A NOTE CONCERNING THE PROGRAM MATERIALS

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I. INTRODUCTION

One of the most common legal transactions, and one of the most readily-experienced by the general public, is the transfer of property from seller to buyer. These transactions can be fraught with difficulty and can be a trap for the unwary. The multiple moving parts in such transactions, however, can be controlled and fixed through the careful drafting and attention to detail attendant in the purchase agreement. This is the most crucial role of the attorney in the real estate process, and one that can make the difference between difficult and smooth transactions. These materials will cover the basic roles in a real estate transaction, then focus on the provisions of the purchase agreement.

II. VARIOUS ROLES IN REAL ESTATE TRANSACTIONS

A. Broker

1. Kentucky Law.

   a. KRS §324.010(10) – "Broker" means any person who is licensed under KRS §324.046(1) and performs acts of real estate brokerage.

      • Lockridge v. Hale, 764 S.W.2d 84, 87 (Ky. App. 1989) – Found no enforceable commission under contract for one who acted as a real estate broker without being licensed to do so. “The purposes of the statute include the protection of the public from unscrupulous and incompetent brokers, and to provide good business ethics.” Id. at 86.

   b. KRS 324.010(1) – "Real estate brokerage" means a single, multiple, or continuing act of dealing in time shares or options, selling or offering for sale, buying or offering to buy, negotiating the purchase, sale, or exchange of real estate, engaging in property management, leasing or offering to lease, renting or offering for rent, or referring or offering to refer for the purpose of securing prospects, any real estate or the improvements thereon for others for a fee, compensation, or other valuable consideration.

      • Relevant words here are "for others" – real estate brokerage doesn't take place if a person is selling her or his own real estate, although brokers and
associates must comply with KRS §324 if their own property is involved. See KRS §324.020(3).

c. Givan v. Aldemeyer/Stegman/Kaiser, Inc. (Ask Realty), 788 S.W.2d 503 (Ky. App. 1990), states that "brokers owe duties of honesty, candor and fair dealing to all those with whom they deal, even in the absence of an express principal/agency relationship." Id. at 505, referencing Hughey v. Rainwater Partners, 661 S.W.2d 690 (Tenn. App. 1983).

2. "Sales Associate" – anyone affiliated with a Kentucky-licensed broker to perform acts of brokerage under the supervision of a principal broker. Must also be licensed. KRS §324.010(6).

3. Real estate professionals are governed by the Kentucky Real Estate Commission. See KRS §324.281.

4. The listing agreement – the listing agreement generally requires the broker to procure a ready, willing, and able buyer to earn the commission.

a. There are generally two types of listing agreements:

i. Open Agreement

A listing agreement can be an open agreement, which is a unilateral contract. Basically, this type of agreement is along the lines of "If broker sells the house, seller pays the broker a commission." The broker accepts the offer by performing. The seller could sign as many open listing agreements with as many brokers. This used to be the most common type of agreement before the MLS system was in place. Commission was based on the broker bringing in a willing and able buyer.

(a) This type of listing has drawbacks

(i) There's no incentive for the broker to advertise the property or invest time in selling it.

(ii) More than one agent could bring in willing and able buyers, setting up multiple commissions.

(iii) Questions arise as to who gets paid when two brokers show the house to the same buyer.
ii. Exclusive Agent

This is the more prevalent approach now – a broker acts as an exclusive agent for the sale of the house. If the house sells, that broker gets the commission, regardless of who makes the sale (generally).

(a) Buyer can reserve the right to sell the home themselves – if this happens, no commission for the broker.

(b) Always check the listing agreement language to see if it is open or creates exclusivity. A court could interpret ambiguous agreement as being an open one.

b. Authority of the broker - The broker cannot exceed the authority given, and a listing agreement generally doesn't authorize the broker to bind the seller to any offers. This was affirmed in Kentucky Real Estate Comm'n v. Kachler, 819 S.W.2d 41, 43 (Ky. App. 1991) – "Authority "to sell" does not constitute a power of attorney or otherwise empower the broker to bind the owner." Citing Forbis v. Honeycutt, 273 S.E.2d 240 (N.C.1981).

c. If the broker performs the terms of the contract – procuring a willing, able and acceptable buyer - he or she has fulfilled that contract and is eligible for the commission, regardless of whether the sale ultimately goes through. Cooper v. Hubbard, 703 S.W.2d 494, 497 (Ky. App. 1986).

d. The listing agent must require the seller to complete a seller's Disclosure of Property Conditions Form. The broker or agent doesn't participate in completing this form, but the broker or agent is then required to deliver the form to a prospective buyer within seventy-two (72) hours of the receipt of a signed offer to purchase from the prospective buyer.

