



I Should Have Known That

Presented by:
LEGAL EDUCATION DEPARTMENT
of
Attorneys' Title Fund Services, LLC

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“

If you're not willing to
laugh at yourself, I'm
happy to do it for you.

Groucho Marx

”

2



I Should Have Known That!

Michael Rothman, John St. Lawrence, Linda Monaco and Kara Scott
Legal Education Department

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Who Signs?

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Who Signs the Mortgage?

- Title is held by A, B, C and D
- Loan on property is being refinanced
- C is sole borrower on Note
- Who signs the new mortgage?



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A, B, C & D all must sign the mortgage as owners of record

Remainderman Sign the Mortgage?

- Title is held by A, as life tenant, with remainder to B upon A's death
- Who signs the mortgage?



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A & B must sign the mortgage as owners of record. Different for "Ladybird" or enhanced life estates.

Enhanced Life Estates - A New Standard (or Three) For Real Estate - BY BENJAMIN T. JEPSON, FUND SR. UNDERWRITING COUNSEL

Standard 6.11 - Enhanced Life Estate: Life Tenant and Homestead Property
A life tenant with an interest in homestead property, coupled with the power to sell, convey, mortgage and otherwise manage the fee simple estate, can convey or encumber the fee simple estate during the lifetime of the holder without the remainderman.

This standard supports The Fund's insuring position that the holder of an enhanced life estate can convey or mortgage fee simple interest in homestead property during his or her lifetime without joinder of the remainderman.

Who Signs the Mortgage?

- Husband and wife are purchasing a new residence
- Loan application made in Husband's name only
- Husband's name alone is on the Note
- Who signs the mortgage?

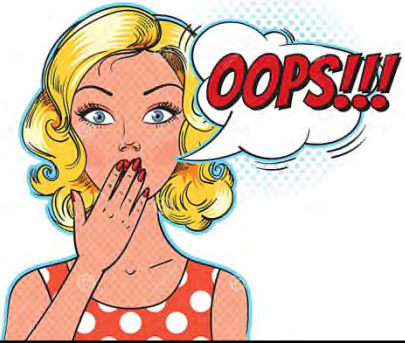


BOTH SPOUSES MUST SIGN. Unless somehow not homestead (assume homestead).

Errors

I typed Lot 21 instead of Lot 12

**Can't I just cross-out the
mistake, fix it and
re-record?**



No. Can't simply cross-out and re-record. But see Title Note 13.02.03 and Sec. 689.041, F.S., that allows for use of a "curative notice" under limited circumstances.

Missing Notary Seal



- Deed in chain of title is missing the notary seal
- Is the deed defective?
- Need a corrective deed?

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Depends on how long the deed has been of record. If more than 5 years, and in the absence of fraud, deed is deemed cured. If less than 5 years, new deed required. Sec. 95.231, F.S. and Title Note 1.02.01.

Notary as Witness

- Mail-away Deed came back with only one witness signature
- Notary says he was present and also witnessed signing
- Are we OK?



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Fact that notary signed the certificate of acknowledgement is not by itself sufficient and a corrective deed may be required. But see Title Note 10.07.04 and also recall that Sec. 95.231, F.S. can cure the defect.

TN 10.07.04

Deed Missing Survivorship Language



- Can we add survivorship language to original deed and re-record as a corrective deed?

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No, you cannot re-record as a corrective deed. The Grantees of the original deed can execute and record a deed to themselves with the survivorship language.

Title Standard 3.2 – Deed Purporting to Correct Previous Effective Deed

STANDARD: A GRANTOR WHO HAS CONVEYED LAND BY AN EFFECTIVE AND UNAMBIGUOUS DEED CANNOT AVOID THE EFFECT OF SUCH CONVEYANCE BY EXECUTING A NEW DEED MAKING A CHANGE IN THE CONVEYANCE, EVEN THOUGH THE LATTER DEED PURPORTS TO CORRECT OR MODIFY THE FORMER.

Also See Title Note 10.03.03

Title Standard 6.8 – Creation of Joint Tenancy

STANDARD: A DEED TO TWO OR MORE GRANTEEES OTHER THAN HUSBAND AND WIFE, AS “JOINT TENANTS” CREATES A TENANCY IN COMMON UNLESS THE DEED EXPRESSLY PROVIDES FOR THE RIGHT OF SURVIVORSHIP.

Incorrect Corporate Name on Deed

- Grantor conveys property to XYZ, Inc.
- The entity's legal name is XYZ Corporation
- Is this a problem?



