The Perils and Pitfalls of the Gift Deed

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What is a “gift deed?” Where the stated consideration is "love and affection," the deed is a gift deed. In Virginia, gift deeds present several challenges in regard to title.

One of these challenges is mitigating concerns in regard to the augmented estate. This challenge arises in instances when a non-owning spouse (if any) does not join in the conveyance, AND the marital status of the grantor is not given in the deed. Va. Code Ann. § 64.2-305 defines the augmented estate. The augmented estate includes real and personal property of the deceased, less allowances, exemptions, funeral expenses, charges of administration, and debts, to which is added (among other things) *the value of property transferred by the decedent during the marriage to someone other than a bona fide purchaser, to the extent that the decedent did not receive adequate and full consideration*. This is only true if the transfer is a transfer by gift within 5 preceding calendar years of the decedent's death, and is limited to the extent the aggregate value of the transfers to the donee (recipient) exceed $10,000 per calendar year (as adjusted per 26 USCA §2503).

Below are 3 instances where, by statute, property is exempted from the augmented estate:
1. the property was transferred by the decedent during his/her marriage with the written consent or joinder of the surviving spouse;
2. the property was received by the decedent by gift, will, or intestate succession before or during the marriage from a person other than the surviving spouse, to the extent such property was maintained as separate property; or,
3. instances of irrevocable transfers to anyone other than the surviving spouse made prior to January 1, 1991.

Of course, the most noteworthy of the above for our purposes is instance 1.

What all of this means from a title perspective is that the property could be subject to a monetary claim under the augmented estate. This is not a concern if the non-owning spouse (if any) joins in the conveyance. If there is no such spouse, then the best way to address this concern for those folks who come across the deed in the future is to indicate that the grantor is unmarried. By doing so, the drafter of the deed removes the need for the title insurance underwriter of the future to somehow determine the marital status of the grantor. If the underwriter cannot do so, or it turns out that there was a spouse, then under the parameters given above, the underwriter may need to make a requirement or exception to address the rights of the surviving spouse under the augmented estate.

The other major concern regarding transfers by gift deed is that such transactions are void as to creditors of the grantor if the grantor is insolvent or would be rendered insolvent by the transfer. The concern arises under a 2006 Loan policy due to Covered Risk 13(a) (Covered Risk 9(a) in the 2006 Owner’s Policy is similar):

(the Company insures as of Date of Policy and, to the extent stated in Covered Risks 11, 13, and 14, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of)
13. The invalidity, unenforceability, lack of priority, or avoidance of the lien of the Insured Mortgage upon the Title

(a) resulting from the avoidance in whole or in part, or from a court order providing an alternative remedy, of any transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction creating the lien of the Insured Mortgage because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws

The creditors protected are those existing at the time of the gift. Va. Code Ann. § 55-81. This provision has been construed by the courts to mean that the gift deed is "voidable" rather than void *ab initio*. This means that, as long as there is no challenge to the transfer, then the transfer stands, but the law provides for the opportunity to challenge and void the transfer. Suits to avoid voluntary conveyances must be filed within five (5) years of recordation of the gift deed or, if not recorded, within five (5) years of the time the conveyance should have been discovered by the creditor. Va. Code Ann. § 8.01-253. The five (5) year statute is not applicable in cases where there is actual fraud, which is defined as "an intent to delay, hinder or defraud creditors, purchasers, or other persons." Va. Code Ann. § 55-80. By its terms, section 55-80 is not applicable to avoid the title conveyed to a "purchaser for valuable consideration, unless it appears that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor." The title examiner should be aware of this risk, and, if the conveyance is closely followed by a series of judgments, point out the possibility of risk in the title report. Where a grantee under a gift deed or voluntary conveyance will be insured under a policy of title insurance, an exception should be taken for rights of creditors of the grantor under Va. Code Ann. § 55-81. Essentially, the coverage provided under Covered Risk 9(a) of the 2006 Owner's Policy would be deleted. If the grantee desires that coverage, then the grantor's financial statement should be reviewed so that a judgment can be made about the risk that such creditors may assert a claim to the property.

As you can see, there is a 5 year period that comes into play in either scenario. If the gift deed falls outside of this time period, and there is no evidence of an action in court challenging the deed (it would be best practice to check the bankruptcy court as well, if we're dealing with the second scenario), then you should be able to proceed without further action or inquiry in regard to concerns raised by a gift deed.