

## Insights

### New Change to the Indiana Code Requires Additional Signature by Witness on All Recorded Documents

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Senate Enrolled Act No. 340, which goes into effect July 1, 2020, will now require that any document to be recorded in Indiana have both a notarized signature of grantor **and** a notarized signature of a witness. Currently, Indiana Code §32-21-2-3 requires any document to be recorded must be either acknowledged by grantor **or** proved before a list of specified persons. The purpose of the acknowledgement is to validate that the instrument was the act of the person who executed it<sup>[1]</sup> and includes a written certificate of acknowledgement prepared by a public official, typically a notary public.<sup>[2]</sup> As for the other means of having a document recorded, Indiana's only guidance regarding proving a document for purposes of recording is in Indiana Code §32-21-2-6 which states that a deed may be proved according to the rules of common law before an authorized officer. Under Indiana common law one such way to accomplish this would be through a subscribing witness.<sup>[3]</sup>

Though the change in Indiana Code §32-21-2-3 from "or" to "and" is small, it requires that any recorded document contain both: (i) an acknowledgement by grantor; and (ii) that the document be proved before one of the listed individuals, including a notary public. In practice, this can be accomplished with a notarized signature of grantor, as is now common practice, and a notarized signature of a witness.

No official guidance has been provided yet by the Indiana Recorders Association, but it seems unlikely that recorders' offices will reject a deed, mortgage, or other instrument solely for the lack of a notarized *witness* signature. Further, Indiana Code §32-21-4-1(c) provides protection in situations where an instrument is recorded, but does not comply with all of the requirements of Indiana Code §32-21-2-3, it will be considered validly recorded and provide constructive notice to an bona fide purchaser. Yet, the protection provided by this statute should be interpreted cautiously, as it may still be possible for a bankruptcy trustee or other parties to attempt to invalidate a mortgage if the instrument does not substantially comply with the recording statutes in Indiana.<sup>[4]</sup>

For more information regarding Senate Enrolled Act No. 340 and its impact on documents recorded in Indiana after July 1, 2020, please contact your Krieg DeVault attorney, or a member of Krieg DeVault's Real Estate and Environmental Practice Group.

[1] Am. Jur. 2d Acknowledgements §1 (March 2020 Update)

[2] 1 Am. Jur. 2d Acknowledgements §1 (March 2020 Update)

[3] *McNeely v. Rucker*, 5 Blackf. 123, (Ind. 1839).

[4] *In re Hershman*, 417 B.R. 97 (N.D. Ind. 2009), through dicta the court stated "even if the recording of the mortgage does not meet the technical requirements of Ind. Code 32-21-2-3, so long as the mortgage is in fact recorded, it will be considered valid, and a bona fide purchaser (or bankruptcy trustee in his shoes) will be deemed to have constructive notice under §32-21-4-1." In this case the mortgagor's name in the certificate of acknowledgement of the mortgage was incorrect. The mortgagor later filed for Chapter 7 bankruptcy, and the

trustee filed a complaint seeking to avoid the mortgage on the grounds of the error in the acknowledgement.

Whether or not the absence of a notarized witness signature will be given the same protection under Indiana Code 32-21-4-1, as was given to a minor error in an acknowledgement (as was the case in *In re Hershman*), is unknown. Prior to *In re Hershman*, the form of the acknowledgement could vary so long it was substantially the same, but the completion of the acknowledgement had to be strictly complied with in order to provide constructive notice. *In re Baldin*, 135 B.R. 586, 599 (N.D. Ind. 1991).