

02-116

PROPERTY AND CONVEYANCES: RECORDATION OF DOCUMENTS — FORM AND EFFECT OF DEEDS AND COVENANTS; LIENS.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).

COUNTIES, CITIES AND TOWNS: CERTAIN LOCAL GOVERNMENT OFFICERS – BONDS.

OATHS, AFFIRMATIONS AND BONDS: BONDS TAKEN BY COURTS AND OFFICERS.

Circuit court clerk may not decline to record deed of trust containing grantor's social security number; may be liable for modifying deed of trust offered for recordation.

The Honorable J. Jack Kennedy, Jr.
Clerk, Wise County-City of Norton Circuit Court
December 19, 2002

Issues Presented

You inquire whether a clerk of the circuit court may decline to accept a deed of trust for recordation that contains the grantor's social security number. You also ask whether a circuit court clerk would be subject to liability for recording a deed of trust containing the grantor's social security number if, prior to recordation, the clerk redacts the social security number from the instrument.

Response

It is my opinion that a circuit court clerk may not decline to record a deed of trust that contains the grantor's social security number. It is also my opinion that the clerk's modification of a deed of trust offered for recordation may expose him to liability.

Applicable Authorities and Discussion

Section 55-106 requires that a clerk of the circuit court of any county or city, "[e]xcept when it is otherwise provided, ... shall admit to record any such writing as to any person whose name is signed thereto with an original signature, ... when it shall have been acknowledged by him." Section 55-108 provides that such writing

"shall be an original or first generation printed form, or legible copy thereof, pen and ink or typed ribbon copy, and shall meet the standards for instruments as adopted under §§ 17-60^[1] and 42.1-82 of the Virginia Public Records Act." A clerk's authority to refuse to record an instrument is very limited.² Further, assuming that a document meets the parameters required by statute, a clerk may not inquire as to its legal sufficiency or add requirements for recording.³

You first ask whether a clerk of the circuit court may decline to record among the public records a deed of trust that contains the grantor's social security number. Specifically, you inquire whether federal law provides a basis for a circuit court clerk to decline to record such an instrument.

Section 405(c)(2)(C) of the Social Security Act sets forth the circumstances under which an individual may be required to furnish his social security number. Section 405(c)(2)(C)(viii)(I) of the Federal Act provides that "[s]ocial security account numbers and related records that are obtained or maintained by authorized persons *pursuant to any provision of law enacted on or after October 1, 1990*, shall be confidential, and no authorized person shall disclose any such social security account number." [Emphasis added.] An "authorized person" under § 405(c)(2)(C)(viii)(III) is defined as "an officer or employee of ... any State, political subdivision of a State ... who has or had access to social security account numbers or related records pursuant to any provision of law enacted on or after October 1, 1990." A "related record" under § 405(c)(2)(C)(viii)(IV) is "any record ... that indicates, directly or indirectly, the identity of any individual with respect to whom a social security account number ... is maintained pursuant to this clause." The provisions of § 405(c)(2)(C)(viii) appear to be directed to employers and other entities charged with the collection of taxes.⁴

A circuit court clerk, as an employer, is bound by the confidentiality provisions of the Social Security Act with respect to the social security numbers of his employees. The act of recording a deed of trust, however, does not implicate § 405(c)(2)(C)(viii) of the Act. Whether a social security number appears on the instrument offered for recordation is irrelevant to the function performed by the clerk. There is no provision of law requiring or prohibiting a social security number from appearing on an instrument offered for recordation. In performing recordation functions, a clerk is not acting in the capacity of an "authorized person," as contemplated by § 405(c)(2)(C)(viii) of the Act.

Mortgage instruments are prepared and offered for recordation to individuals and entities other than the clerk of the circuit court. Presumably, the grantor voluntarily provides the social security number that appears on an instrument offered for recordation. Federal law requires that individuals be informed whether disclosure of a social security number is voluntary, by what authority the number is solicited, and the uses that will be made of it.⁵ The disclosure of the grantor's social security number is to the preparer of the instrument. A clerk must assume that the social security number is knowingly and voluntarily provided by the grantor for the purpose of appearing on a deed of trust. The clerk has no duty to inquire beyond the statutory requirements for the recordation of an instrument. Moreover, a clerk is limited in his ability to refuse to record an instrument that meets the statutory requirements for recordation.⁶ The presence of a social security number on an instrument is not a sufficient reason for refusing to record such an instrument.⁷ The most effective way for an individual to avoid the public display of his social security number in this situation is to refuse to authorize the preparer of the instrument to include the social security number on the instrument for recordation.

Therefore, a circuit court clerk may not decline to record a deed of trust containing the grantor's social security number. Such clerk is not bound by the confidentiality provisions of federal law when recording such instruments.

You next ask whether a clerk would be subject to liability for recording a deed of trust containing the grantor's social security number if, prior to recordation, the clerk redacts the grantor's number from the instrument.

Virginia law has long recognized the constructive notice associated with the act of recording, and the effect of recording on interests in real property.⁸ The Constitution of Virginia dictates that a circuit court clerk is to serve "in the office of which deeds are recorded," and that the duties of such constitutional officer "shall be prescribed by general law or special act."⁹ The clerk's office is a central repository of land records that are, "[a]s a matter of public policy, ... established in the public domain to protect those whose interests may be affected by those writings, and the duties of the clerk to record and index the writings run from him to them."¹⁰ The recordation of deeds by a circuit court clerk is considered a ministerial act.¹¹ The accurate and permanent retention of all such writings is singularly the most basic function of the clerk.

