the document goes to review. You and your staff must review each other's work. Initial the review and the changes. Make it worth the effort by rewarding the person who finds a mistake or who finds the most mistakes. This process will not only save you money, it will also put into practice a review process that will catch mistakes before recordation and improve everyone's skill with drafting documents and identifying errors.

¹N.C.G.S. § 47-36.1; ²Ballard v. Ballard 230 N.C. 629, 55 S.E.2d 316 (1949); ³Webster, WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA, § 10-6, (5th ed. 1999); ⁴N.C.G.S. § 47-18.; ⁵N.C.G.S. §47-14 (a). ⁶Webster at §10-49; ⁷Id.; ⁸See, e.g., Moelle v. Sherwood, 148 US 21 (1892); In re Hudson, No. COA06-345 (N.C.Ct. App. April 3, 2007) ⁹See: "Warranties of Title: Estoppel by Deed vs. The Conner Act," published in Investors Title Newsletter, <http://nc.invtitle.com/node/1548>

NC FUN FACTS

Eastern Box Turtle

The eastern box turtle is found throughout the state's forested areas and was designated as the state reptile in 1979. It is the only "land turtle" found in North Carolina. Box turtles are slow crawlers, extremely long lived, slow to mature, and have relatively few offspring per year.



CLAIMS Corner

Eye on Fraud

by Uta Zacharias, Subrogation Counsel
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The Home Equity Conversion Mortgage (“HECM”) is the FHA’s reverse mortgage program, which is available to homeowners age 62 and older who have accumulated a sizeable amount of equity in their home. As Baby Boomers continue to age, the popularity of reverse mortgages has grown and with that, the prevalence of reverse mortgage scams. Scammers like to target the elderly, believing that older people are less quick to catch on to a potentially harmful scheme than younger people.

“...be on the
lookout for these
red flags...”



Reverse mortgages are used to convert the equity in the senior’s home into funds using a variety of payment options. The senior’s home typically must be owned free and clear of debt, or with little outstanding debt, and must be occupied by the senior as their primary residence. Repayment is typically not required until the owner dies, sells, or permanently moves out of the home. Once any of those events occur, the property is relinquished to the mortgage lender who may sell it to recoup the loan balance, fees, and interest.

Reverse mortgage fraud is usually more difficult to detect since payment is not due until significant time has passed from the date of the loan. As a real estate practitioner, you should be aware of the most common types of reverse mortgage fraud which include the following:

1. Equity Theft Property Flipping: This transaction looks much like a typical flip scheme in that a straw buyer transfers title to an unsuspecting senior without going through a normal sale or closing. The senior is then instructed by the scammer to obtain a reverse mortgage against the property, and the senior is supplied with the necessary tools such as the overstated appraisal. The scammers then pocket the loan proceeds. HUD reports

that reverse mortgage schemes like this one have been used by organized gangs to launder money. Some of those gangs have also created fraudulent programs which appear at the outset to benefit the most vulnerable seniors such as the “Home for Seniors” program that puts seniors into “free” homes in order to steal the proceeds of the reverse mortgage.

2. Senior Identity Theft/Power of Attorney Abuse:

Under this type of fraud, the scammer obtains a power of attorney from a vulnerable senior or assumes that person’s identity and then applies for a reverse mortgage on the home owned and occupied by the unknowing senior. Again, the fraud is not detected until the senior dies or permanently leaves the home. This is the perfect set up for the scammer, as both he and the money are long gone by the time this fraud is detected.

3. Cash-Out Theft: Under the cash out theft scam, the senior is usually duped by someone they know and trust such as a family member, a care taker or even a loan officer. The senior is aware of the loan in this case, but is persuaded to entrust the funds to the scammer who claims he will distribute amounts when needed.

4. Foreclosure Bailouts: In the foreclosure bailout scheme, a distressed mortgagor under the age of 62 is tricked by someone usually pretending to be a “mortgage consultant.” The “consultant” convinces the mortgagor into quit claiming the real estate to their senior parents or other senior family members or friends. A reverse mortgage is then obtained and the proceeds used to repay the underlying delinquent mortgage. The mortgage consultant is paid a fee for this service, when, in reality, this is fraudulent use of a reverse mortgage, which could subject the original mortgagor and senior to criminal penalties.