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Title Standard 10.6 – Name Variances in Corporate Conveyances

STANDARD: CORPORATIONS ARE SATISFACTORILY IDENTIFIED ALTHOUGH THEIR NAMES ARE INCORRECTLY SET OUT OR VARIANCES EXIST FROM INSTRUMENT TO INSTRUMENT DUE TO THE OMISSION, ADDITION, OR MISSPELLING OF ANY PART OF THE CORPORATE NAME IF THE IDENTITY OF THE CORPORATION PLAINLY APPEARS FROM THE CONTENTS OF THE INSTRUMENT; AFFIDAVITS AND RECITALS OF IDENTITY MAY BE USED AND RELIED UPON TO OBVIATE VARIANCES TOO SUBSTANTIAL OR TOO SIGNIFICANT TO BE IGNORED.

Use Fund Affidavit 37 – Corporate Misnomer

"[S]light departures from the name used by the corporation, such as the omission of a part of its name or the inclusion of additional words, generally will not affect the validity of contracts or other business transactions as long as the identity of the corporation can be reasonably established from the evidence." [*Presley v. Ponce Plaza Assocs.*, 723 So.2d 328, 330 \(Fla. 3d DCA 1998\) \(Cope, J., specially concurring\)](#)

For individuals rather than legal entities, see Title Note 10.04.07 regarding rule of “idem sonans” relating to similar sounding names and presumption of identity.

Spouse didn't sign mortgage – it is homestead property



Now we're selling the
property. Is this a
problem?

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If the mortgage is being paid off from the proceeds of the sale, the lack of spousal joinder on the mortgage is moot.

But be sure the spouse signs the deed when the property is sold

Title Standard 18.1 – Alienation of Homestead Property Joinder of Spouse

STANDARD: WHEN THE OWNER OF HOMESTEAD PROPERTY IS MARRIED, THE SPOUSE MUST JOIN IN ANY CONVEYANCE OR ENCUMBRANCE OF THE PROPERTY UNLESS THE PROPERTY IS HELD AS A TENANCY BY THE ENTIRETIES AND IS CONVEYED TO THE SPOUSE OR IS HELD BY ONE SPOUSE AND IS CONVEYED TO BOTH SPOUSES AS TENANTS BY THE ENTIRETIES.

Timing of Instruments

- A deed recites “This Deed is made as of January 6, 2024”
- Deed is signed and notarized on January 4, 2024
- Is this a problem?



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TN 1.02.02 – Date of Certificate

The Fund does not consider a deed defective because the acknowledgment shows the date as May 30, 1992, when the deed shows the date as June 2, 1992. See Title Standard 3.6.

In 23 AM.JUR.2d, Deeds, Sec. 18, it is stated:

The date of a deed . . . is one of the formal parts of a deed but is not essential to its validity. The deed operates from the time of delivery; the date merely raises a presumption that it was delivered then.

Title Standard 3.6 – Erroneous, Inconsistent or Omitted Date

STANDARD: THE FACT THAT AN INSTRUMENT SUCH AS A DEED OR MORTGAGE IS UNDATED, BEARS A DATE DIFFERENT FROM THE DATE OF THE ACKNOWLEDGMENT, OR BEARS AN IMPOSSIBLE DATE, DOES NOT AFFECT THE VALIDITY OF THE INSTRUMENT AS A MUNIMENT OF TITLE.

The Closing & Recording

Condo & HOA Estoppels

- Where Title Agent and Opposing Counsel argue over who should order the estoppel, what to do?



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Sec. 627.7711 F.S.

(b) “Primary title services” means ... determination and clearance of underwriting objections and requirements to eliminate risk

Therefore, the settlement agent should order the estoppel from the HOA, Condo & Co-op. Furthermore, the settlement agent should always order any loan estoppels to minimize risk. Accepting an estoppel for a mortgage payoff from anyone beside the lender creates a great risk for mortgage payoff fraud.

Keys



- Seller says “Don’t give the buyer the keys until I have my money”
- What to do?

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Always follow the contract. This is what the parties agreed to and you are only following their directions.

Paragraph 6(a) “... at Closing, Seller shall have removed all personal items and trash from the Property and shall deliver all keys, garage door openers, access devices and codes, as applicable, to Buyer.”

Tax Prorations

Non-Ad Valorem CDD assessment

- How to prorate?



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Non-Ad Valorem CDD are not subject to paragraph 9 (f) in the FR/Bar. CDDs are pursuant to Ch. 190 . F.S. The CDD will be prorated according to paragraph 18. K

This, as with all non-ad valorem taxes, needs to be checked with the governing body to see if it is on a calendar year, or a fiscal year and if it is paid in advance or arrears. Then you will know how to prorate. Also, the FR/Bar contract calls for the buyer to pay for the day of closing. For more information, please read the September 2018 Concept article **Fun with Non-Ad Valorem Prorations**

Stop the Wire!

