CURING TITLE PROBLEMS
USING QUIET TITLE ACTIONS, PARTY WALLS, AND ESCROW AGREEMENTS

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I. The Quiet-Title Suit

A. General Overview of Georgia Quiet Title Procedure

A quiet title action is brought to cancel any instrument or clear any cloud that has appeared on the complainant's title to real property. In Georgia, there are two statutory actions to quiet title: (1) the conventional *quia timet* action, governed by O.C.G.A. § 23-3-40, et. seq.; and (2) the *quia timet* against the world action, governed by O.C.G.A. § 23-3-61 ("The Quiet Title Act of 1966"), the main difference between the two being that traditional *quia timet* requires another instrument to be placing the cloud over title to the subject property, while *quia timet* against the world allows the complainant to obtain a judgment binding "the world" that title to the subject property is in the complainant's name only, even though there may not be an actual document recorded which constitutes a cloud on title; rather, it is possible that the problem is quite the opposite – that there is nothing, or very little, of record evidencing record title ownership.

As a traditional *quia timet* action is a suit in equity, the complainant must be able to show that: (1) no other course or proceeding will successfully allow them to protect their rights in the subject property; (2) that the instrument the complainant seeks to be canceled is of a type that would cast a cloud or suspicion over the subject property[1]; (3) that the claimant is in possession; (4) that the complainant is either suffering from a present harm or that the evidence they would rely on to quiet title in their favor could be

lost if the action is not presently heard[2]; and (5) the petition must contain a prayer for a final order canceling the offending cloud on the title in the land records. The old statute is very rigid, sometimes inconsistent, old, and case law offers a variety of interpretations which can be confusing; therefore, the traditional *quia timet* is often not useful to the modern-day practitioner.

Quia Timet against the world is far more common and useful today, as it does not require an instrument to be placing a cloud over title in order for the petitioner to have standing.

The Quiet Title Act of 1966 contains a clear statement of purpose, clarifying that the purpose of the statute is to provide a definite way to clear up defective titles:

> "The purpose of this part is to create a procedure for removing any cloud upon title to land, including the equity of redemption by owners of land sold at tax sales, and for readily and conclusively establishing that certain named persons are the owners of all interests in land defined by a decree entered in such proceedings, so that there shall be no occasion for land in this state to be unmarketable because of any uncertainty as to the owner of every interest therein."[3]

In fact, the number of suits involving this type of quiet title suit has proliferated in recent times due primarily to the number of tax sales taking place, as well as the increasing scarcity of land in urban areas. William H. Dodson, II explains:

> "What are left are locations which are a challenge to the developer and to the title specialist. In other words, the land that was once ignored due to title problems now has sufficient value to justify the litigation. The larger reason is that a significant volume of the vast number of non-judicial ad valorem tax sales is now making its way into mainstream commerce and Quiet Title Actions are necessary to sanitize them for public consumption."[4]

Quia timet against the world allows for interests in property, such as adverse possession or an equity of redemption, which are not generally expressed in instruments, to be cleared from title, as well as to establish what person or persons are the true owners of any piece of real property.[5] To bring a *quia timet* against the world proceeding, the complainant must claim either a fee simple estate in the real property or any freehold

estate which will continue for at least five years before expiring.[6] Said complainant does not have to actually be in possession of the subject property, nor does there have to be any development upon the subject property for the complainant to have standing to bring an action of *Quia Timet* against the world.[7]

In order to comply with O.C.G.A. § 23-3-60, a *Quia Timet* against the world petition must be filed in the county where the land is located[8], and must contain:

(1) a legal description of the land, including a plat survey[9];

(2) specifications of the petitioner's interest in the land[10];

(3) a statement as to whether the interest is based upon a written instrument, adverse possession, or both[11];

(4) descriptions of all adverse claims of which petitioner has actual or constructive notice, including copies of immediate instruments of record which a person might base an interest in the land adverse to the petitioner[12];

(5) names and addresses of any possible adverse claimant(s)[13];

(6) copies of the immediate instrument or instruments of record or otherwise known to the petitioner, if any, upon which any person might base an interest in the land adverse to the petitioner[14] and

(7) if the action is called to remove a cloud or clouds, a statement as to the grounds upon which the cloud or clouds are sought to be removed.[15]

(8) The petition should also be accompanied by a lis pendens;[16] and

(9) an abstract of title[17] (while this is not required by statutes, it may be required by the special master, and it is therefore good practice to submit one since it is necessary to perform anyway).

