WHEN ALL ELSE FAILS:

RESOLVING TITLE ISSUES IN COURT

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INTRODUCTION

While many title issues can be resolved without a court action, often a lawsuit must be filed where parties are uncooperative or the issue can only be fixed by court order. This seminar addresses legal theories and litigation strategy for resolving title issues when efforts to fix the problem through corrective documents have failed. The discussion includes tips on pleading, discovery, case presentation, and trial for various title issues.  

I. LEGAL DESCRIPTION ERRORS.

Real property may be improperly described in any number of documents, including a deed, mortgage, or easement. While a replacement deed or corrective mortgage executed by the grantor with the proper description may resolve such an issue, often parties are uncooperative and unwilling to provide such a document. In such a case, it may be necessary to file a court action. Litigation claims and strategy for the most common legal description errors is set out below.

A. Claims and Parties.

1. Reformation. A written instrument can be reformed by a court if the following elements are proved: (1) there was a valid agreement between the parties expressing their real intentions; (2) the written instrument failed to express the real intentions of the parties; and (3) this failure was due to a mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party. Nichols v. Shelard National Bank, 294 N.W.2d 730, 734 (Minn.1980) (citing Theros v. Phillips, 256 N.W.2d 852, 857 (Minn. 1977). Reformation is generally not available when it would prejudice the interest of subsequent good faith purchasers.

2. Parties.

   a. Grantor and grantee for conveyance to be reformed.
   b. Current owners of property.
   c. Other parties with an interest in the property, including omitted property being added by reformation (holders of mortgages, docketed judgments, easements, etc.).

B. Evidence and Investigation.

The evidence supporting reformation will primarily concern the intent of the parties. The following items may be located in a closing file (perhaps retained by

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1 It should be noted at the outset that many title problems are covered by title insurance. While title insurance coverage is outside the scope of these materials, if you represent an owner or mortgage lender and have discovered a title problem, determine if they have a title insurance policy and whether a claim should be submitted.
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For a mortgage transaction, originating lenders and mortgage servicers typically retain loan origination files with numerous documents. If the legal description is underinclusive or describes the entirely wrong property, quick action should be taken to protect your client’s interest by recording a Notice of Lis Pendens or an Affidavit of Unrecorded Interest (Notice of Unregistered in the case of Torrens property). The following is often instructive or useful evidence in reformation cases.

1. **Title Commitment.** Issued by the title company handling the closing including a legal description for the property. Because the description in the title commitment is sometimes carried over to the document to be reformed, it may also be erroneous.

2. **Appraisal.** Obtained by lenders to determine the value of the property which typically include address, acreage, description of improvements, a parcel identification number, and a legal description. Sometimes include pictures, maps, or diagrams. May also show an omitted parcel or improvements known to be on the omitted parcel. Legal descriptions and depictions of boundaries can be evidence of intent but should not be relied upon; appraisers are not surveyors and may have no knowledge of the borrower’s intent.

3. **Maps, surveys, or diagrams.** Parties may have prepared a drawing or marked up a survey or aerial photograph. “Plat drawings” are often prepared showing boundaries and improvements. These are not surveys and have nothing to do with platting but can sometimes nonetheless be insightful in understanding a situation.

4. **Testimony of the Parties.** Parties may have had oral agreements or discussions which may include physical markers indicating which property was being conveyed (“from this road to this tree line,” etc.), or identified the property by the improvements (“the property with the house and pole barn”). Parties may know the actual intended legal description. The parties should be asked whether they intended to convey or receive everything owned by the grantor, or whether the grantor intended to retain any property. Testimony of the person who actually drafted the document in question can illustrate the drafting process and confirm if a legal description error was nothing more than an inadvertent scrivener’s error.

5. **GIS Images and County Tax Information.** Most counties maintain an online database of aerial imagery with lot lines imposed along with property tax including rudimentary legal descriptions. This information can be helpful in gaining a general understanding of the descriptions, boundaries, property location, or location of improvements to a boundary but the boundaries and descriptions should not be used as definitive evidence of the legal description or boundaries and may not speak to the parties’ intent.

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C. **Common Defenses.**

Often legal description errors are uncontroversial and will result in a default motion. However, adding a parcel omitted from a mortgage or some other more significant change can result in a contest. A grantor may assert that they did not intend to mortgage the parcel to be added by reformation. A defendant may claim there was not an agreement in the first place. The response to these defenses is typically to point to facts showing a clear agreement was reached or that there was a scrivener’s error: a signed instrument is almost always strong evidence of an agreement and often only conveying part of a piece of property makes little sense when the property is displayed visually (ex: mortgaging one of two parcels when the house rests on both parcels). Third parties such as the holder of a mortgage on an omitted parcel may claim that they did not have notice of the parties’ intent to encumber the omitted parcel and therefore have priority over the mortgage being reformed.

D. **Case Presentation and Litigation Strategy.**

Prepare a clear color-coded diagram of the legal descriptions which will help you understand the case and be a useful visual aid for the judge and other parties. This will be particularly helpful for metes and bounds descriptions or cases with multiple parcels. Attach this diagram as an exhibit to your complaint and use it as a poster-sized visual aid in court. For an example, see Appendix A.

II. **STRAY OWNERSHIP INTERESTS.**

Sometimes stray interests in property must be eliminated in a quiet title action, particularly where the interested party is deceased and therefore cannot provide a document eliminating their interest.

A. **Claims and Parties.**

1. **Adverse Possession.** Minn. Stat. § 541.02 sets the period for adverse possession at fifteen years. A party asserting adverse possession must show by clear and convincing evidence an actual, open, exclusive, hostile, and continuous possession over the statutory period. See *SSM Inv. v. Siemers*, 291 N.W.2d 383, 384 (Minn. 1980) (citing *Ehle v. Prosser*, 293 Minn. 183, 189, 197 N.W.2d 458, 462 (1972)).