- Immediately after Closing Buyer finds a burst pipe as they're moving in and calls Closing Agent saying "Don't send the wire!"
- Can you stop the wire?



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No. when the closing has already taken place the settlement agent may not halt the seller's wire. The Closing is complete when buyer's funds have been tendered and seller has delivered the deed.

See:

Paragraph 4, "AS IS" Residential Contract: "The closing of this transaction shall occur when all funds required for closing are received by Closing Agent and Collected pursuant to STANDARD S and all closing documents required to be furnished by each party pursuant to this Contract are delivered ("Closing")."

Note: under Paragraph 12(e) of the Contract, buyer may perform a walk-through inspection on the day before or day of Closing **prior** to time of Closing, to verify that Seller has maintained the Property as required by the AS IS Maintenance Requirement. Any issues should be addressed prior to Closing.

Fees for Title Services



- Can I charge less than the actual costs for title services (provide discounts)?

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A title agent may not provide a rebate or abatement for title related charges – at least actual cost must be charged.

FAC 69O-186.003(11)(a)

(11) Unlawful Rebates or Abatement of Charges.

(a) No title insurer, title insurance agent or agency, including attorney agent, shall decrease the risk premium by an illegal rebate or abatement of charges for abstracting, examinations, or closing charges. At least actual cost must be charged for related title services in addition to the adopted risk premium.

(b) Charges for related title services (title search, examination, and closing) shall be shown separately on the closing statement, and shall, at a minimum, show title search charges, examination fees, and closing charges. The risk premium as defined by Section 627.7711(2), F.S., and as provided in Section 627.780(1), F.S., shall be shown separately on the closing statement.

BUT the title agent MAY rebate his/her portion of the title insurance premium to the party who paid for the title insurance. Butler Rebate. Chicago Title Insurance v. Butler, 770 So.2d 1210, 1214 (Fla.2000)

Order of Recording



- Mortgage Refinance
- A portion of the loan will be used for a kitchen remodel
- In addition to the new mortgage, a notice of commencement for the remodel project needs to be recorded.
- Does it matter in what order I record the instruments?

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Yes, you should record the Mortgage first, followed by the Notice of Commencement.

While a Notice of Commencement is not a lien, it is constructive notice that a claim of lien may be recorded and may take priority under Sec. 713.07 F.S.

713.07 Priority of liens.—(1) Liens under ss. 713.03 and 713.04 shall attach at the time of recordation of the claim of lien and shall take priority as of that time.

(2) Liens under ss. 713.05 and 713.06 shall attach and take priority as of the time of recordation of the notice of commencement, but in the event a notice of commencement is not filed, then such liens shall attach and take priority as of the time the claim of lien is recorded.

Closing before LLC formed?

- Buyer is a new LLC – Articles of Organization have been submitted on Sunbiz.org. On day of closing, we haven't yet received notification from Sunbiz that the LLC was formed.
- Can we still close and can we record the deed?



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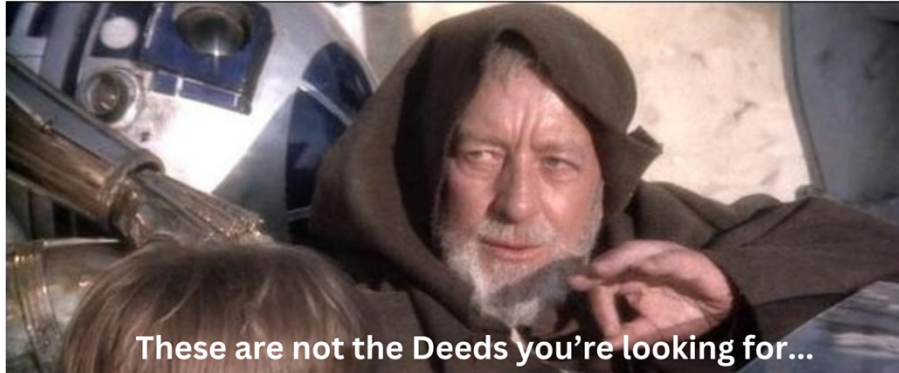
A deed into to a Grantee entity that has not yet been formed is uninsurable. Closing must be delayed until the LLC has officially been formed.

