



Who gets to keep the utility shed?

Release Date: 05/17/2018

[Will Martin](#), Martin & Gifford, PLLC

QUESTION: I'm representing the seller in a deal that is about to close. The parties used the Offer to Purchase and Contract (form 2-T) to put the property under contract. There's a small utility building in the back yard that the seller told me he'd bought to keep his lawnmower and some garden equipment in. It's sitting on a few concrete blocks. The seller said the reason he never put it on a permanent foundation was because he thought he would take it with him when he sold the property, and he assumes he will be able to do so. I told him that since it wasn't permanently affixed to the property and since he had intended to take it with him at the time he put it in the back yard, it was personal property that he was entitled to keep. Can you please confirm that I am correct?

ANSWER: You're not going to like our answer. You are correct that if the legal test for determining whether an item is a fixture or personal property was applied to the situation you describe, the utility building likely would be considered personal property. However, according to paragraph 2(a) of the contract, a utility building is deemed a fixture and conveys with the property unless it is excluded by identifying it in paragraph 2(d). We assume, since you didn't mention it, that the utility building was not identified in subparagraph (d). If that's correct, the building is a fixture because the parties agreed by contract that it was to be considered a fixture, and if it's a fixture it conveys to the buyer with the property.

There are any number of items on the laundry list in paragraph 2(a) that might be considered personal property, depending on the particular facts. However, since they are on the list, they are considered fixtures unless excluded. The common law "fixtures test" simply isn't applicable if the parties agree otherwise.

Reasonable minds may, and oftentimes do, differ about whether an item is a fixture or not, so there is benefit in taking a potential fixtures dispute off the table by agreeing in the contract that certain items will be considered fixtures unless otherwise indicated. However, it is very important for agents and their clients to understand how paragraph 2 works to avoid surprises. Your situation underscores the importance of a listing agent reviewing the laundry list of items with the seller, identifying any items on the list that may be present on the property, and, if there is an item present the seller wants to keep, describing it in paragraph 2(d).

NC REALTORS® provides articles on legal topics as a member service. They are general statements of applicable legal and ethical principles for member education only. They do not constitute legal advice. The services of a private attorney should be sought for legal advice.

© Copyright 2018. North Carolina Association of REALTORS®, Inc. This article is intended solely for the benefit of NC REALTORS® members, who may reproduce and distribute it to other NC REALTORS® members and their clients, provided it is reproduced in its entirety without any change to its format or content, including disclaimer and copyright notice, and provided that any such reproduction is not intended for monetary gain. Any unauthorized reproduction, use or distribution is prohibited.