2. **Action to Determine Adverse Claims, Quiet Title.** Minn. Stat. § 559.01 states that any person in possession of real property may bring an action against another who claims an adverse interest or a lien in order to determine the rights of the parties. A quiet title action complaint can include the adverse possession elements as well as a reference to Minn. Stat. Chapter 559. The action is intended to provide an easy and expeditious mode of quieting title to real estate. *Steele v. Fish*, 2 Minn. 153 (Gil. 129). C. Although it has never been determined whether the
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action is strictly legal or equitable, the action has been recognized as substantially an equitable one. See Mathews v. Lightner, 85 Minn. 333, 88 N.W. 992 (1902).

3. Declaratory Judgment. Minn. Stat. Chapter 555, the Uniform Declaratory Judgments Act, gives Minnesota courts the power to construe rights in real property generally or under a conveyance. See Minn. Stat. §§ 555.01, 555.02. An action may be necessary to declare a mortgage satisfied, address a missing certificate of redemption, etc.

4. Reformation. A stray interest may be eliminated by reformation of the conveyance creating that interest, provided that that was the parties’ intent (ex: reforming a deed to eliminate a grantee or reforming a conveyance’s legal description to ensure no property is retained).

5. Parties.
   a. Property owners (if not the plaintiff).
   b. Heirs of the deceased stray interest holder. If there is an open probate, the estate should be named. If there was a probate of the decedent’s estate, the heirs as determined by the probate court should be named. If there has been no probate, the known heirs (often identifiable in an obituary) should be named along with unknown heirs (served by publication of the summons).
   c. Any other unknown parties claiming an interest. See Minn. Stat. § 559.02 (also by publication).
   d. Other persons with interest in the property (holders of mortgages, judgments, easements, liens) in the event the court order must be binding on them.

B. Evidence and Investigation.

1. Title search and documents. Obtain a title search from the point the stray interest was created to the present in order to trace the title history to the intended current owner. A stub abstract from that date can be helpful although not strictly necessary if the abstractor understands your title search needs.

2. Documents concerning heirship. As mentioned above, probate documents or obituaries and other family records may be necessary to determine the decedent’s heirs. A death certificate or communication with family members may be necessary.

3. Testimony of parties. Interest holders, family members, real estate professionals, or attorneys may be able to identify what the parties intended when an interest was erroneously created or retained.
C. **Common Defenses.**

Some defendants, including some heirs, may attempt to profit from erroneously retaining an interest in property. Their defenses are likely to be specific to the stray interest, but generally they may claim that the interest was not created or retained in error or that the current owners have not satisfied the adverse possession elements.

D. **Case Presentation and Litigation Strategy.**

Consider making a diagram depicting the chain(s) of title to the property demonstrating when and how the stray interest was created and the basis of the current owner’s interest. For an example of a visual depiction of legal descriptions for a series of conveyances, see Appendix B. For a diagram depicting a complex chain of title, see Appendix C. Set the chain of title out clearly in your complaint and in your proposed order at the conclusion of the case for the benefit of the judge, defendants, and future title examiners. When serving your summons and complaint, include a cover letter to the defendants explaining why they are named in a lawsuit and the purpose of the action. This will go a long way in avoiding an unnecessary contest, particularly with heirs who have no direct connection to the issue or property.

III. **BOUNDARY LINE DISPUTES.**

A. **Claims and Parties.**

1. **Adverse Possession.** Party seeking to establish adverse possession must show by clear-and-convincing evidence “that the property has been used in an actual, open, continuous, exclusive, and hostile manner for 15 years.” *Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999); Minn. Stat. § 541.02 (2014). Possession of successive occupants in privity may be tacked to make adverse possession for the requisite period. *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 109 (Minn. App. 2002) (quoting *Fredericksen v. Henke*, 167 Minn. 356, 360, 209 N.W. 257, 259 (1926)).

2. **Practical Location of Boundaries.** In order to establish a boundary by practical location by acquiescence the location relied upon must be acquiesced in as a boundary for a sufficient length of time to bar right of entry under the statute of limitations. *Fishman v. Nielsen*, 53 N.W. 2nd 553 (Minn. 1952); *Gifford v. Vore*, 72 N.W. 2nd 625 (Minn. 1955); *Engquist v. Wirtjes*, 68 N.W.2nd 412 (Minn. 1955). Practical location can be established in three ways: (1) The location relied upon must have been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations; (2) the line must have been expressly agreed upon between the parties claiming the land on both sides thereof, and afterwards acquiesced in; or (3) the party whose rights are to be barred must, with knowledge of the true line, have silently looked on while the
other party encroached upon it, and subjected himself to expense in regard to the land, which he would not have done had the line been in dispute. *Engquist V. Wirtjes*, 243 Minn. 502, 68 N.W.2d 412 (1955).

3. **Reformation.** If a particular conveyance or set of conveyances do not reflect the parties’ intent as to boundary, the legal descriptions in said conveyances may be reformed to conform with the parties’ intent and therefore resolve the boundary issue. See reformation case law cited above.

**B. Evidence and Investigation.**

1. **Survey.** Obtain a survey showing the location of use (fences, mowing line, improvements, etc.) showing the boundaries in the parties’ legal descriptions and boundaries for the new legal description plaintiff is seeking to establish by adverse possession or practical location.

2. **Aerial photographs.** Fences, outbuildings, gardens, mowing or lawn maintenance, retaining walls, and improvements are often visible in aerial photographs and are key pieces of evidence in establishing the use or agreed-upon boundary of the parties. Counties maintain online databases of aerial photographs, some going back many years. Google also has aerial imagery. Other government agencies can also be sources for such photographs but may require a specific request. The USDA Farm Service Agency is a particularly good source of aerial imagery ([http://www.apfo.usda.gov](http://www.apfo.usda.gov); apfo.sales@slc.usda.gov).

3. **Photographs from parties.** Parties to the lawsuit often have pictures of their property even if the boundary area is not the focal point of the photograph. Old photographs and videos can show fences or other markers in the background. Provide a context for pictures used when the area shown is not easily locatable or obvious.