B. The Attorney

Attorneys can serve many functions in the real estate transaction, most noticeably in the formation and drafting of the necessary agreements. Attorneys can also, however, act as agents or brokers, subject to license requirements and ethical rules. Attorneys are always bound by the rules of professional conduct and ethical issues may arise when the attorney attempts to act both as counsel and as a broker.
Counsel may also run into problems when attempting to represent multiple clients to a transaction—this situation could arise when a buyer refuses outside counsel and relies on the assistance of seller’s counsel in facilitating the agreement. This situation is governed by SCR 3.130-1.7:

(a) [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
   (1) the representation of one client will be directly adverse to another client; or
   (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding paragraph (a), a lawyer may represent a client if:
   (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
   (2) the representation is not prohibited by law;
   (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
   (4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

III. PURCHASE AGREEMENTS

A purchase agreement is, at its most basic, merely a contract between the buyer and the seller. The standard contract basics apply—offer, acceptance and some sort of consideration are necessary to create an enforceable agreement.

A. Basic Considerations:

1. 201 KAR 11:250 §2 sets out what should be in any purchase agreement prepared by a real estate broker:

   Section 2. An offer to purchase or a counteroffer prepared by or at the direction of a licensed agent shall include the:

   (1) Purchase price, the amount of contract deposit given and who is to hold the deposit;

   (2) Date and time of signing of the offer or counteroffer for all parties who sign;
(3) Date and time when the offer or counteroffer expires;

(4) Street address or a general description of the real estate sufficient to identify the parcel;

(5) Names of the offering party and the agent who prepared the offer or counteroffer; and

(6) Provision setting forth the date by which the closing shall occur and when possession shall be given to the buyer.

2. Statute of frauds – since a purchase agreement is a contract for the purchase of land, the Statute of Frauds applies. Kentucky has its own adoption of the Statute of Frauds.

KRS §371.010 – Statute of Frauds – Contracts to be written:

"No action shall be brought to charge any person:

. . .

(6) Upon any contract for the sale of real estate, or any lease thereof for longer than one year;

. . .

Unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent. It shall not be necessary to express the consideration in the writing, but it may be proved when necessary or disproved by parol or other evidence."

- This writing also must be signed by the party or an authorized agent to be charged, which is defined by Kentucky as "[T]he vendor of the real estate, and if the writing is signed by him and it is otherwise sufficient, it will be enforceable by either party." Hamblin v. Walters, 54 S.W.2d 907, 908 (Ky. 1932).

B. Provisions

1. Necessary Parties.

The very first element of the purchase agreement should be the parties to the transaction. This should be clearly stated and every relevant party identified, so as to prevent any confusion as to who is bound by the agreement.
Make sure that all relevant parties are included in the agreement – sometimes multiple parties have an interest in the property that must be conveyed, and failure to include everyone will result in a botched transaction. Parties not included in the agreement aren't bound by it, and a court won't enforce a contract as to them. The attorney writing the agreement should investigate several factors:

a. The marital status of the seller – a spouse may hold a property interest.
   • Dower and curtesy – (KRS §392.020; KRS §392.080) A couple seeking a dissolution of marriage will often run into problems with dower and curtesy when either spouse attempts to buy a new home, as the soon-to-be ex will suddenly have an interest in the new property being purchased. At minimum, this requires the non-purchasing spouse to sign some of the legal documents at the closing, but at the worst, can create a particularly bad situation; unreasonably holding up closings, affecting interest rates, and generally adding stress and possible costs to divorce litigation.

b. Whether the seller has filed for bankruptcy.

c. Whether the seller is legally incompetent.

d. Other factors bearing on the ability of the seller or buyer to act on behalf of another to enter into the agreement.
   • Agents or Attorneys-in-fact – the attorney drafting an agreement that includes a party acting as an agent or an attorney-in-fact should review any Power of Attorney to make sure the agent or attorney-in-fact actually has the power to enter into the transaction, if possible.

2. Identification of the Property.

a. Description

Naturally, an essential element of the purchase agreement is a description of the real estate to be conveyed. Deeds and other recordable instruments require a higher standard of description than purchase agreements. While the standards for the purchase agreement property description aren't particularly high, some degree of specificity might help to, once again, avoid any confusion.
i. Street address – This may be enough for a purchase agreement, but still may not be specific enough in cases where a significant amount of land is involved, for example.

ii. Legal description of the property – as full a description of the property as possible, describing boundaries, etc. This, together with the street address, gives added specificity and helps to avoid confusion as to what is being conveyed. This can be obtained from the source deed.

b. Personalty

If a seller intends to remove a fixture, the seller should disclose and identify that fixture in the property identification section of the agreement. Otherwise, according to KRS §381.200(1),"Every deed, unless an exception is made therein, shall be construed to include all buildings, privileges and appurtenances of every kind attached to the lands therein conveyed."

i. All personal property that is included in the sale should be listed – if there's any doubt as to whether the property is personal property or a fixture, set out what happens to it in the agreement.

ii. Any amounts paid for the personalty included in the sale should be set out separately from the consideration paid for the real property to avoid paying transfer or ad valorem taxes on amounts that aren't paid for the property.

