



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

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The Honorable Rebecca P. Hogan
Clerk of the Frederick County Circuit Court
5 North Kent Street
Winchester, Virginia 22601

Dear Ms. Hogan:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether the exemption to the grantor's tax contained in § 58.1-811(C)(4) of the *Code of Virginia* applies to a Trustee's Deed of Foreclosure where the creditor is a United States administrative agency and is listed along with the trustee as a grantor.

Background

You relate a scenario in which a Trustee's Deed is presented for recordation at the Clerk's Office. The deed lists the trustee as grantor, but it also lists the creditor as an additional grantor. The deed states that the creditor is listed as a grantor "for indexing purposes only." Because the creditor is the United States, acting through an administrative agency, the party recording the deed asserts that inclusion of the federal government creditor as an additional grantor makes the deed exempt from grantor's tax pursuant to the exemption for government grantors found in § 58.1-811(C)(4).

Applicable Law and Discussion

The Virginia Recordation Tax Act¹ provides generally that certain recording taxes must be paid when a deed is presented for recordation. In addition to all other applicable recording taxes imposed on a deed conveying real estate to a purchaser, the Act imposes a separate recording tax upon the grantor.² Several exemptions, however, apply to imposition of the grantor's tax. The exemption in question, which is contained in § 58.1-811(C)(4) of the *Code*, provides that the grantor's tax "shall not apply to

¹ VA. CODE ANN. §§ 58.1-800 to 58.1-817 (2013 & Supp. 2016).

² See VA. CODE ANN. § 58.1-802 (Supp. 2016); see also § 58.1-802.2 (Supp. 2016) (imposing a "regional congestion relief fee" in the form of a grantor's tax that is assessed only in certain localities). I shall refer to the recording taxes imposed upon a grantor by either §§ 58.1-802 or -802.2 as "grantor's tax" in this opinion.

any . . . [d]eed conveying real estate from the United States, the Commonwealth or any county, city, town, district, or other political subdivision thereof”³ Pursuant to the statute, where one of these governmental entities conveys real estate in a deed (*i.e.*, is the grantor in a deed), the exemption applies.⁴ Thus, the essence of your inquiry is whether the federal agency listed as a grantor in the Trustee’s Deed has actually “conveyed” real estate such that it is properly identified as a grantor entitled to the exemption.

The mere fact that the federal agency is listed as grantor in the Trustee’s Deed is not dispositive. In the circumstance you describe, it is necessary to look to the mechanics of the transaction to determine whether the federal agency has actually conveyed real estate to the grantee. The purpose of a Trustee’s Deed is to transfer real estate to a purchaser after a foreclosure sale. Prior to any foreclosure proceedings, the trustee holds legal title to the property for the benefit of the creditor as security for the debt,⁵ while the debtor retains equitable title, including the use and enjoyment of the land.⁶

In the event of the debtor’s default, the trustee’s possession of legal title enables him to commence foreclosure proceedings at the request of the creditor and sell the property at auction.⁷ Although the debtor’s equitable title gives him the right to cure the default and redeem the property prior to sale, “[c]ompletion of the sale extinguishes the debtor’s equity of redemption and unifies legal and equitable title in the trustee, subject to the equitable interests of the purchaser at foreclosure.”⁸ Stated differently, once the trustee accepts the highest bid at auction and executes a memorandum of sale, full title to the property becomes vested in the trustee alone,⁹ who later conveys it to the purchaser by executing the Trustee’s Deed.

The mechanics of this transfer by Trustee’s Deed show that neither the creditor nor the debtor conveys title to the property; rather, it is the trustee who conveys title as agent for both parties.¹⁰ In particular, and as relevant to your inquiry, under Virginia case law, the creditor “sells nothing . . . and is merely to receive the proceeds of the sale.”¹¹ Thus, in the scenario you describe, the federal agency is the creditor and the beneficiary under the trust, but it does not convey the real estate to the purchaser at foreclosure. Therefore, it is not identified correctly as a “grantor” in the Trustee’s Deed, and the exemption from grantor’s tax in § 58.1-811(C)(4) does not apply. Including the federal agency as a

³ VA. CODE ANN. § 58.1-811(C)(4) (Supp. 2016).

⁴ BLACK’S LAW DICTIONARY 816 (Bryan A. Garner et al. eds., 10th ed. 2014) (defining the term “grantor” as “[s]omeone who conveys property to another”).

⁵ See, e.g., *Larchmont Homes, Inc. v. Annandale Water Co.*, 201 Va. 178, 181-82 (1959).

⁶ See, e.g., *Abdelhaq v. Pflug*, 82 B.R. 807, 809 (E.D. Va. 1988) (describing how the execution and delivery of a deed of trust creates a separation of title, with the trustee gaining legal title and the debtor retaining equitable title).

⁷ See, e.g., *Larchmont Homes, Inc.*, 201 Va. at 182; see also VA. CODE ANN. § 55-59(7) (2012) (providing that, at the request of the creditor, the trustee may accelerate the debt in the event of default and “may take possession of the property and proceed to sell the same at auction”).

⁸ 2 HON. ROBERT A. PUSTILNIK, STEVEN L. HIGGS, & JAMES L. WINDSOR, *DEBT COLLECTION FOR VIRGINIA LAWYERS: A SYSTEMATIC APPROACH* 695 (5th ed. 2013); see also *In re Rolan*, 39 B.R. 260, 263-64 (Bankr. W.D. Va. 1983); *Feldman v. Rucker*, 201 Va. 11, 21 (1959) (citing *Powell v. Adams*, 179 Va. 170, 174-75 (1942)).

⁹ Subject to the equitable interests of the purchaser at foreclosure.

¹⁰ See, e.g., *Feldman*, 201 Va. at 20.

¹¹ *Powell*, 179 Va. at 175 (quoting *Motley v. Hodges*, 120 Va. 498, 499 (1917)).

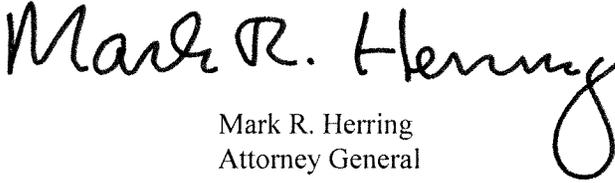
grantor “for indexing purposes only” on the face of the deed does not defeat the legal realities of the transaction—nor does it alone remove the obligation of the trustee to pay grantor’s tax.¹²

Conclusion

Accordingly, it is my opinion that the grantor’s tax exemption contained in § 58.1-811(C)(4) does not apply to a Trustee’s Deed on the basis that the creditor is a government agency and is named along with the trustee as a grantor for indexing purposes only.

With kindest regards, I am

Very truly yours,


Mark R. Herring
Attorney General

¹² See VA. CODE ANN. § 17.1-249 (2015), for provisions regarding indexing of deeds.