4. **Witness testimony.** The parties to the action can also provide evidence explaining what property they occupied or where they believed a boundary was located. Neighbors, family, friends, lawn service professionals or persons involved in maintenance or construction on the property, and other community members are often familiar enough with the property to identify what land was used by what owners.

5. **Markers and monuments.** Often owners identify their property lines by a tree, fence, improvement, or other object, or a series of any of these, on the property. Locating and understanding these markers is important and such markers should be included in a survey.

5. **Building permit and construction documents.** Often improvements are good evidence as to what property was used by the owner of those
improvements. Building permit files often include maps and diagrams showing the applicant’s understanding of the boundaries in relationship to improvements being constructed.

6. Tax information. The county’s tax records may show how much lakefront, acreage, or area is assessed, and owners sometimes base their understanding of what they own on the county’s information.

C. Common Defenses.

Defendants may claim the party asserting adverse possession had permission to use the property (defeating the hostile element). Defendants may also claim a break in the chain of possession or that the possession has been infrequent or inconsistent with ownership or the nature of the property at issue. Responding to these defenses may be as simple as proving facts to the contrary and/or showing that the possession is typical of ownership for the type of property. If the claim is for practical location of boundaries, defendants may assert that they never agreed to the boundary.

D. Case Presentation and Litigation Strategy.

A color-coded survey showing markers and improvements is very useful in presenting the possession and boundaries at issue. For an example, see Appendix D. A series of photographs similarly cropped and presented with context showing the use over time is particularly effective in showing adverse possession over time. A timeline showing the events demonstrating continued possession during the fifteen year period may also be appropriate.

IV. ENCROACHMENTS.

A. Claims and Parties.

1. Adverse Possession. For a long-standing encroachment, there may be a claim for adverse possession. See the adverse possession statute and case law citations above.

2. Practical Location of Boundaries. Practical location of boundaries may apply if the parties agreed to a boundary line which places the improvement within the improvement owner’s property. See the practical location of boundaries citations above.

3. Prescriptive easement. “A prescriptive easement requires the same elements [as adverse possession], but a difference exists ‘between possessing the land for adverse possession and using the land for a prescriptive easement.’” Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 230 (Minn. 2008) (quoting Boldt v. Roth, 618 N.W.2d 393, 396 (Minn. 2000) (emphasis added). The requirements of continuity and exclusivity

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differ somewhat from adverse possession because the focus is on use rather than possession. See Romans vs. Nadler, 14 N. W. 2d 482, 486 (Minn. 1944); Nordin v. Kuno, 287 N.W.2d 923, 926 (Minn. 1980).

4. **Reformation.** The parties may have intended that the boundaries properly enclose an encroaching structure. In such a case, reformation may apply to reform a conveyance to include a revised legal description and thereby resolve the encroachment issue. See reformation case law cited above.

5. **Other Claims.** Other claims against a neighbor may include estoppel or reformation. In the event a lender is bringing an action for an encroachment off of the mortgaged property onto property not encumbered by the mortgage (even if owned by the same borrower), that lender may assert reformation of its mortgage, equitable subrogation (if the mortgage funds paid off a mortgage encumbering the encroachment), and equitable lien.

6. **Parties.**
   a. Possessor of property (typically the plaintiff).
   b. Mortgage lender for possessor of property (may serve as plaintiff where improvement encroaches off of mortgaged property even when underlying property owned by same borrower).
   c. Owner of property sought by plaintiff.
   d. Lienholders with an interest in that property must be named.

B. **Evidence and Investigation.**

1. **Survey.** A survey should be obtained showing the legal description boundaries, the boundaries and description sought by plaintiff, and any improvements, markers, or other indicators of the parties’ possession.

2. **Plat Drawings.** If the encroachment involves mortgaged property, there may be a plat drawing depicting the improvements and boundaries. However, proceed with caution. Plat drawings are not surveys, and our firm has encountered improvements depicted within boundaries on a plat drawing but later discovered to be encroaching onto neighboring property.

3. **GIS Imagery.** If the plat drawing or GIS imagery (discussed above) show improvements close to the boundary line, a survey may be necessary to confirm whether there is an encroachment. Again, GIS images are not definitive proof of boundary location and should not be relied upon to show conclusively that there is an encroachment.

4. **Building permits and records.** Building permit information is often available from the county and can be a valuable source of information about the origin and extent of the encroachment, as well as information
about where the parties believed the boundary was when the encroaching improvement was built.

5. **Testimony of the parties.** The persons discussed under boundary disputes may also know about the existence of encroaching improvements. Also, builders, former owners, and other parties involved in the construction of the improvement are relevant sources of information.

6. **Photographs.** See discussion above of photographs as evidence for adverse possession.

C. **Common Defenses.**

The neighbor may make a counterclaim for trespass and/or ejectment in order to have the encroachment removed. Defendants are likely to raise defenses similar to those discussed above in regard to boundary line disputes.

D. **Case Presentation and Litigation Strategy.**

Consider using a visual aid such as an enlarged survey or diagram showing the boundaries and encroaching improvements. For an example, see Appendix E. A series of images showing the improvement over time (including before and after construction) can be helpful. An enlarged timeline may also help the court or a jury understand the facts of the case.

V. **NON-JOINDER OF SPOUSE.**

Minnesota law requires that both spouses join in a conveyance of homestead property, including mortgages, although there is an exception for purchase money mortgages. Minn. Stat. § 507.02. Failure to obtain the signature of both spouses renders the conveyance void unless an exception applies. Non-joinder issues are most commonly seen in the context of refinance mortgages.

