THE DUFFORD WALDECK QUARTERLY

A NEWSLETTER FOR OUR CLIENTS

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STATE SUPREME COURT ADVISES WHO OWNS LAND UNDER RAILROADS

by Wm. S. DeFord

The Colorado Supreme Court has issued guidance on who owns the land under railroad rights-of-way. In 1901, the Great Western Railway Company built an 11.7-mile railroad line in Weld County, Colorado, between Windsor and Eaton, known as the Eaton Subdivision. In 2003, the railroad petitioned to abandon the Eaton Subdivision. Local municipalities formed a trail sponsor organization called the Great Western Trail Authority that issued a notice that it wanted to use the railroad right-of-way for a trail under the Rails-to-Trails Act. The Rails-to-Trails Act allows a railroad to discontinue use of a rail line without abandoning the right-of-way by agreeing with a trail sponsor for interim use of the right-of-way as a recreational trail. This practice of establishing an interim use of a railroad right-of-way to prevent abandonment is called "railbanking."

A group of owners of land abutting the Eaton Subdivision brought an action in federal court against the United States—*Asmussen v. United States*—alleging that they owned the land under the rail line to the centerline and when the government approved the railbanking, it was a taking of their property without compensation in violation of the Fifth Amendment of the U.S. Constitution. The federal court certified a question to the Colorado Supreme Court asking for clarification of Colorado law as to "whether a presumption applies that landowners abutting a railroad right-of-way own the underlying land to the centerline of the right-of-way."

The landowners' claim rests on the so-called "centerline presumption." This presumption is a common law rule of conveyance providing that "the conveyance of land abutting a highway or street is presumed to carry title to the center of that roadway to the extent that the grantor has any interest therein, unless a contrary intent appears on the face of the conveyance." *Asmussen v. U.S.*, ___ P.3d ___, 2013 CO 54 at ¶ 15 (2013). In *Asmussen*, the landowners produced evidence that they were the current owners of land abutting the rail line, but they did not produce proof of the entire chain of title establishing that the persons the landowners acquired the land from owned the land under the right-of-way.

The Court concluded "that the centerline presumption is a common law rule of conveyance that presumes that a grantor who conveyed land abutting a right-of-way intended to convey land to the center of the right-of-way to the extent that the grantor owned the property underlying the right-of-way, and absent a contrary intent on the face of the conveyance." Further, the Court held that "the centerline presumption applies to railroad rights-of-way." The centerline presumption "operates only if the adjacent landowner produces "evidence that his or her title derives from the owner of the land underlying the right-of-way." *Asmussen* at ¶ 27.

This means that a court will not automatically presume that someone owns land under a railroad, a highway, or street just because she owns the land next to the right-of-way. The landowner will first have to produce evidence that she obtained title to her land from someone who owned the land under the right-of-way. Once the landowner satisfies this threshold requirement showing that her title comes from someone who owned the land under the right-of-way, the court will presume that the previous owners intended to convey the land under the right-of-way to the centerline even if the deed only describes the parcel outside the right-of-way.

The Court notes that the purpose of the centerline presumption is to give effect to the intentions of the owner and previous owner in conveying the property. Accordingly, if the deed shows an intention that the land under the right-of-way not be conveyed, then a court will not apply the centerline

presumption to nullify the apparent intent of the parties to the transaction.

If you own land that abuts a railroad, highway, or street, the question of whether you own to the centerline of the right-of-way may be more complex than was previously thought. It is now clear that a thorough review of the land records will be necessary to know whether ownership to the centerline will be presumed.

GOVERNOR APPOINTS RICH KROHN TO REAL ESTATE COMMISSION

In April, DWMK partner Richard H. Krohn was appointed to the Colorado Real Estate Commission by Governor John Hickenlooper. Rich was appointed to a three year term and will serve until April 2016.

The Real Estate Commission is a five-member board appointed by the Governor. Three members must be experienced real estate brokers, while two are chosen to represent the public at large. Rich brings over thirty-five years of experience as a Colorado real estate attorney.

The Real Estate Commission meets bi-monthly to conduct rulemaking hearings, make policy decisions, consider licensing matters, review complaints, and take disciplinary actions. The Real Estate Commission is responsible for overseeing all real estate brokers in the state, as well as property managers, the Board of Mortgage Loan Originators, the Board of Real Estate Appraisers, and the Conservation Easement Oversight Commission. In addition, the Real Estate Board promulgates state-approved real estate forms, including the forms for listings and sales of residences, land, and commercial properties.

In 2014, the Real Estate Commission will establish a process to apply for conservation easement tax credit certifications. Starting in 2015, the Real Estate Board will also oversee the licensing of HOA managers and management companies.

The Colorado Real Estate Commission is part of the Colorado Division of Real Estate. Since 1925, the Division of Real Estate and its predecessors have worked to protect real estate consumers by licensing and enforcing laws for real estate brokers, appraisers and mortgage loan originators. Today, the Division investigates over 1,000 complaints a year against brokers, appraisers, and mortgage loan originators.

Previously, Rich has served as the Chair of the Real Estate Section of the Colorado Bar Association and has authored numerous publications about Colorado real estate law.

WILLIE DEFORD GIVES PRESENTATION TO MESA COUNTY BAR ASSOCIATION

DWMK partner William S. DeFord, with attorney Jason P. Bailey of Traylor, Tompkins & Black, gave a presentation about the Colorado Civil Union Act at the June meeting of the Mesa County Bar Association. Bailey's portion of the presentation focused on the basic provisions of the Act, such as the formation and dissolution of civil unions. DeFord's portion of the presentation addressed some of the broader legal ramifications of the act, particularly in the area of estates, insurance, trusts, civil rights, real property ownership, and then-pending Supreme Court cases.

In March of this year, the Governor signed into law Senate Bill 13-011, commonly known as the Colorado Civil Union Act. The Act recognizes that "only the union of one man and one woman" constitutes a marriage. However, the Act declares that its purpose "is to provide eligible couples the opportunity to obtain the benefits, protections, and responsibilities afforded by Colorado law to spouses consistent with the principles of equality under law and religious freedom embodied in both the United States constitution and the [Colorado] constitution."

This change in the law has broad ramifications and opportunities that may require adjustment to existing estate plans, advance directives, and insurance policies. If your heirs, devisees, or beneficiaries of trust or insurance policies include persons who may enter into a civil union, or if you may enter into one, careful planning will help assure your plans are carried out the way you want.

Drawing on his experience as a trial lawyer, DeFord stressed that any time there is a new legal regime, particularly one with little guidance from other jurisdictions, there is likely to be litigation if attorneys and their clients do not plan ahead carefully. The recent Supreme Court decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013), which struck down the definition of marriage ensconced in the federal Defense of Marriage Act, illustrates how rapidly the law is changing. If you or a family member are, or may be, impacted by these changes, it might be time to seek the advice of an attorney.