3. Purchase Price and Terms of Payment.

a. Price

The purchase agreement should state the specific amount to be paid, which is usually the sum total of the consideration in the contract. Don't rely on stock boilerplate concerning consideration – make the amount as specific as possible.

b. Terms of payment

In setting how much the price will be in the contract, it is equally important to set out the manner and timing of the payment. If there are more financial considerations to be discussed, set them out in as much detail as possible. As with any contract provisions, avoidance of ambiguity is paramount and will save a lot of headache later.
c. Earnest money

KRS §324.111(4) states that an earnest money deposit with a broker can only be released one of three ways: "None of the contract deposits shall be withdrawn until the contract has been terminated by performance, by agreement in writing between all parties, or by order of a court of competent jurisdiction."

4. Contingency Clauses.

Contingency clauses in purchase agreements are a common item that can relieve either the buyer or the seller of performance under certain conditions precedent.

a. An agreement can include a clause making the agreement "subject to financing," which allows the purchaser to back out if a mortgage falls through, or it can allow the seller to contract with another buyer if the financing isn't in place at a certain date.

b. "Subject to sale of other property" is another common clause that alleviates the purchaser's worry of having to pay on two mortgages if her or his previous property doesn't sell.

c. A buyer may wish to make the contract subject to some sort of home inspection or repair by the seller.

d. Such contingency clauses require good faith efforts to meet the conditions in the clauses.

5. Taxes and Assessments.

The purchase agreement should set out how any assessments against the property will be handled at closing, especially taking care to set out the party responsible for payment of the assessments or taxes.

6. Closing, timing and possession.

a. Date, Time and Place

Purchase agreements generally set out the terms of the closing. The date is generally the most important provision, but the time—and even the place—are fodder for agreement as well. The parties may choose, however to leave these provisions ambiguous, as locations and timing are often determined by the lender – too much specificity might leave the door open to easy breach.
b. Time of the essence

The clause "time is of the essence" is an important consideration that should be weighed heavily before inclusion or exclusion, as it can cut either for or against either party, depending on the circumstances. This also may appear in forms, so attorneys are advised to watch for this crucial language to advise clients accordingly.

c. Time of possession

Drafters should take care and set out with some specificity a time certain when the buyer can take possession of the property. It may be necessary for the agreement to include a provision to remedy seller holdover periods and compensate the purchaser accordingly.

7. Title.

There is an implied condition in purchase agreements that the seller will convey marketable title, but this may be a point of contention if not explicitly stated. The purchaser may want a warranty deed, while a seller is only willing to give a quitclaim, so it's important to specify in the purchasing agreement what kind of deed will be conveyed with specificity as to warranty. Title will be discussed more thoroughly in a later section.

- Marketable title:
  
  a. Title can be held or possessed in peace and quiet and is reasonably free from the threat of future litigation. 77 Am. Jur. 2d Vendor & Purchaser §103.
  
  b. No outstanding interest that might endanger the holder's right to continued possession of the property. 77 Am. Jur. 2d Vendor & Purchaser §105.
  
  c. Title isn't marketable if there's a reasonable fear that another entity retains the right to use or transfer the property.
  
  d. Marketable title means the title is clear from defects, whereas insurable title isn't necessarily clear from defects but an insurance company is willing to take the risk of insuring it.


The risk of loss passes to the purchaser on execution of a purchase contract in Kentucky, so it may be necessary to alter this risk by agreement to protect the buyer, especially since the seller
is usually in possession of the property until the day of closing. Estes v. Thurman, 192 S.W.3d 429, 432 (Ky. App. 2005) (affirming that the risk of loss is on the equitable owners of the property under the purchase contract).

9. Other provisions.

Drafters of purchase agreements should look to various state and federal laws to determine what disclosures and representations a seller must make upon entering a purchase contract (i.e., property condition disclosures under 201 KAR 11:350, lead paint disclosures), as well as any agreements between the buyer and the seller not included or covered under the remainder of the agreement.

C. Commercial vs. Residential Considerations

Most of the basic elements are the same between commercial and residential purchase agreements – the capacity to contract, the intent of the parties, necessary provisions/disclosures/representations, etc. There are a few differences that merit brief discussion, however.

1. Other types of agreements common in commercial real estate transactions:

   a. Letters of intent

   A letter of intent is, simply put, a non-binding expression of intent and agreement of terms. Sloppy drafting can, however, turn a "letter of intent" into its far more enforceable cousin, a "contract." Careful drafting should take pains to stress the non-binding nature of the agreement, thoroughly separating binding clauses from non-binding clauses when necessary. Don't leave the document ambiguous as to whether the agreement is meant to be binding on the parties.

   b. Option contracts

   An option contract is a means of securing a binding commitment from the owner of a commercial property without agreeing to be bound to purchase the property. The option contract gives the potential buyer a chance to purchase the property at a specified price and under agreed-upon terms if the purchaser exercises this option within the term specified. To make the option contract enforceable, the potential purchaser must pay an option price to the potential seller. Do not make the mistake of making the option payment refundable, as this negates the requirement of separate consideration on the option and
the option contract is no longer enforceable against the potential seller.

i. Ford v. McGregor, 234 S.W.2d 493 (Ky. 1950) - an option contract specified that the consideration given for the option could be refunded at the election of the potential buyer. Since this was not mutual consideration, the option contract was considered to be an offer rather than a contract, which was then withdrawn by the potential seller. The potential purchaser could not then enforce the option contract.