A. **Claims and Parties.**

1. **Estoppel.** Estoppel is applied to prevent non-signing spouses from challenging conveyances when the purpose of § 507.02 is not at risk. *See HSBC Mortg. Services, Inc. v. Graikowski, 812 N.W.2d at 848; Dvorak v. Maring, 285 N.W.2d 675, 677-678 (1979); Karnitz v. Wells Fargo Bank, N.A., 572 F.3d 572, 574 (8th Cir. 2009); National City Bank v. Engler, 777 N.W.2d 762, 766 (Minn.App. 2010).*

A married person at the time of execution of a mortgage is estopped from asserting the protections of Minn. Stat. § 507.02 to void a conveyance made solely by their spouse where: (a) The non-signing spouse consents to and has prior knowledge of the transaction, (b) the non-signing spouse retains the benefits of the transaction, and (c) the party seeking to invoke...
estoppel has sufficiently changed its position to invoke the equities of estoppel. See Karnitz, 572 F.3d at 574-75 (citing Dvorak, 285 N.W.2d at 677-78 (Minn. 1979)).

“[T]he signing spouse, is estopped from challenging the validity of his mortgage because (1) he procured the conveyance through an intentional or negligent misrepresentation of fact, (2) the lender relied on the misrepresentation to its detriment, and (3) he retained the benefits.” CitiMortgage, Inc. v. Roback, 2013 WL 6725824, 3 (Minn.App. 2013) (unpublished) (quoting Graikowski, 812 N.W.2d at 848–49).

2. **Waiver.** The non-signing spouse can waive the homestead interest. However, the waiver must include explicit language waiving the spouse’s homestead interest. Marine Credit Union v. Detlefson-Delano, 813 N.W.2d 429 (Minn. 2012). A quit claim deed or some other instrument which does not clearly set out the waiver will not be sufficient. See id. The marital homestead interest is not a title interest to be conveyed by a deed and thus a quit claim deed is not the appropriate document. See id.

3. **Declaratory Judgment - Property Not the Homestead.** If the property was not the homestead of either spouse at the time the mortgage was executed, the holder of the mortgage should obtain a court order with such a finding determining that the spouse’s signature was not required. “Occupancy” of the kind needed under Minnesota homestead exemption statute § 510.01, requires a determination of legal, not merely factual, right of occupancy and possession. In re Stenzel, 259 B.R. 141 (2001), reversed 301 F.3d 945, rehearing and rehearing en banc denied, vacated and remanded.

4. **Equitable lien.** “An equitable lien exists when there is a contract, express or implied, sufficiently indicating an intention to make some particular property a security for a debt or other obligation[.]” Marquette Nat. Bank of Minneapolis v. Mullin, 205 Minn. 562, 571, 287 N.W. 233, 238 (1939). Where property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched, an equitable lien arises. Borsgard v. Elverum, 248 Minn. 405, 414, 80 N.W.2d 604, 610 (1957); Fredlin v. Farmers State Bank, 384 N.W.2d 532, 535 (Minn. Ct. App. 1986).

5. **Adoption and Confirmation, Ratification.** One case has found that a deed signed by both spouses was an “adoption and confirmation” of a prior purchase agreement signed by only spouse, although the Minnesota Supreme Court found that, as to third parties, this adoption and confirmation did not relate back to the date of the purchase agreement. Marr v. Bradley, 239 Minn. 503, 59 N.W.2d 331 (1953)). If both spouses signed a later document, this may serve as an adoption or confirmation of a prior invalid instrument signed by only one spouse.
Some cases appear to refer to “estoppel” and “ratification” as the same claim. See Engler, 777 N.W.2d at 766. Another case uses the phrase “estoppel by ratification.” See Chojnacki, 668 N.W.2d at 5, 6. While some cases seem to suggest that a mortgage void under Minn. Stat. § 507.02 cannot be ratified (see Engler, 777 N.W.2d at 766; Anderson, 303 Minn. 412, 228 N.W.2d at 259-260), others note that ratification is an exception to the statute (see Gores, 777 N.W.2d 527-528).

The adoption and confirmation or ratification theories may be particularly suited for situations where evidence of the non-signing spouse’s prior knowledge of the conveyance in question is scant or otherwise not present.

6. Equitable Subrogation. Under equitable subrogation, when a person has discharged the debt of another with respect to real property, that person may, “when justice requires, ... be substituted in place of a prior encumbrancer and treated as an equitable assignee of the lien.” Citizens State Bank v. Raven Trading Partners, Inc., 786 N.W.2d 274, 279 (2010) (citing First Nat’l Bank of Menahga v. Schunk, 201 Minn. 359, 363, 276 N.W. 290, 292-93 (1937). “In other words, that person may be substituted to the rights and position of the prior creditor.” Id. A party seeking equitable subrogation has the burden of establishing that equities weigh in the party's favor, which also requires that no injury to innocent third parties will result if subrogation is applied... There is no injury to a party if the party's position remains unchanged or the party received that for which the party bargained.” Citizens State Bank v. Raven Trading Partners, Inc., 786 N.W.2d 274, 284-285 (2010).

7. Parties.
   a. Signing spouse
   b. Non-signing spouse
   c. Holders of other interests in the property. Other mortgage lenders that hold mortgages on the property have standing to challenge the validity of another lender’s competing mortgage due to lack of signature by mortgagor’s spouse on the mortgage. Gores v. Schultz, 777 N.W.2d 522 (Minn.App. 2009), review denied.

B. Evidence and Investigation.

The theme of the evidence relevant to these claims is whether the non-signing spouse is the type of person intended to be protected by the statute. Namely, an unknowing spouse who faces loss of the homestead due to the actions of the other spouse. Look for evidence that supports the conclusion that all parties believed the mortgage was valid, and allowing the enforcement of the mortgage places the parties in the position they believed and acted as though they were in. Evidence which demonstrates that the non-signing spouse had the opportunity to accept or reject the mortgage lien and benefits of the transaction is also particularly

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relevant.

1. **Tax Information.** County’s tax information will typically indicate whether property is classified as homestead, which is not a definitive answer as to the homestead status but can be evidence on that point.

2. **Marriage database.** Minnesota has a searchable online database for marriages entered into in this state (Minnesota Official Marriage System, https://moms.mn.gov/). A mortgagor may have married in another state or country and many states do not maintain such a database. Court docket searches are more common and will show divorces.

