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Jessica Palmer-Denig, Esq.
Administrative Law Judge
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
Saint Paul, MN 55101

Via email: Michelle.Severson@state.mn.us

Re: Proposed Amendments to Rules Governing Minnesota
Department of Veterans Affairs, Minnesota Veterans Homes,
Minnesota Rules Chapter 9050, Revisor's ID Number R-4384

Dear Judge Palmer-Denig:

We are retired lawyers with extensive experience and expertise in Minnesota real estate law, particularly the conveyancing of real property. We want to make some general observations concerning the nature of estates in real property in Minnesota.

Minnesota's law of real property, similar to the laws of other states (except Louisiana, which follows French civil law) is derived from English common law. The English common law recognized four estates in real property: the freehold fee simple, fee tail, and life estate, and the non-freehold term of years, a leasehold interest. The fee tail has been actually or effectively abolished in all US common-law jurisdictions, and is now recognized as a fee simple. All US common-law states as well as the District of Columbia have codified and continue to recognize the common law fee simple, life estate, and term of years.

Fee simple estates may be owned by one or more persons. Multiple persons who co-own a fee simple or other freehold estate hold title either as *joint tenants* or *tenants in common*. The Minnesota legislature has defined those interests in Minnesota Statutes Section 500.01, et seq.

The essential difference between a joint tenancy and a tenancy in common is the *right of survivorship* that inheres in a joint tenancy.

- A *joint tenancy* is a single real property interest owned by more than one person. Each joint tenant has the right to possess the entire joint tenancy property and to enjoy the full bundle of rights associated with that property. When a joint tenant dies his interest is extinguished; only the surviving joint tenants continue to own their joint tenancy property. Neither the de-

ceased joint tenant's successors in interest nor his creditors have an interest in the decedent's former joint tenancy property.

- In contrast, in a *tenancy in common* each owner owns a fractional interest in their concurrently owned real property. When a tenant in common dies, her fractional interest passes immediately to her devisees under her will or, if she died without a valid will, to her heirs as determined by Minnesota's intestacy statutes.

Minnesota has recognized the joint tenancy and the tenancy in common at least since the inception of statehood. To our knowledge, the only exception that the Legislature has made to Minnesota's law of concurrent interests was when the Legislature modified the definitions of joint tenancies and life estates to apply only to certain statutorily defined, limited circumstances relating to the State's recovery of certain medical assistance payments. Although the constitutionality of some of those provisions is questionable, it is noteworthy that the Minnesota Department of Human Services (DHS), the proponent of those changes, recognized that the changes could be effected only by LEGISLATIVE action and not by administrative fiat. DHS's understanding is consistent with the general rule of law that administrative agencies may do nothing more than implement existing law pursuant to authority delegated by a legislature. As even DHS has recognized, administrative agencies have no power to enact new law themselves. Any attempt to do so exceeds the legal authority of the administrative agency and is a legal nullity. This black-letter law has been recognized since the advent of administrative law and administrative agencies. Accordingly, the proposed regulations affecting veterans cannot stand.

Finally, we want to comment on the State's mistaken belief that an administrative agency may decree that a deed to abstract property is effective only upon recording of that deed with the county recorder. Minnesota law has long recognized that a deed or other conveyance of abstract property is legally effective to transfer title immediately upon the transferor's delivery of the conveyance to the transferee. Recording adds nothing to the validity of a recorded abstract document; recording serves only as notice of the conveyance or other recorded instrument. Only the Legislature can change this long-established bedrock of Minnesota real property law. (As an aside, it would be pure folly for the Legislature to do so.)

We hope that these thoughts help you. If you have questions, please contact us.

Sincerely,

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