ii. An option must be exercised in an unqualified fashion. Phelps v. Gover, 394 S.W.2d 927 (Ky. 1965) – Owners of property subject to an option contract tried to tender deed to potential purchasers, but the attorney for the purchasers suggested he didn't think the deed transferred good title. The title actually was good and the attorney was mistaken. The owners transferred the property to different purchasers. The court held that the option expired when the owners attempted to fulfill the terms of the contract by tendering the deed, and any further qualifications or actions by them were unnecessary.

iii. An option contract that is too vague or lacks an essential element won't be enforced. Bennett v. Dudley, 391 S.W.2d 375 (Ky. 1965) – Dudley gave an option agreement to Bennett, saying that if he "desires" to sell to Bennett, he'd notify him. Dudley sold to someone else, Bennett sued – the court held that the contract is unenforceable, since it was conditioned on Dudley's desire to sell to Bennett specifically.

2. Identity of the parties to the transaction.

Since commercial real estate transactions generally involve corporations, LLCs and other organizations, there are other considerations at play with regard to agency and party identification.

a. Agency – it's important to identify the legal nature and true name of the entity that is a party to any contracts, as well as determining the authorization of the person acting on behalf of the entity. Some form of authorization on behalf of the entity should be required before closing.
b. Foreign corporations – there may be more requirements of an out-of-state corporation to transact business in the state, so counsel should contact the counsel for the corporation at the formation of the contract to determine any further issues of authorization, execution of the contract, etc.

IV. TITLES

"Title", of course, refers to legal ownership of property and is used to establish a clear chain of ownership when transferring real property.

A. There are, of course, four different ways to hold title in Kentucky, and each can affect transferability differently.

1. Fee simple – a holder of title in fee simple absolute has full rights to a property now and in the future, and this continues indefinitely. There are very few limitations on what this holder can do with property as a legal matter.

2. Joint tenancy – this type of title covers two or more owners who share an undivided interest in the property. Joint tenancy also generally comes with a right of survivorship. For instance, if two people own property as joint tenants and one of them dies, the survivor now holds title to the property in fee simple.

3. Tenancy in common – two or more owners have an undivided interest in the property, but the interest is proportional and that portion passes via will or intestate succession at the death of the interest-holder.

4. Tenancy by the entirety – this interest can only be held by a validly-married couple and comes with a right of survivorship.

B. There are potential problems with titles that can delay or inhibit transferability.

1. Past ownership claims – ownership of property can pass over generations and title can become murky, etc.

2. Liens – liens are encumbrances on the title and must be paid off before the title can be transferred.

3. Covenants of record – these are covenants made on the land to another party that bind every successive holder of title.

C. Title Search and Examination

One of the primary and most basic functions of an attorney in a real property transaction is the certifying of ownership and conditioning of title to that real property.
1. Title Search.

A title search is an investigation of all the public records located in the county clerk's office. The deed must contain the source of title that gives the Deed Book and Page where the deed is recorded. KRS §382.110(4). Using this information, an attorney conducting a title search then traces the succession of the title from the current owner back to the original owner. All of the transfers of the specified property can be discovered, which provides a clear picture of any interests in the property. These searches can be done with varying degrees of involvement.

2. Title Examination.

A title examination is a thorough review of all the documents discovered in the title search. The examination determines how each document affects title to property, discovering any interests created by the document and whether all documents comply with applicable Kentucky law.

3. If the buyer discovers that the title is not marketable or is otherwise unacceptable, the seller must be notified of the alleged defects and be given a reasonable amount of time to cure them. Norman v. William Koch Motors, Inc., 342 S.W.2d 392, 393 (Ky. 1961). However, a buyer has the right to demand the exact condition of title as specified in the purchase agreement, even if the defect is found to be trivial. Vogt v. Shumate, 281 S.W. 514, 516 (Ky. 1926).

4. Liens.

a. Various liens and statutory limitations:

i. **Mortgages** – fifteen years from the date of maturity of the loan. This maturity date should be set forth in the mortgage; if not, the fifteen years will run from the executing date of the mortgage. – KRS §413.090.

ii. **Mechanic’s Liens** – generally, any person who performs work or supplies materials to real property, has six months from the date that person last performed work or supplied material in order to file a notice of Mechanic’s Lien – KRS §376.080. The lien holder then has twelve months to file suit in order to enforce the lien. – KRS §376.090.

iii. **State Tax Liens** – ten-year statute of limitations on all state tax liens. This time begins to run from the date the tax lien is recorded. – KRS §131.500; KRS §134.420.
iv. **County/City Ad Valorem Property Taxes** – eleven years from the date of delinquency or from the date a certificate of delinquency can be issued. Therefore, delinquent county/city taxes should be searched back twelve years. – KRS §134.420(1); KRS §134.470.

v. **Judgment Liens** – fifteen years from the date Notice of Judgment Lien was filed. – KRS §413.090(1); KRS §426.720.