As the attorney about to certify title, be on the lookout for these red flags, identified by Fannie Mae, which may indicate reverse mortgage fraud:

1. The senior claims he received the house free from a “special government program;”
2. The senior obtains title to the property immediately prior to the reverse mortgage loan application;
3. There is a power of attorney on behalf of the senior, or a caregiver or family member is coaching the senior;

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4. The senior has no prior home ownership;
5. Appraisal photos show the property is vacant;
6. Proceeds of the reverse mortgage are being used to satisfy a non-borrower lien; and

7. The senior takes HECM loan proceeds in a lump sum at closing. (Scammers are not interested in the line of credit or annuity distribution options.)

While none of these red flags is dispositive of mortgage fraud, they may indicate that further investigation is warranted. Be vigilant and never hesitate to postpone a closing to obtain more information or guidance from an Investors Title attorney.

Investors Title Personnel Changes

Investors Title is very pleased to announce key 2013 personnel changes in North Carolina. Please join us in welcoming new team members and in congratulating all those who have recently received well-deserved promotions.

Shannon Davenport has joined Investors Title as Regional Underwriter based in Asheville and brings over 10 years of title industry experience.

Patricia Hicks has become Office Manager of the Raleigh Office after serving as the Durham Office Manager for the last 6 years. **Jane Booth** has replaced Pat as the Durham Office Manager and brings 30 years of real estate industry experience to this role.

Liz Smith is now supporting the Raleigh Office as Assistant Office Manager and brings over 10 years of paralegal experience to her new position.

Debbie Saunders has joined the Kill Devil Hills Office as Office Manager, replacing Denise Woolston who has moved to Jacksonville. Debbie brings over 5.5 years of banking and mortgage lending experience to her new role.

Sonya Starnes has been promoted to Operations Support Representative for TN and KY after serving as the Hickory Office Manager for the last 5 years.

Jane Goble has been promoted to replace Sonya as the Hickory Office Manager. She has been an Underwriter in the Hickory Office for the last 10 years.

Amanda Orsell will replace Jane Goble in June 2013 as an Underwriter in the Hickory Office. She has two years of underwriting experience with North Carolina Title Center in Statesville.

Summer Edwards has been promoted to Office Manager in the Smithfield Office, where she was an Underwriter for the last 5 years.

Joan Santoro has joined Investors Title as an Underwriter in our Smithfield Office replacing Summer. She has 10 years of paralegal experience.

Hayley Carlson has been promoted to Regional Underwriter from Underwriter. She remains based in Greenville.

Carol Camburn, Jacksonville Office Manager, plans to retire after celebrating her 30-year anniversary with Investors Title in June 2013. We thank Carol for her loyalty and dedication over her many years of service.

Denise Woolston, who has served as the Kill Devil Hills Office Manager for last 5 years, will assume the role of the Jacksonville Office Manager upon Carol's retirement.

On-Demand Education

nc.invtile.com/ondemand

CLE/CPE CREDIT COURSES:

NC Mechanics Lien Law—Nuts and Bolts

The New Mechanics' Lien Law in NC

(Note: This course is an introduction and a precursor to the above 'Nuts and Bolts' course.)

1031 Exchange Basics: A Brief Primer

What Are We Gonna Do With Mama's Property?

Title Insurance Endorsements

(Commercial Transactions Focus)

Additional CPE and non-credit courses also available.



Investors Trust Company: *Hankins v. Bartlett*

To prove that there was a valid contract between two parties to execute reciprocal Wills, most agreements will need to satisfy the Statute of Frauds. The North Carolina Court of Appeals made that ruling in a case that developed after Edwin Vaughn died in May 2010. Vaughn and his wife Mildred had executed Wills

simultaneously in 1977. When Mildred died in 1983, her entire estate passed to Edwin under the terms of her Will. The Will also specified that, had Edwin not survived, her assets would be distributed equally between the couple's two daughters. In 2010, Edwin executed a

new Will, which not only left his property to an *inter vivos* trust that named his daughter Janice as the sole beneficiary but also named her as the Executrix. After Edwin's death, the other daughter learned she was not a beneficiary of the trust. She then filed suit arguing, *inter alia*, that her parents had intended to maintain joint and mutual Wills. The trial court granted partial summary judgment in favor of Janice, and the appellate court affirmed. In reaching that conclusion, the Court specifically noted that any contract between the couple would have "necessarily involved devising real estate" because Mildred owned real property at the time of her death and transferring real estate invokes the Statute of Frauds. The Court also referred to a specific provision in Mildred's Will, which provided, "in no event shall our Wills be considered joint or mutual." That provision, the appellate court said, was conclusive, considering there was no written evidence to the contrary.