Besides pleading requirements, there are also certain procedural requirements, most of which involve service of process of potentially adverse claimants. They are:

(1) service must be made upon all of the following:

(i) adjacent landowners;[18]

(ii) all adverse claimants of whose claims the petitioner has actual or constructive notice[19]; and

(iii) service upon all persons who are entitled to notice and to all other persons whom it may concern[20]

(2) Process is served by the sheriff on known persons whose residence is ascertainable; or process may be ordered by the court on known parties whose residence is outside the state or whose residence is unknown[21].

(3) A respondent is entitled to at least thirty (30) days to respond to the petition[22].

(4) If a respondent is a minor, a guardian ad litem must be appointed and served[23].

1.) Application to Specific Situations involving Tax Deeds and Title Problems Relating Thereto

A special problem arises in quiet title proceedings dealing with property purchased at a tax foreclosure sale, as this property is generally subject to a right of redemption belonging to the party foreclosed upon. When property is purchased at a tax foreclosure sale, the purchaser is treated as having a defeasible interest in the property, but said interest is still subject to a right of redemption, which the party foreclosed upon maintains for one year.[24] After expiration of the right of redemption, a purchaser must commence an action under the Quiet Title Act of 1966 in order to clear its title.

The Act, however, may not be a cure-all for defects affecting the title, for various reasons. For example, even after the right of redemption has expired, title in the property is still questionable for several reasons. First is that the tax lien could later be ruled excessive by the court, as the tax owed by the landowner could be a small amount while the levy is still over the entirety of their land.[25] If the prior landowner can show that the tax lien was excessive, the tax deed purchased at the foreclosure sale would be ruled void, and the purchaser at the foreclosure sale would lose their rights to the property.[26]

An example of this is *L.R. Sams Company, Inc.* v. *Hardy*, where a fi. fa. was served upon a landowner in the amount of $1,230.46, but a tax levy was placed upon the real property of the business, valued at the time at approximately $50,000.[27] The court ruled the amount of the levy excessive, and voided the levy pursuant to company

admitting in court as to the amount owed and agreeing upon payment.[28] The court, in its discussion, states that the levy may have been valid had it only been over a portion of the petitioner's property, as the property was easily partitioned and a portion of it could have been sold to satisfy the debt rather than the entire parcel.

As well, the defendant could be found to have been deceased before the time that the fi. fa. was issued on the property. If this is the case, the fi. fa. would be rendered void, and again title to the property would vest in the deceased landowner's estate.[29] This same result occurs if the levy on the tax deed has a "vague and indefinite description (of the property), as it often does."[30]

There is one other vulnerability that is inherent in all quiet title actions – which stems from the procedural requirements concerning service of process. This topic is discussed in more detail below, under the section entitled "Enforcing the Quiet Title Suit Judgment"

2.) Alleyways and Roadways

Quiet title litigation often involves disputes over alleyways and other roadways between two lots of property. The increase in the number of suits involving right of ways makes sense considering the amount of development occurring in urban areas, which has made small parcels of land valuable to owners who may need additional parking, a more convenient right of access to a small parcel, or more footage in order to get zoning changes or variances approved.

Alleyways and roadways require special consideration of a different set of factors than many quiet title actions. Whether the petitioner will be successful depends on variables such as (1) whether the roadway was public or private; (2) whether municipalities where the thoroughfares are located accepted dedication of same; (3) whether an adjoining property owner or municipality has an express easement in the roadway or alleyway or whether there is an easement by prescription or necessity; (4) and whether the alleyway is currently in use or whether it has been abandoned.