Title Note 11.01.05.A. Title that is dependent on a deed that was executed, delivered and accepted before the grantee company was incorporated is uninsurable without corrective action. A deed from the original grantor is required, whether it be to the intended grantee after proper formation, or to the proposed insured in the current transaction. In lieu of the corrective deed, a possible solution may be a quiet title suit naming the original grantor and the pre-incorporation company. See *Belcher Center LLC v. Belcher Center, Inc.*, 883 So.2d 338 (Fla. 2d DCA 2004). See also Title Standard 3.1 and **TN 11.02.03** and **TN 11.02.04** (de facto corporations). The doctrine that a deed to a nonexistent entity is a nullity may not apply to tax deeds. *Kahama VII, LLC v. KTLC Riverboat, LLC*, 2016 U.S. Dist. LEXIS 47267 (S.D. Fla. April 7, 2016).

Documents

Deed Types

Difference between Trustee's Deed, Personal Representative's Deed, Guardian's Deed and Quit Claim Deed? Aren't they all the same?



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Personal Representative's, Trustee's, and Guardian's Deeds have no title covenants or warranties since the personal representatives, trustees, and guardians are acting not for themselves, but on behalf of others who are the owners of the property. Since their deeds have no warranties, personal representatives, trustees, and guardians are shielded against being held personally liable by buyers should the properties the fiduciaries convey have title defects.

Contrary to popular belief, the Quit Claim Deed was not intended, and does not claim, to actually convey any type of ownership in property, much less fee simple ownership. In fact, it contains no covenants of title. Basically, a person who signs a Quit Claim Deed is saying that they are not guaranteeing that they own or have a valid claim to any part of the property, or if they do, they make no guarantee as to what kind of ownership it is, but if they have any ownership or claim, whatever it is, they convey it to you.

LLC as seller

Husband and Wife are the sole members of the LLC

- Can husband and wife sign the deed individually instead of as members of the LLC?



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TN 11.10.01

Affidavit 62

“Who Signs for the LLC” online webinar

Private Mortgages

Can private lenders still lend on residential transactions after Dodd-Frank?

- Exceptions to Dodd-Frank restrictions?



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Loan Originator Rule

Seller Financing

“Private Lending After Dodd-Frank”

12 CFR 1026.36

Homestead – limitation on devise



Can I avoid limitations on devise with a revocable trust?

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No – TN 31.06.10

COMPLETED GIFT. VESTING EVENT IS DEATH.

Aronson v. Aronson, 81 So.3d 515 (Fla. 3d DCA 2012)

- Adult sons, as successor trustees, plan to sell condo, pay Doreen only the annual disbursement requests from proceeds, and distribute remainder to themselves
- Trial court found condo was Doreen's homestead; trustees must reimburse mortgage payoff and transfer interest in trust principal equal to annual requests
- On appeal, 3d DCA reversed and remanded; finding condo was Hillard's homestead at the time of his death, thus trust disposition failed; condo passed upon his demise to Doreen for life; remainder to sons

Sec. 732.4017, F.S. provides in part (emphasis provided)

(1) If owner of homestead property **transfers an interest** in that property, **including a transfer in trust**, with or without consideration, to one or more persons during the owner's lifetime, the transfer **is not a devise** for purposes of s. 731.201(10) or s. 732.4015, and the interest transferred **does not descend** as provided in s. 732.401 **if the transferor fails to retain a power, held in any capacity, acting alone or in conjunction with any other person, to revoke or revest that interest in the transferor.**

(3) The transfer of an interest in homestead property ... may not be treated as a devise of that interest **even if transferor retains a separate legal or equitable interest** in the homestead property, directly or indirectly through a trust or other arrangement such as a **term of years, life estate, reversion, possibility of reverter, or fractional fee interest;**

Title Insurance

Title Commitment

- Can I add items to the Title Commitment after Closing?



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No

Title Policies

- Can I issue the Title Policies at Closing?



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Fund

Yes! See Concept Article from January 2014: “Shortcut to the Finish Line”

Title Commitment

- Do I really have to give the title commitment to the surveyor?



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It's a best practice to do so,. In preparing a boundary survey, the surveyor must only plot (i.e., draw) easements appearing on the plat. Provide the Schedule B-II items to the surveyor that you want plotted.



What
happened
to the ALTA
“limited use
waiver”?

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ALTA limited use waiver is GONE. Agents who go through the Membership sign-up process and indicate they issue 50 or fewer policies per year will be offered a \$50 license, which is now the least expensive option



What happens to
policy limits after
a claim is paid?

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Title claims reduce policy limits by the amount of the claim. Payment of the claim on the loan policy will also reduce policy limits on the owner's policy.

