

## CHAPTER 8 – DEEDS & TRANSFER OF TITLE

An \* in the left margin indicates a change in the statute, rule or text since the last publication of the manual.

Before the modern-day concept of land ownership, title to real estate was evidenced primarily by possession of the land and the power to defend the land against others. The earliest method of transferring title to real property was simply surrender of possession by the claimant to another.

The use of deeds to convey real property has a long and colorful history. Personal property has always transferred by giving possession of the thing itself. In feudal land transfers, the seller presented a clod of dirt from the land to the buyer in the presence of witnesses to symbolize delivery of title. Today, the delivery of the deed constitutes the actual transfer of title to the land.

Title to real property transfers from one person to another by one of four general means:

- (1) descent;
- (2) will;
- (3) involuntary alienation; or
- (4) voluntary alienation.

Title transfers by descent when a person dies without leaving a will (intestate). All states have statutes of descent and distribution providing for the orderly disposition of real property for those who die intestate. Such statutes typically distribute property to the nearest relatives, on the presumption that this would have been the desire of the deceased. According to the Colorado Probate Code, a portion of which is printed below, distribution of the largest share of the property of the intestate, and never less than half of the estate, descends to the surviving spouse.

### **15-11-101. Intestate estate.**

- (1) Any part of a decedent's estate not effectively disposed of by will or otherwise passes by intestate succession to the decedent's heirs as prescribed in this code, except as modified by the decedent's will.
- (2) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his or her intestate share, (effective July 1,1995)

### **15-11-102. Share of spouse.**

The various possible circumstances describing the decedent, his or her surviving spouse, and their surviving descendants, if any, are set forth in this section to be utilized in determining the intestate share of the decedent's surviving spouse. If more than one circumstance is applicable, the circumstance that produces the largest share for the surviving spouse shall be applied.

- (1) If:

- (a) No descendant or parent of the decedent survives the decedent, then the surviving spouse receives the entire intestate estate; or
  - (b) All of the decedent's surviving descendants are also descendants of the surviving spouse and there are no other descendants of the surviving spouse who survive the decedent, then the surviving spouse receives the entire intestate estate;
- (2) If no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent, then the surviving spouse receives the first two hundred thousand dollars, plus three-fourths of any balance of the intestate estate;
  - (3) If all of the decedent's surviving descendants are also descendants of the surviving spouse, and the surviving spouse has one or more surviving descendants who are not descendants of the decedent, then the surviving spouse receives the first one hundred fifty thousand dollars, plus one-half of any balance of the intestate estate;
  - (4) If one or more of the decedent's surviving descendants are not descendants of the decedent's surviving spouse, and all of such surviving descendants who are children of the decedent are adults, then the surviving spouse receives the first one hundred thousand dollars, plus one-half of any balance of the intestate estate;
  - (5) If one or more of the decedent's surviving descendants are not descendants of the decedent's surviving spouse, and if one or more of such descendants who are children of the decedent are minors, then the surviving spouse receives one-half of the intestate estate.

(Applies to decedents dying on or after July 1, 1995)

If there is neither surviving spouse nor children, then the law provides for the nearest surviving relatives to inherit the estate. (15-11-103 C.R.S.)

Title to property by a decedent more often transfers by will. The laws of each state give a person a limited right to dispose of property after death. A person who dies leaving a last will and testament, is said to have died testate. In no state may a decedent completely exclude a spouse from distribution of his or her property. Under Colorado Probate Code, a surviving spouse is entitled to a share of the estate even if there is a will to the contrary. (15-11-201 C.R.S.)

Involuntary alienation (alienation as used here means "transfer") is a transfer without the owner's consent. Examples of such involuntary transfers are tax sales, sales to foreclose a mortgage or to enforce mechanics' or other liens. Involuntary alienation also occurs if title is lost through adverse possession, a condition in which an owner is not making use of the property and an adverse claimant possesses the real estate openly and notoriously, hostile to and to the exclusion of the owner for a period of time as required by law (18 years in Colorado).

Voluntary alienation, by gift, loan, trade or sale is the normal mode of real estate transfer, whereby either all or some of the owner's rights are voluntarily transferred to another. Examples of such transfers are: a buy/sell contract consummated by delivery of a deed, transfer of title by a deed of trust or mortgage as security for the payment of a note, or a lease.