vi. **Federal Tax Liens** – ten years from the assessment of federal taxes, unless lien is re-filed by IRS or federal government. I.R.C. §6502(a).

vii. **UCC Financing Statements** – Filed financing statement if effective for five years from the date of filing unless continuation statement filed. – KRS §355.9-403(2).

viii. **Unemployment Liens** – No statute of limitations. Lien continues until the amount of the original assessment and any interest or penalties are paid in full. – KRS §341.310.

ix. **Inheritance Tax Lien** – No action to enforce the collection of inheritance tax shall be commenced more than ten years after the cause of action accrues. The cause of action must accrue sometime within eighteen months from the date of death. Therefore, (practically speaking) the statute is eleven and one-half years after death. – KRS §141.060(3).

x. **Workers’ Compensation Lien** – ten year statute of limitations. – KRS §342.770.

xi. **Bail Bonds** – five year statute of limitations. – KRS §413.120(13).

xii. **Condominium Liens** – five years after the full amount of the delinquent assessments become due. - KRS §381.9193(5).

b. **Attachment of liens:**

Equitable owner vs. legal owner - Can a lien against an owner of only an equitable interest in the property attach to the property itself even if the owner has no legal title in the property?
i. Sebastian v. Floyd, 585 S.W.2d 381 (Ky. 1979) – The seller's interest under a land sale contract is treated as a lien against the property. These types of contracts should be looked as if they were a deed with a lien from the seller.

ii. KRS §376.020 – Mechanic's and Materialman's Liens - If the owner claims by executory contract and for any cause the contract is rescinded or set aside, the lien provided for in KRS §376.010 (mechanic's or materialman's liens) shall follow the property into the hands of the person to whom the property may come or with whom it may remain by reason of the rescissions, but only to the extent that the actual value of the property is enhanced by the improvements so placed upon it.

D. Title Insurance

Title insurance protects against loss that comes about as a result of defects of title to real property. It's different from what one generally considers insurance to cover in that it protects against future losses from events that occurred in the past. Insurance in general is designed to protect against future losses due to future events.

V. CLOSINGS

A. The closing is the final step in the real estate transaction, a ceremony that is the end result of all the negotiations, document preparation, etc. This is the completion of the transfer between the parties and ends with the transferee receiving legal title.

B. Elements of a Closing:

1. The closing is where the buyer and the seller finalize the terms of the contract and sign off on it.

2. The seller provides the buyer with title, the buyer provides the seller with the purchase price (or other consideration).

3. The process includes the delivery or finalization of several documents and may include other transactions as well.

   a. Purchase contract – as discussed earlier, this sets out the parties, the purchase price, a description of the property, etc., and is the ultimate agreement concerning the terms of the sale.

   b. Deed – this document conveys title to the property. There are generally two kinds in real estate transactions.
i. General Warranty Deed – the seller conveys title with certain warranties or covenants.

(a) Covenant of seisin – the grantor warrants that they are the true owner of the property and they have the legal right to convey it.

(b) Covenant against encumbrances – unless they are otherwise listed in the deed, the grantor warrants that the property is free of liens or encumbrances.

(c) Covenant of quiet enjoyment – the grantor warrants that the title will be good against third parties trying to claim title to the property.

(d) Covenant of further assurance – the grantor makes a promise to deliver any document or instrument necessary to make the title good.

ii. Special warranty deed – the grantor warrants against claims by or through the grantor. This is different from a general warranty deed in that a special warranty deed will only apply to claims against the title by and through the grantor. A general warranty deed warrants against claims from any party, even those unknown to the grantor. Special warranty deeds only warrant against claims for the duration of the seller's tenure in a property.

- This is used more commonly in commercial real estate transactions.

iii. Quitclaim Deed – the seller merely releases a hold on any right to any title in the property and makes no warranties about whether the title is even good.

c. Title – expressed as a legal opinion or as a commitment by title insurer rendered after careful examination of the public record, there is no single "document" which creates title.

d. Survey – this is a legal confirmation of the boundaries/extent of the property, conducted in anticipation of the sale of the property.

e. The Settlement Statement/ Real Estate Settlement Procedures Act (RESPA)/Housing and Urban Development (HUD) Uniform Settlement Statement – while there are many closing statements in use, the predominant
settlement form is HUD-1, known as the Uniform Settlement Statement. It's required for use with federally-related mortgage loans. The settlement statement covers several types of information, which will be discussed briefly here.

i. The settlement statement requires information generally from three sources:

(a) The purchase contract, which provides the purchase price, down payment, commission, and any provisions relating to proration.

(b) The loan commitment from the lender, which gives the loan amount, various fees, etc.

