Principles of Real Estate
Chapter 5-Transfer of Title

The chapter will identify the difference between voluntary and involuntary transfers of title, and differentiate between the types of deeds and their characteristics.

Overview

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Objectives

At the end of this chapter, the student will be able to:

- Define voluntary and involuntary alienation, describing the difference and listing examples of each
- Explain the purpose of a deed, the contents of a deed, and list the covenants
- Name each type of deed and list their characteristics and uses
Alienation

Alienation is the act of transferring title, ownership, an estate, or an interest in real estate from one party to another.

Depending on the circumstances, alienation may be:

- Voluntary
- Involuntary

Voluntary Alienation

A transfer of title made with the owner's consent is called voluntary alienation.

Transfers of this nature are initiated by either a public grant, dedication, or a property owner executing a will, making a gift, or selling his property.

Voluntary Alienation—Land Patent

A land patent is a government document which conveys title to public land to a private individual.

- Through legislative enactment, public grants are used to transfer legal title to land from the government to private parties and to certain groups of people.
- As a requisite to ownership, the land must have been effectively occupied and improved for a specified time.
- Historically, public grants were used extensively in order to encourage the settlement and development of land by homestead.

Voluntary Alienation—Dedication

A dedication takes place when a citizen donates land as a gift to the public.

An example would be donation of land for a library or public park.
Voluntary Alienation-Wills

A last will and testament is a written instrument executed by an individual to arrange for the conveyance of his property at the time of his death. A person who makes a will is referred to as a testator.

- Real property received by will is known as a devise and the recipient the devisee. With reference to real property transferred by will, the testator is also the devisor.
- Personal property received by will is referred to as a legacy or bequest, and the recipient the legatee. With reference to personal property transferred by will, the testator is the legator.
- An executor (male) or executrix (female) is a person named in a will to act as a personal representative for the testator in carrying out his instructions. If none is named, the courts will appoint an administrator.
- A person who dies leaving a valid will is said to have died testate.

For a will to be valid, it must comply with all legal requirements of the state where the real property is located. All states require that the testator possess legal capacity. This essential element is missing, if, at the time of execution, the testator was either a minor or insane. Also, a will is voidable if it lacks the genuine assent of the testator.

An example of a voidable will is a will executed under duress or undue influence. If a court declares a will void, title to the decedent's property passes to his heirs by intestate succession.

Wills are classified according to the manner in which they are prepared:

- Formal Will
- Holographic Will
- Noncupative Will
Formal Will
A formal will is a typed or preprinted instrument usually prepared by an attorney.

The testator must declare in the presence of two or more witnesses that the instrument is his last will and testament and that he is voluntarily signing it. At the request of the testator and in his presence and in the presence of each other, the witnesses must sign the will. This procedure is called attestation. It is a necessary part of executing a will to help establish its validity.

A formal will is recognized in all states and is preferred by the courts.

Holographic Will
Holographic wills are entirely handwritten, dated, and signed by the testator.

Attestation is not required by the states that recognize this type of will. Unless a testator who writes his own will is fully aware of the legal requirement in his state, the instrument may be declared void and his property conveyed to his heirs by intestate succession.

Noncupative Will
Noncupative wills are made orally by a testator in expectation of death.

- The oral declaration must be properly witnessed and reduced to writing within a specified time allowed by law. Wills of this nature are effective only for disposing of personal property. The decedent’s real property would pass according to the laws of descent and distribution.

A will has absolutely no effect as long as the testator is alive. Until his death, he has the right to revoke the entire will or to modify any provisions in it.

Modifications can be made by either executing a new will or by the testator stating the desired changes in a separate instrument executed with the same formalities as the will itself (i.e. dated, signed, and witnessed). An instrument used for this purpose is called a codicil. Crossing out specific language or inserting new language in an existing will, even if such changes are initialed and witnessed, is not legally binding.
Voluntary Alienation—Transfer by Deed

Title to real estate may be conveyed as a gift during the owner's lifetime unless it is done for the purpose of defrauding creditors. In this event, a creditor may petition a court to nullify the conveyance.

- **Title to real estate is usually transferred by deed as result of a sale.** The type of deed is influenced by state law, local custom, and agreement of the parties, as provided in the contract of sale.
- **A deed cannot be used to place restrictions on subsequent owners who wish to sell the property** or otherwise convey title to it.