In *Smith* v. *Tolbert*, plaintiff brought a breach of warranty claim based on a cloud over title to property he had recently purchased.[31] Plaintiff contended that the alley

behind the building he recently purchased was private rather than a public alley because the warranty deed they received specifically described the gravel alley. Defendant seller refused to defend the purchaser's title in the alley as against the city of Roswell because buyer, when making the purchase, had actual knowledge of the public use of the alley for parking and various other reasons.[32] The court reasoned that, because of the buyer's knowledge that the alley was used by the public, it had a duty to inquire further as to whether the alley was public or private, and that the seller was under no duty to defend buyer from any claims by the city of Roswell.[33]

In a similar situation, plaintiff in *Richitt* v. *Southern Pine Plantations* purchased two adjoining lots that had a dirt road passing through them.[34] When plaintiff attempted to gate the dirt road, he was informed by the county that the dirt road was a public roadway.[35] Plaintiff brought suit to quiet title in the roadway in his favor, and the special master ruled that the roadway was a public county road and that the plaintiff was subject to the conditions of having such a public roadway on his property, which included an easement for the public to use said roadway.[36] As the court previously stated in *Smith*, because the plaintiff had knowledge of the roadway and its use when he purchased the property, his purchase was subject to the public easement regardless of whether said easement had been recorded.[37]

3. Lack of Record Title

Another common use of quiet title proceedings is to judicially determine the proper owner of a property when there is not record title. For example, there might be no recorded transfer of the property over many generations; or prior owners may have deceased and their wills were not probated, thereby making it difficult to determine who the legal heirs are. In this situation, a quiet title action is necessary to make the title marketable. The petitioner must establish the heirs through affidavits and make every effort to serve those heirs who many have an interest in the property. Many times the heirs cannot be found and the court will order notice to be served by publication. This can cause problems with the enforceability of the quiet title judgment, which is discussed in more detail below.

B. A Defense: Adverse Possession

Adverse possession is one of the most common defenses to a quiet title action, allowing a person who buys property in good faith and holds it as their own for a period of seven continuous and uninterrupted years to obtain good title to said property regardless of whether or not title was originally good.[38] To successfully defend a quiet title action with an adverse possession claim, the respondent must be able to show (1) that the person asserting the defense has been in possession of the property; (2) Possession by the respondent must generally not have originated through fraud; (3) possession by the respondent must have been public, continuous, exclusive, uninterrupted, and peaceable; and (4) the claim must be accompanied by a claim of right.[39]

This defense is useful in that it protects those that buy property in good faith and without knowledge to other claims on the subject property when any other party with a claim to the property delays in making that claim for an extra-ordinary period of time. It is important to note that Georgia does not protect parties who are aware that they are in possession of the property of another; the party claiming adverse possession must have been acting in good faith, or under the belief that they had a right to possess the subject property, before they will be able to successfully assert adverse possession as a defense.

C. Use of a Special Master in Quiet Title Proceedings

If a traditional *quia timet* proceeding is chosen by the plaintiff, O.C.G.A. 23-3-63 – 68 calls for the court to appoint a special master to make the determination as to what instrument is valid, extinguishing the defendant's right to a trial by jury in this regard.[40] Prior to the *quia timet* hearing, the special master is to determine all parties that have an interest in the proceeding and is to have them served with notice of said proceeding, with any adverse party being given at least 30 days notice so as to allow them to file any pleading they desire in regards to the proceeding.[41] Once this notice is given to the parties and they have had a chance to respond to the proceedings, "the special master shall have complete jurisdiction within the scope of the pleadings to ascertain and determine the validity, nature, or extent of petitioner's title and all other interests in the land, or any part

thereof, which may be adverse to the title claimed by the petitioner, or to remove any particular cloud or clouds upon the title to the land and to make a report of his findings to the judge of the court."[42] The only exception to this is if, after receiving the findings of the special master, a question of fact has arisen, in which case any involved party is able to demand a trial by jury.[43]

D. Enforcing the Quiet Title Suit Judgment

Once the special master or jury gives their decision, the court will issue a decree which will be recorded in the land records of the county or counties in which the land is located. The order or decree when recorded shall bind the land and be conclusive upon and against all persons named therein, known or unknown. The clerk shall also make a marginal notation upon any recorded instrument affected by the decree or order.[44] Theoretically, one would imagine that the order would then be enforceable and recognized as marketable. William H. Dodson, II explains in detail the vulnerability of orders coming out of quiet title actions:

