New Law School Graduates May Be Particularly Adept at Defeating the Technical Language Trap

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In the current economy, as banks seek to foreclose on deeds of trust, attorneys for banks and borrowers in default will be pouring over deeds to discover – and defeat – defects in the title. Newly-graduated associates fresh from the Bar exam may be particularly helpful when examining unusual deeds with complicated remainder interests or archaic, technical language that every lawyer learns for the bar exam, but that rarely appears in actual practice. Firms that are able to bring on new associates are likely to see a direct benefit to their clients, particularly in title defense and examination work.

In a recent case in Westmoreland County, a bank attempted to foreclose on a house after the owners failed to pay their mortgage on a home improvement loan. It seemed like just another foreclosure until the bank examined the deed to the house. Instead of the fee simple ownership interest they were expecting to find, the deed granted the land to the owner and the owner's son for life, with "the remainder to the issue of the body" of the owner's son, and if the owner's son should die without issue, the remainder was directed to go to the owner's nephew.

The bank was concerned about moving forward with the foreclosure, because they feared they would be foreclosing on merely the life estates of the owner and his son, who were both parties to the mortgage. Attorneys at Sands Anderson Marks & Miller, who represented the bank, were suddenly immersed in a fact pattern not seen the Bar exam, as they attempted to determine the remainder interests, if there was a reversion, and when the property rights would vest (or were they already vested?). Throw in the Rule Against Perpetuities and the Rule in Shelley's Case and it was a perfect first year law school property exam hypothetical – but a thorny problem for experienced practitioner Ben Lacy.

Lacy realized that the complicated contingent remainders in the deed were similar to the hypothetical questions on the Bar exam and called in the firm's newest associate to research the problem. Having just finished a review of estates in land for the Bar exam a few months earlier, she quickly identified the construction "to owner's son for life, then to the issue of the body" as creating a fee tail estate.

The fee tail creates a series of life estates in each successive generation, until there are no more blood heirs left to inherit, then the estate reverts back to the grantor or the alternate remainderman. Virginia abolished the fee tail in 1776, to prevent landowners from creating dynastic estates that would pass from generation to generation, sheltered from creditors who could only foreclose against a life estate. The statute converts the fee tail into a fee simple, which allows the creditor to foreclose and make good on a bad debt.

In this case, the grantor who requested this unusual deed knew the owner and his son had financial difficulties that were likely to last throughout their lives. The deed language appeared to be an attempt create an estate that would be sheltered from creditors by granting the owner and his son life estates only, and then leave the remainder to future generations, in the hope they

would be more prosperous. But by using the specific construction that created a fee tail, with the technical phrase “issue of the body,” the drafting attorney inadvertently did the very thing his client did not want: he created an interest the bank could foreclose on when the owner and his son defaulted on their mortgage.

There are several lessons practicing attorneys can learn from this unique case. New graduates may have insight into the black letter law that is taught in every first year law class, but is only seen in practice once in a career. Attorneys are also cautioned to carefully research (or have that eager new associate research) the chain of title in real estate transactions to avoid hidden pitfalls found in technical language that might have been incorporated into a form deed over a hundred years ago. Of course, attorneys should also review the interests they are creating when drafting deeds, particularly if they deviate from the standard language. Lawyers involved in mortgages, foreclosures, or title examinations could to brush up on the meaning of technical language used a century ago to determine the estates created. Or they could just hire a recent law school graduate.