Involuntary Alienation

Title to property can be transferred by **involuntary alienation;** that is, **without the owner's consent.** Such transfers are usually carried about by operations of law ranging from government **condemnation** of land for public use to the sale of property **to satisfy delinquent tax or mortgage liens.** When a person dies intestate and leaves no heirs, the title to his or her real estate passes to the state by operation of law based on the principle of **escheat.**

Land may also be transferred without an owner's consent in order to satisfy debts contracted by the owner. In such cases the debt is **foreclosed,** the property is sold, and the proceeds of the sale are applied to pay off the debt. Debts that could be foreclosed include mortgage loans, real estate taxes, mechanics' liens, or general judgments against the property owner.

Involuntary Alienation: Alluvion and Reliction

The extent of one's ownership of land can be altered by **accession,** called **title by accession.** This can result from natural or man-made causes. With regard to natural causes, the owner of land fronting on a lake, river or ocean may acquire additional land due to the gradual accumulation of rock, sand and soil. This process is called **accretion** and the results are referred to as **alluvion** and **reliction.**

- **Alluvion is the increase of land that results when waterborne soil is gradually deposited to produce firm dry ground.** Alluvion refers to the soil itself, commonly known as silt.
Reliction (or dereliction) results when a lake, sea, or river permanently recedes, exposing dry land. When land is rapidly washed away by the action of water, it is known as avulsion. Man-made accession occurs when man attaches personal property to land.

For example, when lumber, nails and cement are used to build a house; they alter the extent of one's land ownership.

Involuntary Alienation—Adverse Possession

Each state has passed an Adverse Possession Act, which allows the unauthorized occupation of another person's land to be the basis for acquiring title to it. In essence, the law is an application of the statute of limitations because it prevents the legal owner from claiming title to his land if he remains silent and does nothing to oust the adverse possessor during the number of years required by law. The statutory period of time varies from 3 to 30 years; 10 years is most common.

Before a court will award legal title to an adverse claimant, he must be able to prove that his possession was actual, hostile, open, notorious, exclusive, and continuous for the statutory period. Without these, adverse possession has not taken place.

Actual, Hostile and Notorious Possession

- Actual possession is such that the ordinary person has no doubt as to the nature of the occupancy. Evidence may be established by making improvements, cultivating the land, and paying property taxes. Paying taxes alone would be insufficient to prove actual possession.
- Hostile possession means that possession must be without the owner's consent. A tenant, therefore, could never claim title by adverse possession no matter what improvements he made or how long he might be in possession. For an adverse claimant's possession to be open, it must be obvious and visible to the rightful owner.
- Notorious possession means the public must be able to observe the control being exercised over the land. Also, the use of the property must be exclusive; it could not be shared with anyone else. Finally, his possession must have been continuous and uninterrupted for the statutory period. Any abandonment or just occasional occupancy would defeat the effort to acquire title.
Involuntary Alienation-Tacking

Possession by different adverse claimants may be added together to determine if continuous adverse possession has existed for the necessary period of time. This process is called tacking.

The right of each adverse possessor must be transferred or handed down to the next adverse possessor without any break or interruption in order to tack on the period of possession. This requirement cannot be met by one adverse possessor simply moving out and another moving in. In fact, several states limit tacking to heirs, devisees, spouses, or blood relatives.

Involuntary Alienation-Color of Title/Action to Quiet Title

The required period of continuous possession is shortened in some states if it has been under "color of title" and the adverse claimant has been paying the property taxes. Color of title is anything in writing concerning the title which suggests some plausible appearance of ownership no matter how imperfect the instrument is.

For instance, the color of title exists when an adverse possessor was named as a grantee in a forged deed or as a devisee in an invalid will.

Once an adverse claimant has met all of the necessary requirements of the Adverse Possession Act, he must file an action to quiet title in order to acquire legal title. Upon establishing his adverse claim in court, a judgment awarding title to the claimant will be issued and recorded.

Involuntary Alienation-Partition

If joint tenants or tenants in common cannot mutually agree on a plan to sever their undivided interests in the land, any one of the owners, with or without the consent of the others, may file a partition suit in court to seek an equitable distribution of the property and to dissolve the tenancy.