> The core vulnerability with all Quiet Title Actions is found in O.C.G.A. Section 9-11-4. What that section and the case law which revolves around it teaches us is that constitutional due process requires that all defendants or respondents to a legal action be served with notice of the case in such a manner so as to provide the defendant or respondent a reasonable opportunity to defend themselves. In other words, if claimant to a parcel of land is (a) left out and subsequently not served or (b) if included but not reasonably served, the order or decree coming out of that case does not bind them. "Where there has been no legal service or waiver of service, a court's judgment is null and void. Henry v. Hiawassee Land Co., 246 Ga. 87 (1980). In the absence of service in conformity with O.C.G.A. Section 9-11-4 or waiver thereof, no jurisdiction over a defendant is obtained by the court, and any judgment adverse to defendant is absolutely void. DeJarnette Supply Co. v. F.P. Plaza, Inc., 229 Ga. 625 (1972); Thompson v. Lagerquist, 232 Ga. 75 (1974)[45]

Therefore, a title examiner cannot rely on an order filed in conformance with the Quiet Title action; instead, according to Dodson, the examiner must now (a) confirm that the parties named in the action match the names they found in their independent title examination including probate or possible affidavits of descent, (b) confirm that the list

of defendants or respondents were served and (c) determine whether or not the form of service is reasonable.[46] These requirements simply are not practical in today's real estate closing environment. Therefore, given the current state of the law, unless the title examiner, closing attorney, or title insurer practically recreates the steps behind the proceedings, the order coming out of the Quiet Title action is not reliable in terms of clearing up title.

Hope, however, is not lost. According to Dodson, he is proposing a title standard to the State Bar of Georgia Real Property and Probate Section, which will require that the attorney filing the Quiet Title action file an affidavit stating the steps the attorney took to ensure compliance with the due process requirements. It will nonetheless be required, however, that the title examiner, closing attorney, or title insurer complete due diligence into the inquiry of whether all procedural and statutory requirements are met. In the meantime, if you file a quiet title action, include an appropriate affidavit stating that you have complied with all statutory requirements; specifically, enumeration of steps you have taken to serve all necessary parties will be helpful.

II. Party Wall Agreements

A party wall is a wall erected between two tracts of land, usually with the wall being partly located on each tract of land, with the intent that the wall at least in part be used to support any buildings located on the two tracts of land.

Mutual easements are granted to the two landowners so that either can use the wall for the support of their own building or any other building that they may later choose to build on the property. The easements granted as to the party wall are either by agreement of the parties, in which case the agreement must be in writing to satisfy the statute of frauds and to run with the land; or they may arise by implication, such as when a common landowner sells two adjoining tracts of land that are divided by a wall. Implied agreements may also arise when buildings are constructed dependent upon a common wall[47], such as in the case of condominiums (condominium walls are always party walls to the extent they adjoin other units).

A number of legal problems can arise by the mutual easements that are created along with a party wall. Among these include the loss of the easement by abandonment of the property, destruction of the party wall or construction of a new party wall, or development on either side of the wall that affects the structure of the wall or its usefulness to the party on the other side.

Party walls easements are typically extinguished when the wall is destroyed, but that's not always the case. Where a party wall is demolished for the erection of a new building, the easement is not necessarily abandoned, and a new wall is subject to the same rights.[48]

It is important to note that in Georgia the parties on either side of the wall, absent a contractual agreement to the contrary, are not considered tenants in common as to the wall and neither is required to account to the other for any profits made in use of the wall. Rather, the courts in Georgia have ruled each party is treated as the owner of their side of the wall, with an easement as to the right of support from the other landowner from their side of the wall.[49] Further, this court also ruled that neither party has the right to hang

advertisements on the side belonging to the neighboring party; however, either party does have the right to do so on their own side of the wall, and can do so without accounting for profits to the other party.