A circuit court clerk "may be held personally liable for damages resulting from his omission or neglect in respect of the performance of duties imposed on him by law."¹² The clerk is required to post bond to assure the faithful performance of those duties.¹³ The liability of a clerk that redacts a social security number from an instrument offered for recordation is predicated upon the proof of damages resulting from the alteration or modification. It is difficult to envision a basis for liability in the circumstances you pose. Practical considerations make it unlikely that an individual grantor would be damaged by removing his social security number from a deed of trust, or that a third party examining the public record would suffer damages by that number being redacted. Any alteration or modification of the public record, however, gives rise to a potential cause of action. In the absence of statutory authority, and regardless of the motivation behind the removal of such information from a deed of trust, a circuit court clerk who removes a social security number upon recordation of an instrument does so at the risk of liability.

Conclusion

Accordingly, it is my opinion that a circuit court clerk may not decline to record a deed of trust that contains the grantor's social security number. It is also my opinion that the clerk's modification of a deed of trust offered for recordation may expose him to liability.

¹The 1998 Session of the General Assembly repealed Title 17, including § 17-60, as of October 1, 1998, and transferred the provisions of that section to § 17.1-227 in accordance with the enactment of Title 17.1. *Compare* 1998 Va. Acts ch. 872, at 2128, 2160, 2212-13 (enacting § 17.1-227 and clauses 2, 10, 12) *with* 1997 Va. Acts ch. 579, at 961, 962-63 (amending § 17-60).

²1984-1985 Op. Va. Att'y Gen. 380, 381. *See also* Va. Code Ann. § 55-58.1 (LexisNexis Supp. 2002) (setting forth specific requirements for recording deeds of trust); § 55-106 (Michie Butterworth Repl. Vol. 1995) (providing that clerk of circuit court "shall admit to record any such writing as to any person whose name is signed thereto with an original signature, ... when it shall have been acknowledged by him, or proved by two witnesses as to him in such court, or before such clerk"); § 55-106.5 (Michie Butterworth Repl. Vol. 1995) ("A clerk may refuse any document for recording in which the name or names of the person under which the document is to be indexed does not legibly appear or is not otherwise furnished."); § 55-108 (Michie Butterworth Repl. Vol. 1995) (setting forth standards for writings to be docketed or recorded).

³*See* 1986-1987 Op. Va. Att'y Gen. 159, 160; *see also* Op. Va. Att'y Gen.: 1999 at 220, 220-21; 1984-1985, *supra* note 2, at 381.

⁴*See* 42 U.S.C. § 405(c)(2)(C)(viii)(II) (2000).

⁵5 U.S.C. § 552a(e)(3) (2000); *see also* 1987-1988 Op. Va. Att'y Gen. 3, 4 (discussing disclosure of social security numbers under Federal Privacy Act).

⁶*See supra* note 2.

⁷Certain personal information, such as social security numbers, may not be appropriate for inclusion in a public record. The Identity Theft Task Force of the Attorney General has recommended that Virginia law be modified in this area to prevent identity theft. *See* The Report of the Attorney General's Identity Theft Task Force (Oct. 29, 2002), at http://www.oag.state.va.us/Protecting/ConsumerFraud/ID_TASK_Force/IDTHEFTFINALRPT.pdf

⁸*See* Porter v. Wilson, 244 Va. 366, 369, 421 S.E.2d 440, 442 (1992) (citing Jones v. Folks, 149 Va. 140, 144, 140 S.E. 126, 127 (1927)); McCauley v. Grim, 115 Va. 610, 613, 79 S.E. 1041, 1043 (1913) (quoting Building Authority v. Groves, 96 Va. 138, 140, 31 S.E. 23, 23 (1898)).

⁹Va. Const. art. VII, § 4.

¹⁰First Va. Bank-Colonial v. Baker, 225 Va. 72, 80, 301 S.E.2d 8, 13 (1983).

¹¹*See* 15 Michie's Jur. *Recording Acts* § 13, at 767 (1998); *see also* Lohr v. Larsen, 246 Va. 81, 87, 431 S.E.2d 642, 645 (1993) (holding that, since government employee is liable for negligence in performing ministerial act, use of judgment and discretion is element in determining immunity); Fox v. Deese, 234 Va. 412, 423-24, 362 S.E.2d 699, 706 (1987) (holding that city employees generally are not entitled to sovereign immunity for commission of intentional torts, whether acting within or without scope of employment); *First Va. Bank-Colonial v. Baker*, 225 Va. at 78, 301 S.E.2d at 11 (holding that malfeasance of clerk's ministerial duty is not entitled to protection of sovereign immunity). *But see* Battle v. Whitehurst, 831 F. Supp. 522, 528 (1993) (holding that court clerk is accorded absolute immunity when acting in obedience of judicial order or under court's direction).

¹²76 C.J.S. *Registers of Deeds* § 14(a), at 458 (1994). A government official normally is entitled to sovereign immunity in the exercise of official duties. *See* Messina v. Burden, 228 Va. 301, 313, 321 S.E.2d 657, 663 (1984) (listing among factors to be considered in determining entitlement to immunity (a) nature of function performed; (b) extent of state's interest and involvement in function; (c) state's degree of control and direction over employee; and (d) whether act involved use of judgment and discretion).

¹³Va. Code Ann. § 15.2-1527 (LexisNexis Supp. 2002); § 49-12 (LexisNexis Repl. Vol. 2002).