The right of alienation is one of the "bundle of rights" of real estate ownership, allowing one to transfer ownership of real property to another. Living persons generally convey title by the execution and delivery of a deed. A **deed** is a legal instrument in writing, duly executed and

delivered, whereby a grantor (owner) conveys to a grantee some right, title or interest in or to the real estate.

### **Types Of Deeds**

There are four major classifications of deeds:

- (1) General warranty deed,
- (2) Special warranty deed,
- (3) Bargain and sale deed,
- (4) Quitclaim deed.

The types of deeds differ solely in the degree of protection that the grantor promises or warrants to the grantee. No type of deed transfers any greater or lesser interest than another. For example, if a grantor conveys title in fee simple by a general warranty deed, the same fee simple ownership is conveyed as if he or she had used a quitclaim deed. However, the general warranty deed grantor promises to defend against any loss incurred due to any title defect, whereas transfer by quitclaim deed contains no such warrant.

#### **1. General Warranty Deed.**

A deed in which the grantor warrants or guarantees title against defects that existed before the grantor acquired title or that arose during the grantor's ownership. It does not warrant against encumbrances or defects arising from the grantee's own acts. The usual covenants or warranties contained in a general warranty deed are:

- a. Covenant of seizin.** Guarantees the grantor's ownership and that he or she has the right to convey it. The fact that the property is mortgaged or is subject to some restriction does not breach this covenant.
- b. Covenant against encumbrances.** Guarantees that there are no encumbrances or claims against the property except those specifically excluded in the deed.
- c. Covenant of quiet enjoyment.** Guarantees that the grantee will not be evicted or disturbed in possession of the property. Threats or claims by a third party do not breach this covenant. The grantee would have to actually be dispossessed before being entitled to seek recovery under this covenant against the grantor.
- d. Covenant of further assurance.** Guarantees that the grantor will procure and deliver any other instruments that are subsequently necessary to make the title good.
- e. Covenant of warrant forever.** Guarantees that the grantee shall have title and possession to the property. Sometimes considered part of "quiet enjoyment".

The first two covenants relate to the past, and generally do not generally "run with the land" – meaning that only the current grantee may sue the grantor for a breach. The last three covenants protect against future defect and are said to run with the land - allowing any subsequent grantee to seek remedy for breach against any previous grantor. According to Colorado statute, "Covenants of seizin, peaceable possession, freedom from encumbrances, and warranty contained in any conveyance of real estate, or of any interest therein, shall run with the premises, and inure to the benefit of all subsequent purchasers and encumbrancers." (38-30-121 C.R.S.)

## 2. Special Warranty Deed.

The grantor of a special warranty deed warrants the title only against defects arising after the grantor acquired the property and not against defects arising before that time.

## 3. Bargain and Sale Deed.

Technically, any deed that recites a consideration and purports to convey the real estate is a bargain and sale deed. Thus, many quitclaim and warranty deeds are also deeds of bargain and sale. Bargain and sale deeds often contain a covenant against the grantor's acts, whereby the grantor warrants only that the grantor has done nothing to harm the title. This covenant would not run with the land. Examples of bargain and sale deeds with a covenant against the grantor's acts are an executor's deed, an administrator's deed, and a guardian's deed.

## 4. Quitclaim Deed.

The grantor of a quitclaim deed warrants absolutely nothing. A quitclaim deed conveys the grantor's present interest in the land, if any. A quitclaim deed is frequently used to clear up a technical defect in the chain of title or to release lien claims against the property. Examples of such deeds are correction deeds, and deeds of release.

### Usual Elements Of Deeds

In general, the usual elements of a deed are:

1. Written instrument
2. Parties - grantor and grantee
3. Recital of consideration
4. Words of conveyance
5. Description of the property
6. Signature
7. Delivery and acceptance
8. Exceptions and restrictions
9. Warranties and covenants
10. Date
11. Acknowledgment
12. Recording

The first seven bold elements are absolutely essential for a valid deed. The other five are recommended, but will not invalidate a deed if omitted:

1. **Written Instrument.** A deed must be in writing to be effective. The Colorado statute of fraud and perjuries requires: "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance **in writing**, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing." (Title 38-10-106 C.R.S.) Note the two exceptions to the requirement of a written instrument are: a.) A lease for a term not exceeding one year, and b) An interest or estate created by operation of law.