(c) The title insurance commitment/title report, which states any mortgages on the property that need to be paid off, judgment liens, federal or state tax liens, city and state property taxes, assessments and any other encumbrances that will have to be released prior to the closing.

ii. Lien payoffs – the closing agent needs to obtain the payoff for the lien several days before the closing to allow enough time to get the payment to the lienholder. This payoff should include any fees necessary for the release or recordation of the release of the liens.

iii. Tax Proration – property taxes are generally prorated to the closing date, but the purchase agreement can specify how the taxes are prorated. The document drafter should be careful to understand whether city taxes are payable on a fiscal year or calendar year basis. The amount of taxes paid or obligations to be met are both listed on the settlement statement.

iv. Title insurance – these charges are set by the title insurance company, and there are probably taxes on title insurance as well. Closing agents will identify whether such taxes apply.

v. Commissions – the purchase contract generally sets out the commissions, which are then listed.

vi. The division of charges –
(a) Seller generally agrees:

(i) To furnish a warranty deed.

(ii) To pay any costs associated with clearing any encumbrances or defects in title.

(iii) To pay the real estate broker's commission/fees.

(iv) To obtain any necessary pest control certifications.

(v) To pay Kentucky real estate transfer tax (KRS §142.050).

(b) The Buyer generally agrees:

(i) To pay costs for the preparation of the mortgage or any note or security interest.

(ii) To pay for the title examination and title insurance.

(iii) To get and pay for fire insurance.

(iv) To pay for recording the deed and mortgage.

(v) To pay the lender any transaction costs associated with the loan.

(vi) To pay the attorney fees for document preparation.

f. IRS Form 1099 – the closing agent reports all real estate transactions to the IRS.

g. Truth In Lending Act (TILA) – certain disclosures must be made by the lender upon the closing of the transaction.


ii. 12 C.F.R. §226.8 – other disclosures by the creditor.
iii. TILA allows three-day rescission of mortgage after closing, but this can be extended up to three years, depending on how long it takes the creditor to make the required disclosures.

4. The closing agent should have a list of required documents and check all the documents assembled against the list at the time of the closing.

5. The closing agent should check identification of the parties to make sure they are the necessary parties to the transaction.

   a. Electronic signatures – In 2014, FHA announced they’d start accepting electronic signatures on documents associated with mortgage loans.

   i. This expanded the documents for which e-signatures are now acceptable and now includes:

      (a) Any documents associated with servicing or loss mitigation;

      (b) Any documents associated with the filing of a claim for FHA insurance benefits;

      (c) The HUD Real Estate Owned Sales Contract and related addenda; and,

      (d) All documents included in the case binder for mortgage insurance except the Note.

   ii. Lenders must be in compliance with the Electronic Signature in Global and National Commerce Act ("ESIGN"). Authentication systems must be in place that can confirm that the signature may be attributed to the purported signer and lenders should confirm the signer's identity.

   iii. Under Kentucky law, however, electronic signatures aren't acceptable for transactions governed by "a law governing the conveyance of any interest in real property" or "a law governing the creation or transfer of any negotiable instrument or any instrument establishing title or an interest in title."

6. Merger – the general rule is that all prior statements and agreements, written and oral, are merged into the deed. This binds the parties. Borden v. Litchford, 619 S.W.2d 715, 717 (Ky. App. 1981).
VI. RECORDATION

A. Kentucky's recordation Statutes and Requirements Are Generally Part of KRS Chapter 382.

The general recording statute is KRS §382.080(1) - No deed conveying any title to or interest in real property, or lease of oil, gas, coal or mineral right and privilege, for a longer time than five (5) years, nor any agreement in consideration of marriage, shall be good against a purchaser for a valuable consideration without notice thereof, or any creditor, unless the deed is acknowledged by the party who executes it, or is proved and lodged for record in the proper office, as prescribed by law.

1. Priority and validity of recording is found in KRS §382.270 - "No deed or deed of trust or mortgage conveying a legal or equitable title to real property shall be lodged for record and, thus, valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deed or mortgage is acknowledged or proved according to law. However, if a deed or deed of trust or mortgage conveying a legal or equitable title to real property is not so acknowledged or proved according to law, but is or has been otherwise lodged for record, such deed or deed of trust or mortgage conveying a legal or equitable title to real property or creating a mortgage lien on real property shall be deemed to be validly lodged for record for purposes of KRS Chapter 382, and all interested parties shall be on constructive notice of the contents thereof. As used in this section "creditors" includes all creditors irrespective of whether or not they have acquired a lien by legal or equitable proceedings or by voluntary conveyance."

2. KRS §382.280 – deeds and mortgages take effect in the order that they're recorded.

B. Instruments that May Be Recorded:

1. Deeds - KRS §§382.080; 382.270 –

   Recordation requirements -

   a. Generally - "shall be recorded in the county clerk's office of the county in which the property conveyed, or the greater part thereof, is located." KRS §382.110(1).

   b. Source of grantor's title - "No county clerk or deputy county clerk shall admit to record any deed of conveyance of any interest in real property equal to or greater than a life estate, unless the deed plainly specifies and refers to the next immediate source from which the grantor derived title
to the property or the interest conveyed therein." KRS §382.110(2).


d. Statement of full consideration – KRS §382.135(1).

e. Scrivener's certificate and address of the parties - "A printed, typewritten, or stamped statement showing the name and address of the individual who prepared the instrument, and the statement is signed by the individual. The person who prepared the instrument may execute his or her signature by affixing a facsimile of his or her signature on the instrument." KRS §382.335.

