

From: Milling, David <David.Milling@ctt.com>
Sent: Tuesday, December 31, 2019 9:19 AM
To: Shane Davidson <shane@midtownpropertylaw.com>
Subject: RE: QCD Language

Morning, Shane. Well, let's back up a little so I can explain how I'm looking at the question. At the end, I'll address your question about the POA.

While Vijay and Jennifer are married, each has various inchoate rights to/in the property of their spouse under NC law. As this relates to real property, these include rights like the right to an elective share in the decedent spouse's estate, the right to elect a life estate in certain real property of the decedent, equitable distribution upon divorce, quasi-community property rights. These rights terminate upon divorce (except that equitable distribution may be preserved by filing of a lawsuit and lis pendens prior to divorce).

Separated spouses may enter into a separation agreement wherein each waives and releases these rights, as may well be the case here. However, unless this agreement is put of record, we (and the rest of the public) have no way of knowing this. This creates a marketability problem for the buyer and future owners of the property. If the buyer gets title insurance which does not take exception to the marital interest of the seller's non-owning spouse, then the buyer has coverage and we have a claim if/when the marketability problem is raised (e.g., when buyer goes to sell).

52-10 and 52-10.1 tell us that any instrument wherein either spouse agrees to waive/release marital rights must be executed by both parties (and acknowledged) to be effective under NC law.

Now, look at your deed. It's not signed by Jennifer, so it's ineffective as it pertains to marital rights. Had she signed it, then we might consider it because it at least has some language about the intent of the instrument. The language there is paltry, but we might just say it's enough. So as to your question about specific language, we obviously would prefer that the language be very clear about the rights being released (and referencing statutes is helpful but not necessary), but we won't be super strict about it.

So that leaves them a couple of options – they could record a jointly signed instrument (like the separation agreement which they already signed, apparently), or something like the attached, or Vijay can join in conveying the property.

Fortunately, under the new POA statute, 32C-204(10) would cover this scenario and allow Jennifer to convey/waive/release her spouse's marital interest in a case where the POA incorporates all rights under 32C-204 (which is in the short form POAs). While the form of POA used does not expressly incorporate all rights under 204, it does refer to the rights associated with real property and checks other authorities which are consistent with the interpretation that she has the requisite authority.

Make sure you get a Certification of Agent executed by her at closing.

Thanks,
David

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