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ATTORNEY GENERAL OPINION NO. 87-127

Anne Reves
Register of Deeds
Pottawatomie County
Westmoreland, Kansas 66549

Re: Taxation--Mortgage Registration and Intangibles;
Mortgage Registration--Instruments Subject Thereto

Synopsis: An instrument by which the purchaser of real property under an executory contract grants a lien on his equitable interest in the property, is a "mortgage of real property" for purposes of K.S.A. 79-3101 et seq. If such an instrument gives notice of the existence of the unrecorded executory contract through which the purchaser obtained his interest in the real property, mortgage registration fees must be collected on the instrument itself and on the executory contract to which it refers. Cited herein: K.S.A. 79-3101; K.S.A. 1986 Supp. 79-3102.

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Dear Ms. Reves:

As Pottawatomie County Register of Deeds, you request our opinion regarding the amount of mortgage registration fee to be charged for recording a certain instrument which affects real estate.

You have provided copies of two instruments pertinent to your concern. The first is an affidavit of equitable interest filed by the purchaser of real property under an executory

contract for the purpose of providing notification of the purchaser's interest in the real estate described therein. The second instrument is a mortgage of the purchaser's interest in the real estate purchased under the aforementioned executory contract. This second instrument is entitled "Assignment of Interest in Real Estate Installment Purchase Contract." The executory contract has not itself been recorded and thus no mortgage registration fee has been paid thereon. You question whether, since the "Assignment" references the underlying executory contract as well as the affidavit of equitable interest, a mortgage registration fee must be collected based on the debt created by the underlying executory contract.

K.S.A. 1986 Supp. 79-3102 provides that:

"(d) No registration fee whatsoever shall be paid, collected or required for or on:
. . . (5) any mortgage or other instrument given in the form of an affidavit of equitable interest solely for the purpose of providing notification by the purchaser of real property of the purchaser's interest therein." (Emphasis added.)

Thus, mortgage registration fee may not be collected for filing an affidavit of equitable interest if the affidavit is given solely for the purpose of providing notification of the purchaser's interest in the real property purchased under an executory contract. See Attorney General Opinions No. 81-180, 83-119. The affidavit in question appears to meet these criteria and therefore was properly filed without a mortgage registration fee being assessed or paid.

However, the statutes specifically require that mortgage registration fees be paid for recording executory contracts for the sale of real estate as described in K.S.A. 79-3101. As mentioned previously, the "assignment" in question, which is in fact a mortgage, references the affidavit of equitable interest and the underlying executory contract. A similar situation was addressed by this office in Attorney General Opinion No. 83-119 as follows:

"Our office has consistently opined that a register of deeds may refuse to file an executory contract for the sale of real property or a document that incorporates, by reference, or otherwise gives notice of

the provisions of an executory contract for the sale of real property, unless the mortgage registration fee has been paid on the executory contract or such notice is given in a proper affidavit of equitable interest. See Attorney General Opinion Nos. 81-180, 77-202 and 75-447. We also have said that, as a general rule, if an instrument is a mortgage of real property and it also gives notice of the existence of an unrecorded executory contract for the sale of real property, then two mortgage registration fees are payable before the instrument may be recorded. One fee is due on the mortgage of real property and another fee is due on the unrecorded executory contract. See Attorney General Opinion No. 75-447. This general rule, however, does not mean that two mortgage registration fees must always be paid if a purchaser of real property mortgages his equitable interest in real property.

"In a situation where a purchaser of real property under an executory contract obtains a loan and secures payment of that loan by granting a lien on his equitable interest in the real property being purchased, the instrument by which the lien is granted need not incorporate, or recite, the provisions of the executory contract for the sale of real property through which the purchaser obtained his interest in the real property. The instrument can recite that the purchaser-borrower has an equitable interest in the real property, as evidenced by an affidavit of equitable interest which was filed on a certain date in a certain book and at a certain page in the register of deeds' office of the appropriate county, and that the purchaser assigns, transfers and sets-over all of his rights, title and interests in said real estate, to the lender as security for the loan. Of course, the purchaser would have to file an affidavit of equitable

interest to give notice of his equitable interest in the real property prior to completing the instrument by which he mortgages his interest in the property. But, if such an affidavit is filed and the instrument by which the purchaser grants a lien on his equitable interest in the real property contains only the statements indicated above, we are of the opinion that the mortgage he is giving can be recorded without the purchaser having to pay a mortgage registration fee on the executory contract for the sale of real property through which he obtained his interest in the real property. A mortgage registration fee would be paid only on the loan being made to the purchaser and secured by his equitable interest in the real property.

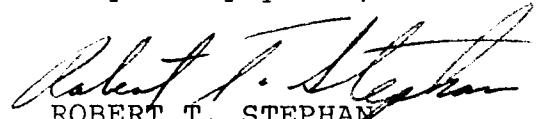
"If, however, a procedure other than that described above is followed, and the instrument by which the purchaser grants a lien on his equitable interest in the property gives notice of the existence of the executory contract through which the purchaser obtained his interest in the real property, then a mortgage registration fee must be paid not only on the loan currently being made to the purchaser, but also on the principal amount of the executory contract."

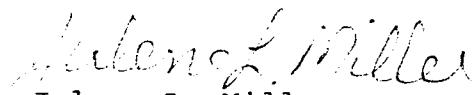
We stand by the conclusions reached in Opinion No. 83-119 and find that the same reasoning applies to the situation now before us. (For the rules applicable to the assignment of the seller's interest in an executory contract, see Attorney General Opinion No. 86-137.) Before the "assignment" in question may be recorded, mortgage registration fees must be collected based on the current loan, and the principal amount of the executory contract referenced by the "assignment".

In conclusion, if an instrument by which the purchaser of real property under an executory contract grants a lien on his equitable interest in the property gives notice of the existence of the unrecorded executory contract through which the purchaser obtained his interest in the real property, mortgage registration fees must be collected based on the loan

currently being made to the purchaser and on the principal amount of the executory contract to which it refers.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Julene L. Miller
Deputy Attorney General

RTS:JLM:jm