3. **Loan Application.** The loan application includes a marital status field, is based on information obtained from the signing spouse, and typically signed at closing. The application also states whether the borrower intends to occupy the property as their primary residence, evidence as to homestead status.

4. **Settlement Statement.** The Settlement Statement identifies what debts are paid as part of the mortgage transaction. If the non-signing spouse’s debts are paid, this is evidence of benefit conferred. The settlement statement will also indicate whether the mortgage is a purchase money mortgage and therefore excepted from of the statute.

5. **Documents signed by the non-signing spouse.** Although the borrower’s spouse may not have signed the mortgage, he or she may have signed other documents related to the transaction. Documents that reference the existence of a mortgage are helpful as they demonstrate the non-signing spouse’s knowledge of, and lack of objection to, the transaction. The Notice of Right to Cancel can be particularly persuasive as it explains that the parties had the chance to avoid the mortgage transaction (and, assumedly, chose not to). Signatures by the non-signing spouse on documents needed to complete the transaction, or other affirming actions by the non-signing spouse, can show conduct by the non-signing spouse inducing the reliance of the lender to proceed with the transaction.

6. **Testimony of the parties.** Both the signing and non-signing spouse should be questioned about the benefit received from the transaction (such as cash used for purchases or improvements to the property, extinguishment of legal obligations such as payment of debts or payoff of mortgages signed by either), whether they intended or believed the lien to be valid (such as making payments on the loan), and whether they discussed the mortgage before the closing. Various other persons may also have relevant knowledge of the mortgage transaction including the closer, notary, mortgage broker, title insurance agent, and abstractor.
7. **Bank records.** Funds deposited in joint bank account accessible to the signing and non-signing spouse can show that the spouse received a benefit from the mortgage transaction. They can also show whether payments were made on the mortgage loan suggesting that the parties believed the mortgage was valid and enforceable. Often, the mortgage lender maintains servicing records, check images, and phone call recordings which prove to be useful in showing knowledge, benefit, or reliance. Servicing records can also show whether the mortgage holder was paying property taxes and insurance for the property while payments were not being made on the mortgage, which can show another manner of benefit conferred by the mortgage transaction.

C. **Common Defenses.**

The application of Minn. Stat. § 507.02 is in itself a defense to the enforcement of the mortgage. The signing spouse, non-signing spouse, or another lienholder with an interest in the property may affirmatively allege that the mortgage is void. Because estoppel, equitable lien, and equitable subrogation are equitable remedies, a defendant may assert that the lender has unclean hands based on unfavorable facts or perhaps simply the fact that the lender failed to obtain the spouse’s signature. Signing or non-signing spouses regularly assert that the lender is a sophisticated party, while they are not, and therefore should not be relieved of the mistake. However, nearly all persons are capable of understanding whether they agreed to and believed there would be a mortgage against their property, and this defense distracts from the fact that the lack of one spouse’s signature is often the result of confusion or drafting error in how the mortgage is prepared for signature and that the signing spouse and perhaps non-signing spouse received significant benefit from the transaction.

D. **Case Presentation and Litigation Strategy.**

A timeline can be a helpful guide to the court or jury in showing the evidence that the borrower and spouse intended the mortgage to be valid and received the benefit of the transaction. This timeline can serve as a clear list of the cumulative evidence in favor of enforcing the mortgage, and often these cases rest on a larger body of evidence rather than one specific fact. Showing a pattern of conduct and belief by the non-signing spouse should be of particular focus and emphasis.

VI. **NON-JOINDER OF TITLE OWNERS.**

Where a mortgage is not on homestead property, is not given by married persons, or is a purchase money mortgage against homestead property, Minn. Stat. § 507.02 will not invalidate the instrument. However, a mortgage which does not include the signature of a title owner only encumbers the interest of the signer. If the omitted owner is unwilling to sign a document encumbering their interest, a court action may be necessary to establish the mortgage as a lien on that person’s interest.
A. Claims and Parties.

1. Reformation. If the non-signing owner was intended to be a mortgagor and the omission was a mistake, reformation may apply. However, intervening lienholders encumbering the omitted owner’s interest may claim priority unless they had notice of the intent to include the omitted owner.

2. Ratification. Where the non-signing party took actions showing it somehow approved or sanctioned the conveyance, ratification may apply. A mortgage is a conveyance that can be ratified, and “[r]atification occurs when a person with ‘full knowledge of all the material facts, confirms, approves, or sanctions, by affirmative act or acquiescence, the originally unauthorized act of another.’” Wells Fargo Home Mortgage, Inc. v. Chojnacki, 668 N.W.2d 1, 5 (Minn. Ct. App. 2003) (quoting Anderson v. First Nat’l Bank of Pine City, 303 Minn. 408, 410, 228 N.W.2d 257, 259 (1975) and explaining estoppel by ratification). Ratification will be found where a person “receives and retains the proceeds or benefits” of the unauthorized act. Chojnacki, 668 N.W.2d at 5. If a person acquiesces to a transaction and receives and retains the benefits of the transaction, as through ratification, his own conduct creates an estoppel that prevents him from denying the validity of the transaction. See Fuller v. Johnson, 139 Minn. 110, 114, 165 N.W. 874, 875 (1917).

B. Evidence and Investigation.

Although the elements differ, the evidence relevant to ratification is very similar to the above-described evidence for estoppel and other non-joinder of spouse claims.

C. Common Defenses.

An omitted owner may contend that he or she never intended to mortgage their interest or that the transaction was carried out as they expected. While this may or may not be the case, if this owner knew of the mortgage and the mortgagee knew of the existence of the owner, it defies common sense to conclude that the mortgage lender would be willing to accept a mortgage on only a partial interest in the property. The mortgage transaction documents will likely show that the mortgage was intended to encumber the entire property, not just a partial interest. It can be explained to a judge or jury that if such a mortgage was to be foreclosed, the lender would be a co-owner with that individual which is not what was contemplated by the parties.