The court will first attempt to divide the property according to each owner's fractional interest in the tenancy. When a physical division is not practical, the court will issue an order for a partition sale with proceeds paid to the co-owners based on their percentage share of the tenancy.
Involuntary Alienation—Laws of Descent

When a property owner dies without leaving a valid last will and testament, he/she is said to have died intestate. In the absence of a will, proportionate shares of the decedent’s property are transferred to his/her heirs according to the laws of descent and distribution in the state where the property is located. These statutes are also known as the laws of succession.

In essence, descent laws act as a "will" for the deceased; with blood relatives being favored, share and priority of inheritance are based upon the closeness of the relationship to the decedent.

Deeds

A deed is a written legal document by which ownership of real estate is conveyed from one party to another. The essential elements of a valid deed are:

- First, a deed must identify the grantor, the person giving up ownership, and the grantee, the person who is acquiring that ownership. The actual act of conveying ownership is known as a grant. To be legally enforceable, the grantor must be of legal age (18 years in most states) and of sound mind.
- Second, the deed must state that consideration was given by the grantee to the grantor. It is common to see the phrase "For $10 and other good and valuable consideration," or the phrase "For valuable consideration." These meet the legal requirement that consideration be shown, but retain privacy regarding the exact amount paid. If the conveyance is a gift, the phrase "for natural love and affection" (good consideration) may be used, in a gift deed, provided the gift is not for the purpose of defrauding the grantor’s creditors. A personal service is not recognized as adequate to satisfy the requirement for consideration in a deed.

Consideration that has value only to the person receiving it is said to be good consideration (ex. love and affection in a gift deed). This is provided that the gift is not being made to defraud rightful creditors.

- Third, the deed must contain words of conveyance, which is found in the granting clause. With these words the grantor:
Clearly states that he is making a grant of real property to the grantee

Identifies the quantity of the estate being granted. Usually the estate is fee simple, but it may also be a lesser estate (such as a life estate) or an easement.

- **A land description that cannot possibly be misunderstood is the fourth requirement.** Acceptable legal descriptions are metes and bounds, rectangular survey, recorded plat, vertical land description, or by any reference to another recorded document that uses one of the methods.

- **Fifth, the grantor executes the deed by signing it.** Some states require that the grantor's signature be witnessed and that the witnesses sign the deed. If the grantor is unable to write his name, he may make a mark, usually an X, in the presence of witnesses. They, in turn, print his name next to the X and sign as witnesses. **If the grantor is a corporation, the corporation's seal is affixed to the deed and two of the corporation's officers sign it.** The person signing a document before witnesses, a notary public, or another official is said to be making acknowledgment. **This is necessary for recording the document.**

**Deeds-Ownership**

For a deed to convey ownership, there must also be delivery and acceptance. Although a deed may be completed and signed, it does not transfer title to the grantee until the grantor voluntarily delivers it to the grantee and the grantee willingly accepts it -- at that moment title passes. As a practical matter, **the grantee is presumed to have accepted the deed if the grantee:**

- Retains the deed
- Records the deed
- Encumbers the title
- Performs any other act of ownership

This includes the grantee's appointment of someone else to accept and/or record the deed on the grantee's behalf. **Once delivery and acceptance have occurred, the deed is evidence that the title transfer has taken place.**
Deeds-Escrows

When using an escrowee, title passes when the deed is delivered into escrow. Under the doctrine of relation-back, the death of the grantor does not terminate the escrow or affect the escrowee’s authority to deliver a valid deed. The delivery of the deed to the grantee "relates back" to the date it was originally deposited with the escrow agent.

Beginning with the words "To have and to hold," the habendum clause describes the quantity and duration of the estate to be conveyed. While it should be consistent with the provisions in the granting clause, the habendum serves to qualify the estate by specifying any existing encumbrances or restrictions affecting the titles, such as a mortgage loan, subdivision restrictions, or an easement. The granting clause is the controlling provision in the event of a conflict between it and the habendum clause.

If the grantor does not intend to convey title to all of his ownership rights but wishes to retain certain rights of use in the property for himself, the granting clause will contain a reservation provision.

For example, Johnson conveys 25 acres of land to Williams "reserving to Johnson a life estate therein." Another typical example occurs when a landowner sells road frontage but reserves an easement for access to another parcel of land lying some distance up the road.