--*Hankins v. Bartlett*, No. COA12-1051, N.C. Ct. App. 3/5/13

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What is an RSS Feed?

An RSS feed is a method to receive notifications of changes to the content of a webpage or blog. Set the subscription through your web browser and be notified of changes to content as they occur. You may choose to receive notifications through the web browser or an email service. You may also unsubscribe at any time.

Are You Ready

for the New NC
Mechanics' Lien Law?

On-Demand Course Available Now!

Real Property Attorneys and Paralegals – get practical information on how to navigate through the new statutory requirements that went into effect on April 1 by viewing the Investors Title online seminar – **NC Mechanics' Lien Law – Nuts and Bolts**. Visit nc.invttitle.com/ondemand.

- practical steps for utilizing and complying with the new mechanics' lien law
- how to use the new centralized lien registry system – visit **LiensNC** at www.liensnc.com
- suggested best practices and procedures
- projected title insurance underwriting standards
- information about new forms
- how to appoint Investors Title as your lien agent

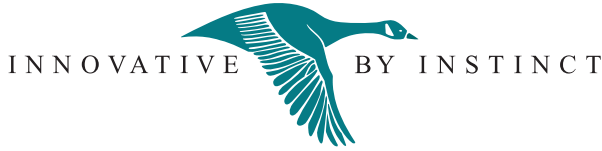
Senate Bill 42 makes very meaningful and positive changes to the mechanics' lien law in North Carolina by introducing the required use of mechanics' lien agents on most residential and commercial construction transactions. The bill provides a long overdue notice vehicle to protect consumers, lenders, and title insurance companies from hidden liens.

90 MINUTES | CLE/CPE CREDIT APPROVED | \$25

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How to Appoint Investors Title Insurance Company as Lien Agent

The **most efficient method** of appointing Investors Title Insurance Company as a lien agent for your project is to:

1. Visit www.liensnc.com
2. Register as a user
3. Select the Appointment of Lien Agent option and
4. Follow the prompts

Additional contact information for appointing Investors Title Insurance Company as lien agent:

Online: <http://liensnc.com>

In Person: 19 W. Hargett Street, Suite 507, Raleigh, NC 27601

Email: support@liensnc.com

Toll Free: 888.690.7384

Fax: 913.489.5231

What to File if not using www.liensnc.com – Form of Appointment of Lien Agent

Appointment of Lien Agent

I hereby designate Investors Title Insurance Company as Lien Agent for:

- (1) Owner’s name, mailing address, telephone number, fax number (if available), and email address (if available):

- (2) Property Description

a. Street address: _____

b. Tax map lot and block number: _____

c. Reference to recorded instrument: _____

d. Other description reasonably identifying the property (subdivision and lot, metes and bounds, etc.) _____

Dated: _____

Signature - Owner _____

Note: In certain situations there may be additional information the Owner is required to provide at time of appointment such as the identity of pre-permit workers (ex. Design professionals) or the identity of a contractor hired to construct a single family residence. The owner should consult NCGS 44A for additional information.

Cost of Appointment

The owner appointing the lien agent must pay \$25 for appointment of lien agent for a 1-2 family residence; \$50 for appointment on any other property. If the appointment is made by the owner in a manner other than online, the payment for the appointment should be made out to “LiensNC.”

Allowable Methods of Filing an Appointment of Lien Agent

1. Filing online at www.liensnc.com
2. Email
3. Certified Mail, return receipt requested
4. Signature Confirmation as provided by the US Postal Service
5. Physical Delivery and obtaining delivery receipt from lien agent
6. Facsimile with facsimile confirmation
7. Depositing with designated delivery service authorized by 26 USC 7502(f)(2)