D. Case Presentation and Litigation Strategy.

Again, presenting this case will be similar to presenting a case for a non-joinder of spouse claim. Be sure to emphasize that a result where the omitted owner’s
When All Else Fails: Resolving Title Issues in Court

interest is mortgage puts the parties where they expected to be, and concluding otherwise produces an absurd and surely unintended result upon foreclosure. Once more, showing a pattern of conduct and belief by the non-signing owner should be of particular focus and emphasis.

VII. LIEN PRIORITY.

A. Claims and Parties.

1. **Recording Act.** Minnesota has a race-notice recording act in which the first party to record its conveyance takes priority unless they are not a good faith purchaser, meaning they have notice of a prior unrecorded conveyance. *See* Minn. Stat. § 507.34 (the “Recording Act”); *Chergosky v. Crosstown Bell, Inc.* 463 N.W.2d 522, 524 (Minn. 1990). A “purchaser in good faith,” also known as a “bona fide purchaser,” is one who in pays value for an interest in property without actual, implied, or constructive notice of inconsistent outstanding rights of others. *Chergosky*, 463 N.W.2d at 524; *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382, 384 (Minn. 1978).

2. **Equitable Subrogation.** Under equitable subrogation, when a person has discharged the debt of another with respect to real property, that person may, “when justice requires, . . . be substituted in place of a prior encumbrancer and treated as an equitable assignee of the lien.” *Citizens State Bank v. Raven Trading Partners, Inc.*, 786 N.W.2d 274, 279 (Minn. 2010) (citing *First Nat’l Bank of Menahga v. Schunk*, 201 Minn. 359, 363, 276 N.W. 290, 292-93 (1937)). Under *Raven Trading*, equitable subrogation is available, at least potentially, to lenders who have not only paid off a prior lien but who are not negligent, or whose negligence was based on “an excusable or justifiable mistake of fact.” *Id.* at 276.

3. **Statutes determining priority.** Although most claims for a determination of priority will be declaratory judgment actions under Minn. Stat. Chapter 555, specific statutes may provide the basis for such a priority determination. For example, the priority of homeowners association liens and mechanic’s liens are both determined by statute. *See* Minn. Stat. §§ 515B.3-116; 514.05. There is an entire body of law governing the attachment and priority of federal tax liens.

4. **Declaratory judgment as to document.** It may be that a subordination agreement or other document provides a basis for determining the priority between liens. In such a case, you may bring an action for a determination of priority based on such a document.

When All Else Fails: Resolving Title Issues in Court
5. **Parties.**
   
   a. Current owners.
   b. Mortgage lenders.
   c. Judgment holders.
   d. State and federal tax lien holders.
   e. Other lien or interest holders.

B. **Evidence and Investigation.**

The evidence relevant to a priority claims dispute will be specific to each claim. Competing mortgages will typically center around notice, requiring you to obtain the other lender’s loan origination and closing files. Mechanic’s lien priority involves notice but of a different type which often requires determining when work was first commenced and last completed. Attention should be given to researching and investigating the validity of the competing lien. There may be a basis for completely invalidating the lien, rather than establishing priority over it.

C. **Common Defenses.**

A competing lienholder may assert priority under the same rules above, or may attempt to invalidate your lien or interest. Defenses tend to be specific to the liens and issues at hand.

D. **Case Presentation and Litigation Strategy.**

A timeline depicting the dates on which documents were signed and recorded, along with other significant dates (first date of work, docketing date for judgment, etc.), may be particularly persuasive in a priority case where notice is the most significant factor. For an example, see Appendix F.

VIII. **MANUFACTURED HOMES.**

In order to be made a part of the underlying real estate, the certificate of title for the home must be “surrendered” through Department of Public Safety, Driver and Vehicle Services (DVS). In this process, the home’s original certificate of title is cancelled and DVS signs a Notice of Surrender which is recorded in the county’s real estate records as evidence that the home is part of the real estate. See Minn. Stat. § 168A.141. If the property is to be mortgaged and the home is affixed to the property, Minnesota statute requires that the title to the manufactured home be surrendered. *Id.* A court action may be necessary if (1) the original certificate of title cannot be located, (2) an original lien release for a security interest listed on the certificate cannot be obtained, or (3) a certificate of title was never issued and an original statement of origin from the manufacturer cannot be located in order to issue and thereafter cancelled and surrendered.

*When All Else Fails: Resolving Title Issues in Court*
A. Claims and Parties.

1. Declaratory judgment action. The complaint should also include information as to the certificate of title, if one was issued, and that the manufactured home is affixed to the property within the meaning of the statute. The order obtained should direct DVS to accept an application for title (if no title was issued) or accept an application for duplicate title (if the original certificate cannot be located), issue a new certificate of title, cancel and surrender it, and execute a Notice of Surrender. You may also want to add a paragraph stating that upon recording of the Notice of Surrender, the home shall be deemed an improvement to the property and subject to the lien of the mortgage (or, if the mortgage has been foreclosed, that the foreclosing lender is the owner of the home as an improvement to the property). Any evidence showing the intent of the parties to either surrender the title or treat the manufactured home as part of the real estate should be pled (such as the existence of an affidavit or manufactured home rider). If there is a lien on the certificate and a release cannot be obtained, that lienholder can be named in the action with a request that the lien be deemed satisfied (if there is evidence to support such a claim).

2. Parties.
   a. Owner of property.
   b. Owners of the home under the certificate of title.
   c. Any lienholder listed on home’s certificate of title.
   d. Mortgage lender.
   e. DVS.
   f. Owner of property sought by plaintiff.
   g. Lienholders with an interest in that property must be named.

B. Evidence and Investigation.

1. Manufactured Home Certificate of Title. Contains the relevant information about the home including whether there is a security interest on the home. The owners of the property may have the original or a copy. If the home was not properly transferred is possible a prior owner still holds the original certificate. It is possible that a copy will appear in a title company’s closing file or a mortgage loan origination file.

