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CAPITAL

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Which Type of Deed Should I Use?

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People or businesses that buy and sell property must choose a type of deed to document their transaction and many non-attorneys are not familiar enough with the different deed options to make a fully informed decision. While most attorneys are familiar with the different types of deeds available, those that do not typically practice real estate law might not be aware of the nuanced differences between the forms, or to know what is commercially reasonable in any given situation. It is important to choose the right deed when documenting a transaction and this article aims to educate you about which deed is most appropriate in a variety of situations.

Deeds are used to convey title to real property. A deed will typically "grant, sell and convey" title to the property with a warranty clause. The warranty gives the grantee the right to recover against the grantor if there is any failure of title. A failure of title can include anything from a total failure when the grantor did not own any interest in the property, to a limited failure such as a utility easement, mineral severance or access right. Most deeds will then include exceptions to that warranty for known title encumbrances, typically either listed on an exhibit or defined as "all matters of record," so that the grantee cannot make a claim against the grantor for the excluded items. The types of deeds discussed below are differentiated based on the breadth of their warranty clauses.

General Warranty Deed

A general warranty deed is the broadest form of deed that contains an express guaranty of title and gives the grantee the right to recover against the grantor for any failure of, or encumbrance on, title (subject to the listed exceptions). The warranty language in the deed will likely be similar to the following:

"Grantor does hereby bind Grantor, Grantor's successors and assigns, to warrant and forever defend all and singular the Property unto the said Grantee, Grantee's successors and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof."

A general warranty deed would thus allow a grantee (both the one named in the deed and, potentially, parties that later acquire title to the property) to recover against the grantor even when the title issue arose prior to the grantor's ownership of the property. For example, a grantee would have a claim against a grantor under a general warranty deed if the deed by which the grantor originally took title to the property had an incorrect legal description and thus did not actually convey title to the grantor.

Even with a general warranty deed, the grantor's liability is limited to the amount paid (or the value of other consideration given) for the property. Also, title insurance is often purchased by the grantor for the benefit of the grantee and acts as an additional source of recovery for the grantee, though it's important to note that the title company can turn around and, using subrogation, seek reimbursement from the grantor for amounts paid out under the policy.

In Practice: General warranty deeds are common in residential transactions but are uncommon in commercial transactions.

Special Warranty Deed

A special warranty deed is more limited than a general warranty deed in that it only allows the grantee to recover against the grantor for a failure of title (subject to the listed exceptions) that arises by, through or under the grantor. The warranty language in the deed would likely be similar to the following:

"Grantor does hereby bind Grantor and Grantor's heirs, successors and assigns to warrant and forever defend all and singular the Property unto the Grantee, and Grantee's successors and assigns against every person whomsoever lawfully claiming or to claim the same, or any part thereof, *by, through, or under Grantor, but not otherwise, however*." (emphasis added)

A special warranty deed would thus only allow a grantee to recover against a grantor for a title issue that arose during the time the grantor owned the property and in some way through the grantor's actions, but exposes the grantee to claims by anyone prior in the grantor's chain of title, or to someone outside the chain of title. For example, a grantee would have a claim against a grantor if the grantor previously sold a mineral interest in the property but does not reference and excep to that conveyance in a later special warranty deed, or if the grantor failed to pay a contractor that improved the property and a mechanic's lien was later filed for the amount owed to it. The grantee under a special warranty deed would not have a claim against the grantor in the example given above for general warranty deeds. (Defect in deed conveying title to the grantor).

In Practice: Special warranty deeds are typically used in commercial transactions. In residential transactions a seller can often successfully negotiate to have a special warranty deed substituted in place of a general warranty deed.

Quitclaim Deed

A quitclaim deed (while not technically a deed) transfers to the grantee any claim to title that the grantor has in the property (if any), but does not warrant or profess that the title is valid. A quitclaim deed will not include any warranty language and the lack of warranty language means that, if there is a failure of title – either total or partial, whether caused by grantor or by its predecessor in title – the grantee will have no right to make any claim against grantor.

A quitclaim deed is most appropriate when the grantor is not sure what, if anything, it owns. For example, mineral ownership can become very fragmented especially when passed through a series of estates. Someone who is trying to purchase all the mineral interests in a piece of land might use quitclaim deeds to acquire mineral interests from people that were potential, but not confirmed, heirs of a prior owner. Or neighbors might use a quitclaim deed to settle a fence-line dispute.

Quitclaim deeds should not be used when a person or entity does have clear title to a piece of land but does not want to give the grantee a warranty of title. When that is the case, a Deed Without Warranty should be used. (See below for additional information). Quitclaim deeds alert a later title examiner to a possible title issue, and put later purchasers on inquiry notice regarding matters outside of the property records. Thus the transaction might receive more scrutiny to determine why a quitclaim deed was used, and therefore, quitclaim deeds should only be used when another type of deed is not a valid option.

Additionally, quitclaim deeds should only be used when necessary because the grantee cannot claim protection as a bona fide purchaser for value ("BFP"). A BFP is a person who takes title in good faith, for valuable consideration, without actual or constructive notice of any outstanding claim against title. In lay terms, BFP is a person who takes title without knowing about an outstanding claim (such as knowledge that the seller has already contracted to sell the property to another party), without an adverse claim being filed in the property records (such as a competing deed, or notice of a pending lawsuit), and pays real value for the property (such as payment of money or exchange for another piece of property). A BFP takes title to the property free and clear of most unknown claims. A person claiming title under a quitclaim deed is charged with notice of all defects in the title, so such a person cannot be a BFP. Additionally, a person who holds title in which a quitclaim deed appears earlier in the chain is not protected against any outstanding title claims that existed at the time the quitclaim deed was executed. Thus, a quitclaim deed should be avoided when possible.

In Practice: Quitclaim deeds are most appropriate when it is not clear whether or not the grantor owns any interest in a piece of property.

Deed Without Warranty

A deed without warranty is more limited than a special warranty deed in that it does not allow the grantee to recover against the grantor if there is a failure of title – either total or partial, whether caused by grantor or by its predecessor in title. The warranty language in the deed would likely be similar to the following:

"Notwithstanding the use of the terms "grant", "convey" and similar terms herein, this Deed is made WITHOUT WARRANTY OF TITLE or otherwise, of any kind or character, whether arising by statute or by common law, but does assign to Grantee the benefit of all warranties of title inuring to the benefit of Grantor with regard to the interests herein conveyed."

This type of deed is best used when the grantor does in fact know it owns an interest in the property but does not want to have any potential liability to the grantee. The deed without warranty maintains the warranty chain and does not alert a title examiner of a potential issue in the same way a quitclaim deed would.

In Practice: Deeds without warranty are most often used when transferring title from an individual to his trust, from one entity to a related entity, when making distributions from an estate or when there is little to no consideration for the conveyance.

Understanding the different types of deeds and when each one should be used will help the attorney, business person or homeowner correctly document any transaction. ■