Another typical problem with party walls is the effect had on the rights of either party should one side destroy the building or buildings that are supported by the wall. In *Simmons* v. *Hall*, plaintiff Simmons brought suit to enjoin a party on the opposite side of a party wall from using the party wall to support a new structure after a previous building had been destroyed.[50] Plaintiff's argument was that the defendant had extinguished his rights under the easement when the building that was build shortly after the agreement was executed was destroyed, so that he could not use the party wall for support in erecting a new building.[51] The court ruled that the intent of the parties must be the governing factor when determining whether a new building can use the wall for support, and in this case the agreement was for the two adjoining landowners to share the wall, regardless of the buildings that it supported.[52]

Party walls should be disclosed by the survey, and express party wall agreements disclosed by the title examiner. They do not always present title defects, but when construction is planned, party walls are more concerning since construction usually requires more, or a different portion, of the parcel than the existing building, so the party wall may not provide adequate support for the new plan. Solutions are usually worked out by agreement among the two adjoining property owners.

III. Monetary Settlement and Escrow Agreements

Escrows were historically used to support installment land sales; however, in terms of how they are most useful in resolving title defects, now they are most useful with the sale or encumbrance of land.

Escrow agreements improve transferability of property because they allow transfers to occur without all conditions haven been met; yet, they also provide a mechanism to make sure that those conditions are met. Otherwise, the escrowed property, or deed, will revert back to the seller, and money will be returned to the purchaser. Escrow agreements may involve postponed delivery of the deed, the purchase price, mortgage or security deeds and notes, or all of these items. Escrows enable parties to close a sale or loan without waiting for clearance of all liens or claims against the property by escrowing part or the entire purchase price to be disbursed upon receipt of all the necessary cancellations or occurrence of other conditions.

The escrow agent may be a title company, bank, or an attorney. In any event, the parties to the transaction should ascertain how the escrow agent will act, especially if the agent is neither a title company nor an attorney, but a bank. An outline of the escrow agreement could be set out in the contract, as well as some formula for protecting the escrow agent against disputes and litigation costs arising from alleged errors in judgment in determining whether specified conditions have occurred. Many escrow agreements contain an arbitration clause or set forth an interpleader procedure.[53]

Many times escrow agreements are used to induce a title insurance company to insure over a title defect. In situations that would likely expose the title insurer to high liability, the title insurer will nonetheless sell insurance over the defect if an escrow of funds is made with the title company. A recent personal experience of mine involved a claim of lien made by a mortgage broker. My client, the borrower, was purchasing property, and the closing involved a purchase money mortgage and construction loan. My client understandably did not want to incur the liability for the claim of lien in the principal amount of $175,000, which at that time was on its face a valid lien enforceable

against the property. I can assure you that the lender would not have approved disbursement if the lien were not to be paid off at closing from the seller's proceeds. The seller did not believe the lien to be valid, and therefore did not want to use his proceeds to pay off the lien. In fact, the seller was then involved in litigation with the lien claimant to attempt to remove the lien as being invalid and unenforceable against the property. The title insurer was willing to remove the exception for the lien from the lender's and owner's title insurance policies if the seller agreed to escrow with the title company an amount equal to 1.5 times the principal lien amount. The seller was agreeable to the escrow because even though he had to escrow a portion of the sale proceeds, he was still able to sell the property and ensure a chance to recover the escrowed amount in the event the seller was successful in the lawsuit with the mortgage broker claimant.

Of course the title problem is not solved for the title company, or the seller, until the lawsuit is resolved or the lien paid off. The escrow is fairly high-risk for the seller since per the terms of the escrow agreement (which was essentially a standard form with few modifications), the title company may at any time settle the claim or pay off the lien, regardless of the status of the litigation. Given that the title company essentially purchased the risk by removing the claim of lien as an exception from the policy, such a provision in an escrow agreement is going to be difficult to remove.

Using an escrow agreement to escrow funds with a title company and thereby create a marketable title is not limited to claims of lien. It may also be used in situations regarding boundary line disputes, outstanding mortgages, or easements which the buyer insists are terminated.

The requirements to create a valid escrow agreement are as follows: (1) An oral escrow is valid, but it is desirable that they be in written form; (2) it is necessary that there be an actual contract between the parties at interest, a proper subject matter, and an absolute deposit of an instrument with a depositary acting for the parties, by which it passes beyond control of the depositor to withdraw the deposit on the performance or happening of the agreed conditions of the escrow; (3) the person to whom the deed is delivered must, by mutual consent, act as the agent of both parties (the ethical

considerations relevant to this requirement are a topic reserved for another time); (4) the agreement must contain a delivery provision, in which the grantor makes delivery to the grantee. In every valid escrow, the deed takes its whole effect by force of the first delivery without any new delivery by the grantor. It is the final delivery to the grantee upon the completion of the conditions which renders the conveyance valid; and (5) the agreement should state the duration of the escrow as well as when and how the funds held are to be disbursed.