2. DVS records for manufactured home. DVS can perform a search for records on the manufactured home. If they have no records for the home, they should be willing to provide a letter stating as such. This can be used as evidence in your court action that a certificate of title has never been issued. If the DVS does have records, they often provide a print off from their computer system which has similar information to the certificate.
3. **Manufactured Home Rider on Mortgage.** Mortgages intended to encumber manufactured homes often include riders describing the home and stating that the borrower has or shall permanently affix the home to the property and cooperate in efforts to surrender the title. This rider can be used to determine the serial number, make, model, year, and size of the home and also as evidence of the parties’ intent to surrender the title and encumber the home with the mortgage.

4. **Manufactured Home Statement of Origin.** A statement of origin is issued by the manufacturer of manufactured homes and the original is provided to DVS in order to issue a certificate of title. This document will also describe the home.

5. **Information from parties.** It is often difficult to locate original certificates of title, lien releases, or statements of origin, but owners and former owners may have information on the location of original documents and whether an attempt was made to surrender the title.

C. **Common Defenses.**

A contest from a defendant in a manufactured home action is unlikely. It is possible that a borrower could claim that the mortgage was not intended to encumber the home and that the home should remain personal property. Sometimes there is debate as to whether the home is actually affixed to the property, which requires a permanent foundation and connection to utilities. DVS and the state attorney general’s office understands that lawsuits are necessary to resolve these issues and typically provide a letter indicating that they do not oppose the relief sought in the pleadings.

D. **Case Presentation and Litigation Strategy.**

It may require some explanation to ensure that the judge understands exactly what you are trying to accomplish by bringing this court action. Be clear in your pleadings. Although not strictly necessary, it is advisable to include citations to the relevant statutes in the complaint.

IX. **TORRENS ISSUES.**

The above-described issues occur with both Torrens and abstract property. However, it is worth noting that Torrens system can present issues unique to that system, and remedying title issues in Torrens has some substantive and procedural differences.

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2 For a more thorough discussion of Torrens matters, see “Understanding the Torrens Land Registration System,” a presentation given by Wayne D. Anderson, current Ramsey County Examiner of Titles, and Kimball Foster, then Hennepin County Examiner of Titles, at the 2010 Real Estate Institute (November 12-13, 2010).

*When All Else Fails: Resolving Title Issues in Court*
A. Claims and Parties.

1. **Torrens-specific relief.** Generally, the above-described title issues occur with both Torrens and abstract property and the claims apply when filing a court action to resolve the issue. There are procedural differences for bringing claims that might otherwise be brought in an action concerning abstract property, described below. A number of different issues require a proceeding subsequent: including obtaining a new certificate of title after a mortgage foreclosure by advertisement, removing a contract for deed from the Certificate of Title after contract for deed cancellation, and obtaining a new certificate within 10 years after real estate tax forfeiture to the state. A proceeding subsequent may also be necessary in order to remove easements, restrictions or other encumbrances from a certificate of title. Where original documents were rejected or otherwise went unrecorded and have since been lost, a proceeding subsequent can be used to allow photocopies to be recorded.

B. Evidence and Investigation.

1. **Determine whether the property is Torrens.** More property is abstract than Torrens. Torrens property will have a certificate of title for the property. If the documents in your title work are consistently recorded with the County Recorder rather than the Registrar of Deeds, then the property is almost certainly abstract. If a certificate of title number is listed on a title commitment, as part of a legal description, or elsewhere on a real estate instrument, then at least part of the property is likely Torrens. However, do not assume that the entirety of the property is Torrens as many properties or contiguous parcels are partially Torrens and partially abstract. The county’s online tax information may also indicate whether the property is Torrens or abstract.

2. **Certificate of Title.** Unlike abstract, the county registrar of titles issues a certificate of title for Torrens property which shows as memorials the various interests which affect the property, with a number of exceptions. An updated copy of this documents should be obtained for analysis and also for use as an exhibit to the petition.

C. Common Defenses.

Most defenses are not Torrens-specific. However, there are some differences specific to Torrens. Most notably, adverse possession and prescriptive easements cannot be obtained against Torrens property. See Minn. Stat. 508.02; Minn. Stat. 508.25. Also, judgments must be specifically recorded against the certificate, unlike abstract where judgments need only be docketed in the county where the property is located in order to attach as a lien. See Minn. Stat. § 508.63.
D. Case Presentation and Litigation Strategy.

1. Examiner’s Directive. Even where parties are uncooperative, some issues can be resolved short of a court proceeding by an “examiner’s directive” issued by the examiner directing the registrar to make a particular correction or change. For example, a spelling mistake in a deed resulting in the same error on the certificate of title can be corrected by the examiner via a directive upon submission of a notarized statement by the owner.

2. Procedural differences, proceeding subsequent. A court proceeding to address a title issue for property already registered is called a “proceeding subsequent to initial registration.” A detailed discussion of the procedure is beyond the scope of these materials. Some procedure is determined by the examiner of titles and varies from county to county. Consulting with the county examiner is recommended if you are unfamiliar with their procedure.

Occasionally, you will encounter an issue that affects both Torrens and abstract property. In such a case, I recommend consulting with the examiner of titles to see if they will allow you to address all of the property in a single proceeding, which will likely be a proceeding subsequent.

Generally, a petition (instead of a complaint) is filed with the district court. When recorded, the petition functions like a Notice of Lis Pendens. The prayer for relief should not only include a request the ultimate determination (ex: “Reforming the mortgage to state the correct legal description”) but also indicating to the registrar of titles how that relief should be reflected in terms of the certificate of title (ex: “Showing by a memorial on the certificate of title that the mortgage has been reformed to state the correct legal description” or “Cancelling the current certificate of title and issuing a new certificate of title in the name of _______”).

Next, the examiner of titles issues a “Report of Examiner” setting out what evidence must be presented at the order to show cause hearing in order to obtain the relief sought. The examiner’s report also sets out which parties must be served with an order to show cause. The petitioner drafts the order to show cause and submits it to the court or examiner to have signed by a judge, after which it is served on the parties who must receive notice of the proceeding. The procedure for determining a hearing date varies with each county.