An exception in a deed excludes from the conveyance some portion of the property granted. Title to the excluded portion remains in the grantor by virtue of the original deed.

For instance, Smith conveys 20 acres of land to Jones "excepting there from a strip fifteen feet wide running along the southerly boundary line."

Deeds-Covenant of Title

A covenant of title is a promise by the grantor that certain conditions of the title exist, and if it is found to be untrue, the grantor, his heirs, or his assigns will compensate the grantee, and in some cases, subsequent grantees, for actual damages suffered. In some deeds, the covenants of title are clearly stated. Other deeds imply certain covenants by use of such
phrases as "warrant generally" or "convey and warrant."

Typical covenants of title include:

- Covenant of Seisin
- Covenant Against Encumbrances
- Covenant of Quiet Enjoyment
- Covenant of Further Assurances
- Covenant of Warranty Forever

**Covenant of Seisin**

*Covenant of Seisin*: The grantor promises that at the time of the conveyance he owns the property and has the right to convey title to it. This covenant is broken, for example, if the grantor purports to convey a fee simple estate but possesses only a life estate. Upon breach, the grantor may be held liable for damages up to the full amount of the purchase price.

*This covenant is breached when a person conveying property warrants that he or she owns the property in fee simple, but does not.*

**Covenant Against Encumbrances**

*Covenant Against Encumbrances*: This covenant assures the grantee that title to the property is free from any and all encumbrances not specifically excepted in the deed. Losses resulting from non-excepted encumbrances can be recovered by the grantee. However, the covenant does not cover open and visible physical encumbrances, such as a power line easement.

**Covenant of Quiet Enjoyment**

*Covenant of Quiet Enjoyment*: The grantor promises that the grantee shall be free of interference from the acts or claims of others having a superior title to the property. The grantor is liable for damages if the grantee's title is found inferior to another claimant.

**Covenant of Further Assurances**

*Covenant of Further Assurances*: The grantor promises to perform any acts necessary to produce whatever documents required to perfect title in the grantee. It may be necessary for the grantor to execute a correction deed when there has been some error in the deed of record or to obtain a quitclaim deed from a spouse who failed to relinquish marital rights.
Covenant of Warranty Forever

This covenant warrants that the grantor will compensate the grantee for any loss suffered while defending his title against those asserting a rightful claim to the property.

Types of Deeds

When properly executed, delivered and accepted, all deeds serve the same basic function: to convey title. Differences are to be found only in the extent of title protection the grantor provides the grantee.

The types of deeds most often used include:

- Warranty Deed
- Grant Deed
- Bargain and Sale Deed
- Quitclaim Deed
- Deed of Confirmation/Correction Deed
- Statutory Deed
- Sheriff’s Deed
- Deed in Partition
- Guardian’s Deed
- Executor’s Deed
- Administrator’s Deed
- Deed in Trust

Types of Deeds—Warranty Deed

A warranty deed guarantees good title to the premises, not the physical condition of the property. Title protection is assured by either the expressed or implied covenants of seizin, encumbrances, quiet enjoyment, warranty forever, and further assurances.

With a warranty deed the grantee is further protected by the doctrine of after acquired title, an equitable remedy developed by the courts to give proper effect to certain conveyance. This principle of law applies to situations where a grantor attempted to convey title but did not actually have
good title at the time. **Should the grantor later acquire the title he thought he had, it will automatically pass by operation of law to the grantee.**

Depending on the extent of title protection, warranty deeds are either general or special.

- *A general warranty deed offers the most comprehensive title protection of any deed.* The five covenants of warranty apply not only to title defects occurring during the grantor's period of ownership but also to those occurring before. In other words, the grantor pledges that he will warrant and defend the title "against the world."

- *A special warranty deed only protects the grantee's title against defects coming into existence while the grantor owned the property.* For this reason it is often called a **limited warranty deed.** The limit of the grantor's warranty is expressed in the **covenant against grantor's acts.** This covenant, in effect, **states that the grantor protects the title only against claims arising "by, from, through, or under him."** Special warranty deeds are frequently used to convey title to property acquired at a foreclosure sale or by court-appointed grantors, such as administrators, guardians, or trustees, or by corporations.