The courts may set aside a deed altered in any manner after delivery to the grantee. This means that all blanks on preprinted forms must be filled in according to the requirements of law and the intention of the parties.

2. **Parties: Grantor and Grantee** A valid deed must clearly name or designate the grantor who is conveying interest in the property. The grantor's name must be identical to the name of the grantee shown in the conveyance by which the grantor received title. A minor discrepancy in name may not invalidate the deed, but may lead to legal challenge. A natural person grantor should be of legal age and sound mind, otherwise the grantor might later have the deed set aside and recover the property. A deed is void if it fails to designate with reasonable certainty the grantee to whom title passes.
3. **Recital of Consideration** A deed is valid without tangible consideration, but should contain at least a recital of consideration (e.g. for \$1.00, or for love and affection). Lack of consideration does not render a gift conveyance void, but may preclude a donee (receiver of the gift) from enforcing warranty deed covenants against the donor (grantor). A gift deed may also be set aside on grounds of fraud. For example, the grantor's creditors may set aside a deed gifting property to defraud creditors. If the deed recites consideration, the burden of proving lack of consideration is on the one who attacks the deed.

Colorado law (39-13-102, C.R.S.) requires a documentary fee on real property conveyances. Each county clerk and recorder must collect one penny per one hundred dollars (Sale price x .0001) of consideration whenever a deed is recorded. The documentary fee aids county tax assessors in determining property values. Colorado statute 39-14-102 requires the grantor and/or grantee to provide a "declaration" to the property tax administrator along with all conveyance documents subject to a documentary when presented for recording. (See sample form TD-1000 in chapter 25.) It is a criminal offense to misstate actual consideration to the clerk and recorder. The assessor may impose a penalty of \$25.00 or 0.25% of the sale price, whichever is greater, for failure of the grantee to submit the declaration. The deed itself is valid whether consideration shown on the face of the instrument is true and actual or nominal.

4. **Words of Conveyance** A deed must contain words that manifest intent to transfer title, or it is ineffective. No specific words are required but "sell and convey", "grant, bargain, sell and convey" or "convey and warrant" are commonly used.
5. **Description of the Property** A deed is not valid unless it legally describes the real estate conveyed. Any description that clearly identifies the property is sufficient, but using the same legal description used in previous deeds to the same parcel avoids discrepancies in the records and possible future title litigation. Courts may be liberal in holding rather ambiguous descriptions to be valid, but a court action is a high price to pay to correct technical errors that could have been avoided when drafting the legal description. A deed normally contains words following the description indicating that all the appurtenances go with the land. All improvements go with the land as appurtenances. Thus, in a deed for a residential property, it is necessary to describe only the land upon which the house is situated.

The law also provides that the street address or identifying numbers on buildings appear on the document of title as well as the legal description, although failure to include the street address or identifying numbers will not make the deed invalid. (38-35-122(1)(a) C.R.S.)

6. **Signature** A deed not signed by the grantor is invalid. If there is more than one grantor, (e.g. joint tenants), each must sign the deed. A few states, primarily in the east, require a seal for a deed to be valid. Colorado and most states have abolished the requirement for a seal. Colorado does not require that the signature of the grantor be witnessed.
7. **Delivery and Acceptance** To be effective, a deed must be both delivered by the grantor and accepted by the grantee. The intent of the grantor determines delivery. Presenting a deed to the grantee for examination does not constitute delivery. The grantor must deliver with intent to pass title to the grantee. Under Colorado law, an acknowledged and recorded deed presumes effective delivery (38-35-101 C.R.S.).

Effective delivery must occur while the grantor is alive. If a grantor executes a deed, retains it and directs it to be delivered to the grantee at the grantor's death, the deed does not pass title. A grantor may deliver a deed to a third party to be held and delivered later to the grantee, but to be effective the grantor must surrender all right to control or recover the deed.