Litigation over an escrow agreement typically arises out of problems with the contract and delivery of the deed held by an escrow agent. In *Brown* v. *Brown*, plaintiff argued that a deed to real property had rightfully become hers when conditions of an agreement between her and her husband had been met.[54] The court, however, ruled that, even if conditions for delivery set out in a contract have been met, title to real property does not vest until delivery of the deed has actually taken place.[55] The court notes that, had the plaintiff only requested specific performance of the agreement, she would have received the deed because the conditions for delivery had been met; she did not, however, receive title to the property purely because her husband had breached the agreement.[56]

Escrow agreements may also be useful in avoiding litigation since many of the terms are set forth prior to the deposit being put in escrow. For example, it is usually stipulated in the Agreement how the escrow agent will be compensated, and often that compensation comes from the escrowed funds, or is paid at closing when the escrowed funds are disbursed. Stating the terms of payment ahead of time allows the parties to allocate the costs fairly without great probability of future dispute.

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[1] O.C.G.A. § 23-3-40
[2] O.C.G.A. § 23-3-42
[3] O.C.G.A. § 23-3-61
[4] Dodson, William H II and C. Terry Blanton, Quiet Title Actions, Marketability and Insurability, presented Nov 5, 2004 at the Land America Dale P. King Memorial Seminar.
[5] O.C.G.A. § 23-3-60
[6] O.C.G.A. § 23-3-61
[7] *Id.*
[8] O.C.G.A. § 23-3-62(a)
[9] O.C.G.A. § 23-3-62(b)

[10] Id.
[11] Id.
[12] Id.
[13] Id.
[14] O.C.G.A. § 23-3-62(c)
[15] *Id.*
[16] O.C.G.A. § 23-3-62(d)
[17] O.C.G.A. § 23-3-63
[18] O.C.G.A. § 23-3-65(a)(1)
[19] Id.
[20] O.C.G.A. § 23-3-65 (a)(2)
[21] O.C.G.A. § 23-3-65(b)
[22] O.C.G.A. § 23-3-65(c)
[23] O.C.G.A. § 23-3-65(d)
[24] O.C.G.A. § 48-4-48
[25] Hinkel, Daniel F., *Pindar's Georgia Real Estate Law and Procedure*, Pgs. 675-76. The Harrison Company Press, Norcross, GA (2002).
[26] *Id.*
[27] *L.R. Sams Company, Inc.* v. *Hardy*, 218 Ga. 147 (1962).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Smith* v. *Tolbert*, 211 Ga. App. 175 (1993).
[32] *Id.*
[33] *Id.*
[34] *Richitt* v. *Southern Pine Plantations*, Inc., 228 Ga. App. 333 (1997).
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] O.C.G.A. § 44-5-161
[39] *Id.*
[40] O.C.G.A. § 23-3-63 - 68
[41] O.C.G.A. § 23-3-65
[42] O.C.G.A. § 23-3-66
[43] *Id.*
[44] Dodson, William H, II, citing O.C.G.A. § 23-3-67.
[45] Id.
[46] Id.
[47] Montgomery v. Trustees of Masonic Hall, 70 Ga. 38 (1883)
[48] Joel v. Publix-Lucas Theatres, 193 Ga. 531 (1942); Forsyth Corp. v. Rich's, 215 Ga. 333 (1959)
[49] *Wilensky* v. *Robinson*, 203 Ga. 423 (1948).
[50] *Simmons* v. *Hall*, 180 Ga. 492 (1935).
[51] *Id.*
[52] *Id.*
[53] Hinkel, Daniel F., Abraham Ga. Real Est. Sales Contracts, §11-18 5th Ed.
[54] *Brown* v. *Brown*, 192 Ga. 852 (1941).
[55] *Id.*
[56] *Id.*