**Types of Deeds—Grant Deeds**

In some states, **grant deeds are the customary instrument of conveyance rather than a warranty deed.** Typically, two covenants of title are implied by statute in this type of deed. By use of the word "grant" in the deed's words of conveyance, the grantor promises:

- **That at the time of conveyance, he owns the property and has the right to convey title to it** (covenant of seizin), and
- **That title to the property is free from any and all encumbrances not specifically excepted** in the deed (covenant against encumbrances).

**In some states the covenant of quiet enjoyment is also implied.** A grant deed is similar to a special warranty deed in that both limit the grantor's
responsibility of title protection to defects occurring during the time he owned the property. The doctrine of after acquired title also applies to grant deeds.

**Types of Deeds—Bargain and Sale Deed**
A true bargain and sale deed conveys title, but contains no warranties about the condition of title, either expressed or implied. The grantee is left with little recourse against the grantor, should title defects later arise. However, the grantor implies that he owns or has an interest in the property described in the deed. Because of this implication, the doctrine of after acquired title usually applies to bargain and sale deeds.

**Types of Deeds—Quitclaim Deed**
Like any other deed, a quitclaim deed conveys whatever interest or title the grantor may have in the property, if any; and, like a bargain and sale deed, it contains no covenants or warranties of title, either expressed or implied. However, in a quitclaim deed the grantor does not purport to have title or possess any interest in the property to be conveyed. Thus, the doctrine of after acquired title does not apply.

- The operative words in a quitclaim deed are usually "remise, release, and quit claim." Because it only passes whatever interest the grantor may have and warrants nothing, a quitclaim deed is often used to remove a cloud on the title.

  For example, in searching the chain of title to a property it is discovered that a wife did not join her husband in signing the warranty deed, failing to relinquish her dower rights. By having her sign a quitclaim deed, the cloud on the title is removed.

- It should be remembered that a quitclaim deed is not inferior to other types of deeds with respect to what it actually conveys. When properly executed and delivered, it conveys whatever title the grantor has.

**Types of Deeds—Deed of Confirmation**
A deed of confirmation or correction deed is one executed and recorded for the specific purpose of correcting an error in another deed.

For example, a name may have been misspelled or a mistake found in the legal description. Quitclaim deeds can be used to make such corrections.
Types of Deeds—Statutory Deed

Court authorized conveyances are called statutory deeds and are usually in the form of a special warranty or bargain and sale deeds.

The court official or appointed representative assumes no responsibility for the condition of the title conveyed.

Types of Deeds—Sheriff's Deed

A sheriff's deed, also known as a deed in foreclosure, is used to convey title resulting from a sale to satisfy a mortgage lien, judgment lien, a mechanic's lien or tax lien (the term tax deed may be used in this case).

No warranties are given through a sheriff's deed.

Types of Deeds—Deed in Partition

A deed in partition is issued by the court when property is sold at a partition sale for the purpose of dividing a joint tenancy or tenancy in common ownership.

Types of Deeds—Guardian's Deed

A guardian's deed is one executed on behalf of a person who lacks legal capacity to convey title for himself.

Types of Deeds—Executor's Deed

An executor's deed conveys title to property of a decedent who died leaving a valid will.

Types of Deeds—Administrator's Deed

For a decedent who died intestate, or without naming an executor in his will, an administrator's deed is executed to convey title to the heirs.

Types of Deeds—Deed in Trust

A deed in trust is a form of deed by which real estate is conveyed to a trustee, usually to establish a land trust. Under the terms of such an instrument, the trustee has the full powers to sell, mortgage, and subdivide. The trustee's powers are controlled by the beneficiary under the provisions of the agreement. A deed of trust, or trust deed, is a legal document in which title is transferred to a neutral third-party trustee as security for an obligation owed by the trustor to the beneficiary (lender).
**In Review**

- Alienation is the act of transferring title, ownership, an estate, or an interest in real estate from one party to another.
- Alienation can be voluntary or involuntary.
- Voluntary alienation can come in the form of patents, dedications, wills or transfers by deed.
- Involuntary alienation can occur through adverse possession, tacking or possession by different adverse claimants, laws of descent, or partition.
- A deed is a written legal document by which ownership of real estate is conveyed from one party to another.
- The most oft-used deeds include: warranty deed, grant deed, bargain and sale deed, quitclaim deed, deed of confirmation/correction deed, statutory deed, sheriff's deed, deed in partition, guardian's deed, executor's deed, administrator's deed, and deed in trust.