Federal Questions

FIRPTA Withholding

- If funds are withheld for FIRPTA, do I need to issue a 1099-S?



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Yes, it is a sale and the full contract price needs to be reflected on a 1099-S. If your seller does not have a tax identification number, please read the September 2017 Fund Concept Article **The Catch-22 of Foreign Sellers and the Form 1099-S**

FIRPTA

- Must a settlement agent check every seller's US status?



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Yes. Under 26 USC Sec. 1445 every seller is presumed to be foreign until they give a non-foreign certification. The easiest way to obtain this information is by the use of the IRS Form W-9. This form will also give you the needed information for the 1099-S reporting.

1099-S



- The settlement agent had the seller sign the 1099-S at closing and gave a copy to the seller
- Is that the end of the settlement agent's responsibility regarding 1099-S?

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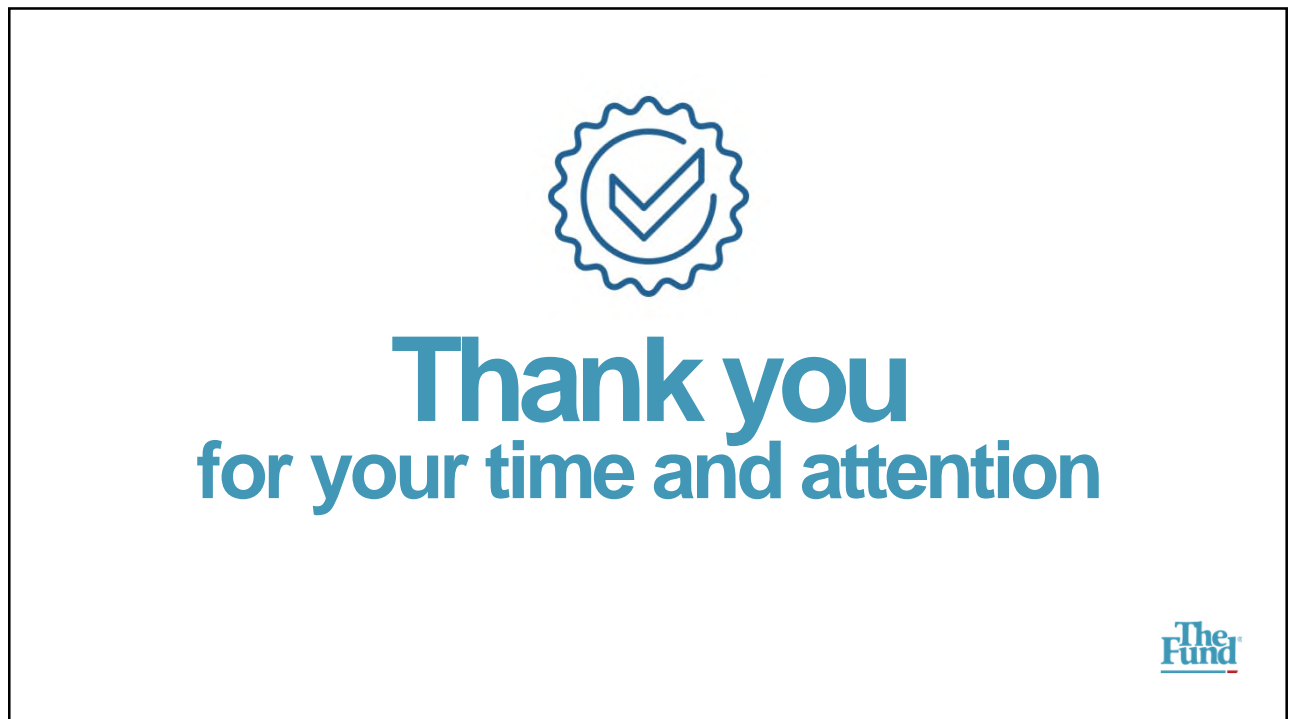
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NO. Each year the settlement agent needs to report to the IRS all of the 1099-S' which were issued the prior year. The deadline to report to the IRS is about the end of February if the settlement agent completed 10 or fewer closings and is going to report using paper. The deadline for electronically reporting is about the end of March. The due dates for each month can shift each year.

Failure to report makes the settlement agent subject to fines from \$60 to \$630 for each 1099-S not reported. These fines also accrue interest.



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The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

850/561-5600
www.FLORIDABAR.org

Certificate of Accreditation for Continuing Legal Education

256131
Attorney's Title Fund Services
PO Box 628600
Orlando, FL 32862-8600

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CLE Credits

General	1.0
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Certification Credits

Real Estate	1.0
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