8. **Exceptions and Restrictions** A grantor is assumed to convey property free and clear of all encumbrances. Therefore, the deed usually provides that the grantor conveys the property "free and clear of all encumbrances except..." - followed by the exception, such as; "subject to a deed of trust (complete description)"; or "subject to an easement (complete description)"; or "subject to all encumbrances and restrictions of record".

A grantor may restrict the grantee's right to use the real estate conveyed, as long as such restrictions are reasonable and not contrary to public policy. The use of such deed restrictions "restrictive covenants" is an old practice deriving from the bundle of property rights. An owner has the right of free alienation; that is, the right to dispose of his or her interest in any manner whatsoever. Once deed restrictions are established they run with the land, limiting its use by all future grantees. Covenants are standard features in subdivisions and are intended to benefit all the landowners.

Typical restrictions deal with the minimum size of the house, type of building or roofing material, or exclusion of commercial establishments. Well-formulated deed restrictions have a stabilizing effect on property values. Homeowners are protected against forbidden uses, and may rest assured that a nuisance business will not be a neighbor or that a neighbor's house will meet certain minimum standards. Deed restrictions must be enforced through court action brought by any party for whose benefit the restrictions were imposed.

9. **Warranties and Covenants** Warranties are not an essential requirement of a valid deed. A grantor may convey interest by a quitclaim deed, giving no warranty of any kind, or by a general warranty deed, wherein the grantor makes numerous warranties to the grantee. Colorado statute specifies a short-form warranty deed whereby every deed that is similar to the statutory form, and which include the words "and warrant the title to the property", automatically implies the usual general warranty deed covenants. (38-30-113 C.R.S.)
10. **Date** A date is not essential for a valid deed, although it is a universal custom to date all deeds. A dated deed might obviously prevent future question or controversy concerning the time of delivery of the deed.
11. **Acknowledgment** An acknowledgment is a declaration made by a person (grantor) to a notary public, or other authorized official, that the grantor executed the instrument and did so freely and voluntarily. The official fills out a certificate of acknowledgment

customarily printed on the deed. Colorado law provides: "No officer...shall take or certify such acknowledgments unless the person making the same is personally known to such officer to be the identical person he represents himself to be, ... It shall not be necessary to state such fact in his certificate or acknowledgment attached to any instrument affecting title to real property." (38-35-101 C.R.S.)

In most states, including Colorado, a deed is valid and may be recorded without being notarized. Only two states require acknowledgement as a condition of a valid deed. Many other states, however, require acknowledgement as a condition of recording.

It is always sound practice to have a deed acknowledged before recording because of the presumption of proper delivery and acceptance noted in Section 7 above. An acknowledged deed may be evidence should a title controversy arise. An unacknowledged deed may only be used as evidence of the transaction if it has been recorded ten years or more and proven in court that the deed was properly executed. (38-35-106 C.R.S.)

The facts in a deed recorded for 20 years or more, may be read in evidence and received as prima facie evidence of these facts. (38- 35-107)

- 12. Recording** A deed is valid even if not recorded. The wording of the Colorado recording statute is permissive ("may be") rather than mandatory ("must be").

Recording offers a two-fold benefit. It protects an innocent purchaser or encumbrancer from acting in ignorance of an unrecorded instrument, and it provides "**constructive notice**", a legally conclusive presumption that all persons have knowledge of recorded instruments. It is in the grantee's best interest to record the deed immediately.

Lack of acknowledgment does not invalidate constructive notice. A recorded deed that is not acknowledged still serves notice to subsequent purchasers. (38-35-106 C.R.S.)

In addition to constructive notice, a purchaser or encumbrancer may have **actual notice** of another's right or claim. For instance, a purchaser is presumed to have actual notice of all rights and claims of parties in possession of the property, so that even if the right or claim is unrecorded, the purchaser cannot defeat it.

Colorado deeds dated after January 1, 1977 must include the legal address of the grantee, including a road or street address. County clerks and recorders may reject a deed that does not comply. (30-35-109 (2) C.R.S.)

Real estate may also be conveyed by deed to a person (individual, partnership, or corporation) as trustee for the benefit of a third party. The trustee then holds legal title and the third party holds the equitable title and receives the benefits. This is called a **trusteeship**.