2. Offers to sell and option contracts – KRS §382.090.


Sebastian v. Floyd, 585 S.W.2d 381, 383 (Ky. 1979) – The Kentucky Supreme Court held that these types of contracts have the effect of conveying a property interest to the purchaser. The seller's interest then becomes a lien, even if the contract contains a forfeiture clause. These types of contracts should be looked at as if they were a deed with a lien from the seller. Land sale contracts are analogous to conventional mortgages and must be enforced through foreclosures.

4. Mortgages.

Recordation requirements:

a. Generally - "shall be recorded in the county clerk's office of the county in which the property conveyed, or the greater part thereof, is located." KRS §382.110(1).

b. Lender's address, if a mortgage or any other instrument constituting a lien or a security interest. KRS §382.430.

c. Date and the maturity of the obligation ("due on demand" acceptable). KRS §382.330.

d. Scrivener's information: "A printed, typewritten, or stamped statement showing the name and address of the individual who prepared the instrument, and the statement is signed by the individual. The person who prepared the instrument may execute his or her signature by affixing a facsimile of his or her signature on the instrument." KRS §382.335(1).

e. Acknowledgment of proof – KRS §§382.130-170.
5. Power of attorney ("POA").
   a. Just as with a conveyance, there must be two parties for a POA or a revocation.
   b. If real estate is to be conveyed, the POA MUST be recorded. KRS §382.370. Unrecorded POA will not be effective as to the transfer of real estate.
   c. Recordation requirements are the same as to a deed, with one exception – a preparation certificate is not necessary. OAG 62-1100.
   d. There are two types of POA – general, which grants full power, and specific, which is limited to certain acts. The best practice is to explicitly state that a POA is authorized to convey real estate, as absent some showing of proof, a deed under such a POA may not be eligible for recordation.

VII. BANKRUPTCY

A bankruptcy of an owner of real property can affect a creditor's rights and interfere with the foreclosure process, as well as with property transactions.

A. Automatic Stay – under §362 of the bankruptcy code, upon a filing of bankruptcy, creditors are prevented from taking any action against the debtor for the duration of the stay without judicial intervention.

1. Effect of the automatic stay –
   a. The automatic stay prevents the creditor from performing eight actions against the debtor (contained within §362(a)):
      i. "(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
      ii. (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
iii. (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

iv. (4) any act to create, perfect, or enforce any lien against property of the estate;

v. (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

vi. (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

vii. (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

viii. (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title."

b. The automatic stay, however, can hinder real estate transactions in the case where the seller files for bankruptcy – this is not uncommon, as the seller might be trying to sell the house quickly to get out from under the financial liability. Both the buyer and the seller may be surprised to discover that once the seller files a bankruptcy petition, the property in question becomes part of the estate in bankruptcy, and the automatic stay will prevent any action to commence or enforce the contract. The seller will have to ask the court for permission to complete the sale, leading to a delay of the closing. The contract is then an executory contract, and the trustee can accept or reject it. If the trustee rejects the contract, it becomes unenforceable.

2. Duration of the automatic stay.

a. Unless there is a ruling by a judge to provide relief to a creditor, the stay remains in effect until:

i. The case is closed

ii. The case is dismissed
iii. The debtor is granted or denied a discharge

iv. The item of property is no longer the property of the estate

v. OR – when a debtor fails to file a Statement of Intentions under §521(a)(2) within thirty days

b. Under certain conditions, certain repeat filers have thirty days, but this can be extended if the debtor can show these were filed in good faith.

3. Relief from the stay.

a. A creditor can petition for relief under §362(d), asking the judge for permission to perform certain actions under a motion to modify the automatic stay. There are specific standards for relief – the debtor can move for relief as spelled out in §362(d) –

i. for cause, including the lack of adequate protection of an interest in property of such party in interest;

ii. if the creditor can show that there isn't sufficient equity in the property or the property isn't necessary to an effective reorganization;

iii. in single asset real estate cases, the stay shall be lifted ninety days after the filing of the petition or thirty days (whichever is later) after the debtor has either:

a) filed a plan of reorganization that has a reasonable possibility of confirmation; or

(b) started making monthly payments to the secured creditor "equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate." § 362(d)(3)(B)(ii).

iv. OR – if the court finds out the filing of the petition was to delay, hinder or defraud creditors.

b. In effect, an automatic stay delays foreclosure once a debtor files, and a creditor must get judicial approval and show some form of loss of an interest if the approval isn't granted.
B. Homestead Exemption – the bankruptcy homestead exemption allows a debtor to shelter a certain amount of equity in their home from the bankruptcy process.

A debtor can choose which list of exemptions to use, but must pick only one list.

1. Kentucky – allows a homestead exemption of $5,000. KRS §427.060.
2. Federal – currently $22,975, but married debtors filing together can double the amount. The current cap against states that have larger homestead exemptions is $155,675. These amounts are recalculated every three years (last recalculation in 2013).