The petitioner submits the necessary evidence, typically by affidavit prior to the hearing, along with a proposed order and evidence of proper service. If the evidentiary requirements are satisfied and everything is in order, the examiner will have the proposed order signed by a judge, after which it is
recorded with the registrar so that the registrar can carry out whatever it is
directed to do by the order.

If a party appears at the Order to Show Cause hearing and/or answers the
Petition, the matter is considered a contested case and is, in most counties,
transferred to a judge of district court. However, again depending on the
county, the examiner of titles may continue to play a role in the
proceeding.

X. LACK OF ACCESS

Lack of legal access to real property can be the result of improper conveyancing,
improper dedication, or other reasons. Addressing the issue will involve some of the
same theories and methods discussed above and some additional legal theories pertaining
to the establishment of public roads.

A. Claims and Parties.

1. **Reformation.** If a prior conveyance intended to convey an access but did
   not that instrument may be reformed. See reformation case law cited
   above.

2. **Prescriptive Easement** A prescriptive easement to establish access ay be
   obtained under circumstances similar to adverse possession. *See Rogers v.
   Moore, 603 N.W.2d 650, 657 (Minn. 1999). Ehle v. Prosser, 293 Minn.
   183, 189, 197 N.W.2d 458, 462 (1972). To establish a prescriptive
   easement, a party must show that the property has been used in an actual,
   open, continuous, exclusive, and hostile manner for 15 years.*

3. **Easement by Necessity/Implication.** The factors that create an implied
   easement of necessity are: (1) a common title to the benefited and servient
   parcels at the time the easement arose; (2) a severance of the common
   title; (3) a use which has been so long and continued and apparent as to
   show that it was intended to be permanent; and (4) the necessity of the
   easement for the beneficial use of the benefitted land. *Nunnelee v. Schuna,
   431 N.W.2d 144, 148 (Minn. App. 1988), review denied (Minn. Dec. 30,
   1988). The necessity of the easement existed at the time of severance.
   Clark v. Galaxy Apartments, 427 N.W.2d 723, 726 (Minn. App. 1988);
   Kleis v. Johnson, 354 N.W.2d 609, 611 (Minn. App. 1984).*

4. **Easement by Estoppel.** Where a vendor who has reserved some property
to himself represents to vendee that vendee will have an easement over
vendor's property as part of the sale transaction, the vendor may be later
estopped from denying the easement, but where there is no evidence of
such a representation, terms of the written conveyance control. *Highway 7
Embers, Inc. v. Northwestern Nat. Bank, 256 N.W.2d 271 (Minn. 1977).*

5. **Common Law Road Dedication.** A public road is established by common
law dedication when a landowner intends (expressly or by implication) to have his land appropriated and devoted to a public use, and the public accepts that use. *Twp. of Villard v. Hoting*, 442 N.W.2d 826, 828 (Minn.App.1989). A common law dedication is “instantly effective and irrevocable.” *Id.* Common law dedication of a road does not require the passage of time; it occurs instantly when its elements have been met. *Bengtson v. Village of Marine on St. Croix*, 310 Minn. 508, 509, 246 N.W.2d 582, 584 (1976).

6. **Road Dedication by Statutory Prescriptive Use.** Minn. Stat. §160.05 Subd. 1 provides:

   When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not.

To satisfy the maintenance requirement, the maintenance must be of a quality and character appropriate to an already existing public road. *Rixmann v. City of Prior Lake* 723 N.W.2d 493 (Minn. App. 2006) (Rev. Den.)

7. **Cartways.** Minn. Stat §164.08 Subd. 2 provides for the mandatory establishment of a “cartway” at least 33 feet wide connecting a landlocked parcel to a public road. *Kennedy v. Pepin Township*, 784 N.W.2d 378 (Minn. 2010). The landlocked parcel must be at least 5 acres in size. The petitioning landowner must bear the expenses incurred in creating the cartway. Minn. Stat. § 164.08 Subd. 2(c)).

8. **Parties.**

   a. Grantor and grantee for conveyance to be reformed.
   b. Current owners of property.
   c. Township, city or county in the case of Road dedication or cartway petition.
   d. Other parties with an interest in the property, including omitted property being added by reformation (holders of mortgages, docketed judgments, easements, etc.).

**B. Evidence and Investigation.**

The investigation will include a thorough examination of the title to all affected parcels, and other historical records pertaining to the uses of the access parcel. Interviewing or deposing prior owners, neighbors, and governmental officials where possible should be done. A surveyor will probably need to be retained to
provide a survey and description of the access parcel, and perhaps testify as to the lines of occupation.

**C. Common Defenses.**

The establishment of an easement by prescription, necessity or estoppel requires that the party seeking the easement prove its case, so common defenses are that one or more of the required elements have not been met.

Defenses to a claim of common law dedication include challenging that the acts of the owner in submitting its land to public use “unequivocally and convincingly” showed the intent to do so. See, *Flynn v. Beisel*, 257 Minn. 531, 540, 102 N.W.2d 284, 291 (1960).

Defenses to statutory dedication under Minn. Stat. § 160.05 Subd. 1 include claims that the maintenance of the access parcel was not of a quality and character appropriate to an already existing public road. *See Rixmann v. City of Prior Lake* 723 N.W.2d 493 (Minn. App. 2006) (Rev. Den.) ” *Town of Belle Prairie v. Kliber*, 448 N.W.2d 375, 379 (Minn.App.1989)

Defenses to a cartway petition include that the parcel seeking access is not actually landlocked. *See Horton v, Township of Helen*, 624 N.W.2d 591 (Minn. App. 2001).

**D. Case Presentation and Litigation Strategy.**

Similar to many of the claims discussed above, a visual aid depicting the parcels and access routes at issue in the dispute can helpful. For an example, see Appendix G.
Appendix A
Appendix B

When All Else Fails: Resolving Title Issues in Court
### Appendix C

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Chain continues with mentioning only Moss as owners.
Appendix D
Appendix G