VIII. TAX ISSUES

A. Capital Gains

1. Personal real estate.
   a. Gain of up to $250,000 (filing single) or $500,000 (married filing jointly) can be excluded from capital gains on the sales of a house, if:
      i. Ownership test – you must have owned the home for at least two of the five years prior to the sale date
      ii. Use test – you must have used the home as your main home for a period aggregating at least two years out of the five years preceding the sale date
   b. Gain can't be excluded if you received the home as part of a §1031 like-kind exchange.
   c. Gain can't be excluded if you used this exclusion at any time within the last two years.

2. Commercial or investment real estate.

   Capital gain rate of unrecaptured §1250 gain on real property is 25 percent.

   Unrecaptured §1250 gain is the gain on the sale of real property over the depreciated value. If an asset property is depreciated over thirty years to a value of $0 and is theoretically worthless, the sale of the property for $100,000 produces $100,000 of gain and is taxed at the 25 percent rate.
B. §1031 (Like-Kind) Exchanges – I.R.C. §1031 allows for those with a capital gain in business/investment property to reinvest proceeds from the sale of that property in new property to defer taxation on those capital gains.

1. While it is seen as a "swap" of property for purchases of the code, it's a sale and a reacquisition that is treated like a trade of the properties. The results of the sale of the first qualified property are placed with a third party intermediary who then buys the second piece of property with the money and "sells" it to the original investor. In this way, the intermediary acts as the party with whom the investor is swapping property. The investor sells off property and receives property in return.

2. There are two rules that must be followed:

   a. The total purchase price of the replacement "like kind" property must be equal to, or greater than the total net sales price of the relinquished, real estate, property, or the investor will be taxed on the remainder, or "boot."

      Mortgages and other debt on the properties must be considered – if liabilities go down, that will be treated as income.

   b. All the equity received from the sale of the relinquished real estate property, must be used to acquire the replacement "like kind" property.

3. These transactions all must take place within allotted time periods:

   a. Forty-five days from the date of the sale of the first property, the investor must identify other properties to purchase.

   b. Within 180 days of the transfer of the first property, the investor must receive the replacement property.

IX. REAL PROPERTY AT DEATH

A. Power of Sale in a Will

1. KRS §395.220 authorizes the ability of a testator to direct a personal representative to sell land.

   a. Without the power of sale, the executor has no power to sell the land without a court order. See Strode v. Kramer, 169 S.W.2d 29, 30 (Ky. 1940).

   b. KRS §389A.010(1) – the personal representative of the estate may move the District Court for an order granting
the power to sell the real estate. If such an order is granted, there's a thirty-day waiting period before the personal representative may attempt to sell or mortgage the property so that aggrieved parties may bring suit. KRS § 389A.010(4).

The suit must be brought in Circuit Court, however. KRS §389A.010(4).

c. The power, however, may be implied to carry out the instructions given by the will.

2. A testator may give a power of sale to the executor either generally or for a limited purpose.

a. KRS §389A.020 – If the power of sale of the fiduciary is limited, however, it can be altered or amended in Circuit Court of the county where the fiduciary was appointed if the limitations substantially impair the accomplishment of the purposes intended and the alteration is in the best interests of all parties. If the sale of only the necessary part of the land to satisfy debts would impair the value of the property, the executor should ask the court to allow sale of the entire tract.

b. If the personal representative does have discretionary power to sell land, the devisees may still demand distribution rather than sale.

Lucas v. Mannering, 745 S.W.2d 654 (Ky. App. 1987) – Executor had broad power to sell and was planning to sell to lessees who had built houses on the property at issue. The devisees sued and won distribution of the property among them.

3. The testator may condition the power of sale upon a specific event or a certain condition, and this will limit the power of the executor to sell the property.

a. For instance, if a devisor gives a life estate to someone with the remainder of the estate to be sold at that person's death and the proceeds distributed to others, the executor has no power to sell the estate during the life of the person with the life estate. Dohoney v. Taylor, 79 Ky. 124, 1 Ky. L. Rptr. 415 (Ky. 1880).

b. A testator may direct the administrator to sell sufficient land to pay estate debts, but the executor doesn't necessarily exceed his or her powers if more land than necessary is sold, as long as the purchaser had no knowledge that the administrator was exceeding his or her authority.
Takpy v. Lexington & E.R. Co., 157 S.W. 726 (Ky. 1913) –  
The purchaser of property knew that the debts of the 
estate were far exceeded by the sale price of the property, 
so the sale was set aside.

B. Intestate Succession

KRS §382.120 requires that when a decedent dies intestate, real property 
that passes under Kentucky's laws of descent require the filing of an 
affidavit of descent with the county clerk of the county the property is 
situated in. It must include:

1. The name of the ancestor;
2. The date of the ancestor's death;
3. Whether the ancestor was married or single, and the name and 
   address of the surviving spouse if married;
4. The place of residence of the ancestor at the time of death;
5. The fact that the ancestor died intestate;
6. Names and addresses of the heirs at law who inherit the property 
   and the relationship of each to the ancestor as well as the interest 
   in the property inherited by each.