

Modern Real Estate Practice in Illinois, 6th Edition
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Chapter 12: Transfer of Title

Learning Objectives

After reading this chapter, students should be able to:

- Identify the basic requirements for a valid deed.
- Describe the seven fundamental types of deeds.
- Explain how property may be transferred through involuntary alienation.
- Distinguish transfers of title by will from transfers through involuntary alienation.
- Define the following key terms: acknowledgment; adverse possession; bargain and sale deed; deed; deed in trust; devise; devisee; general warranty deed; grantee; granting clause; grantor; habendum clause; heir; intestate; involuntary alienation; probate; quitclaim deed; reconveyance deed; special warranty deed; testate; testator; title; transfer tax; trustee's deed; voluntary alienation; and will.

Why Learn About Transfer Of Title?

The material in this chapter is one of those things that a good real estate agent will know about, but will rarely deal with directly. This aspect of a real estate transaction is generally handled by attorneys and title companies. Nonetheless, as with other "legal" aspects of the transaction, an agent who is aware of the fundamentals of deeds and other title issues will know the kinds of questions to ask, and the kinds of warning signs to look for, in order to alert the title professionals to potential title issues.

Suggested Items to Bring To Class

1. Copies of various types of deeds, both blank and completed.
2. Newspaper and periodical articles and photographs of properties affected by accretion, erosion, and avulsion as they relate to the transfer of title.

Lecture Outline

I. Title

Title to real estate means the right to or ownership of the land; it represents the owner's bundle of rights. Title also serves as evidence of that ownership. Title is not an actual printed document. The document that shows who holds title to real

property is the deed. The deed must be recorded to give public notice of the holder's ownership.

II. Voluntary Alienation

Voluntary alienation is the voluntary transfer of title by the owner. A deed is the written instrument by which an owner of real estate intentionally conveys the right, title or interest in the parcel of real estate to someone else.

- The owner who transfers the title is referred to as the *grantor*.
- The person who acquires the title is called the *grantee*.
- A deed is executed (signed) only by the grantor.

A. Requirements for a Valid Deed

IN ILLINOIS . . . *the following are the minimum requirements for a valid deed:*

- *Grantor, who has the legal capacity to execute the deed*
- *Grantee named with reasonable certainty, sufficient to be identifiable*
- *Recital of consideration*
- *Granting clause (words of conveyance, together with any words of limitation)*
- *Accurate legal description of the property conveyed*
- *Any relevant exceptions or reservations*
- *Signature of the grantor*
- *Delivery of the deed and acceptance by the grantee to pass title*

Some states require a habendum clause to define ownership taken by the grantee.

1. Grantor

- A grantor must be of lawful age (at least 18). A deed executed by a minor is voidable.
- A grantor also must be of sound mind.
- The grantor's name must be spelled correctly and consistently throughout the deed.

2. Grantee

The grantee must be specifically named so that the person to whom the property is being conveyed can be readily identified from the deed.

IN ILLINOIS . . . *the grantee's present address is required.*

3. Consideration

A valid deed must contain a clause acknowledging that the grantor has received consideration.

4. Granting clause (words of conveyance)

A deed must contain a granting clause that states the grantor's intention to convey the property.

5. Legal description of real estate

To be valid, a deed must contain an accurate legal description of the real estate conveyed.

6. Signature of grantor

To be valid, a deed must be signed by all grantors named in the deed.

IN ILLINOIS . . . *seals are not required for individual grantors' signatures. Corporations need not affix their official corporate seals to validate a deed when they are grantors.*

- 7. Acknowledgment:** A formal declaration made before a notary public or other officer that the person who signs a written document does so voluntarily and that his or her signature is genuine.

IN ILLINOIS . . . *acknowledgment is not essential to the validity of the deed. However, unless the deed is acknowledged, it may not be introduced as evidence in a court of law without some proof of its execution. Therefore, it is customary for most documents conveying title to be acknowledged. The recorder of deeds does not require acknowledgment, but most title insurance companies do for deeds covered by their policies.*

8. Delivery and acceptance

A title is not considered transferred until the deed is actually delivered to and accepted by the grantee. The effective date of the transfer of title from the grantor to the grantee is the date of delivery of the deed.

B. Execution of Corporate Deeds

A corporation can convey real estate only by authority granted in its bylaws or upon a proper resolution passed by its board of directors. Deeds to real estate can be signed only by an authorized officer.

C. Types of Deeds

- 1. General warranty deed** provides the greatest protection of any deed. The grantor is legally bound by certain covenants or warranties (promises):

- Covenant of seisin
- Covenant against encumbrances
- Covenant of quiet enjoyment
- Covenant of further assurance
- Covenant of warranty forever

IN ILLINOIS . . . *state law provides that a deed using the words "convey and warrant" implies and includes all covenants of general warranty, which are as binding on the grantor, his or her heirs and personal representatives as if written at length in the deed. These covenants are not limited to matters that occurred during the time the grantor owned the property; they extend back to its origins. The grantor defends the title against himself or herself and against all others as predecessors in title. It is sufficient for a general warranty deed to recite only nominal consideration.*

2. **Special warranty deed** contains two basic warranties: (1) that the grantor received title; and (2) that the property was not encumbered during the time the grantor held title.
3. **Bargain and sale deed**, in some states, contains no express warranties against encumbrances. It implies that the grantor holds title and possession.

IN ILLINOIS . . . *the words in the granting clause are "grant, bargain and sell." A grant, bargain, and sale deed conveys a fee simple title with the following covenants: (1) the grantor holds a fee simple estate, (2) the title is free from encumbrances made by the grantor except those listed in the deed and (3) the grantor warrants quiet enjoyment. Therefore, an Illinois bargain and sale deed is similar to a warranty deed but less complete in its warranties.*

4. **Quitclaim deed** provides the grantee with the least protection of any deed. It carries no covenants or warranties and generally conveys only whatever interest the grantor may have when the deed is delivered.

IN ILLINOIS . . . *a quitclaim deed uses the words "convey and quit claim" and conveys in fee all the grantor's existing legal and equitable rights, held at the time of delivery.*

5. **Deed in trust** is the means by which a trustor conveys real estate to a trustee for the benefit of a beneficiary.
6. **Trustee's deed** is a deed executed by a trustee when the trustee conveys real estate held in the trust to the beneficiary.
7. **Deed executed pursuant to court order** is used to convey title to property that is transferred by court order or by will.

D. Transfer Tax Stamps

IN ILLINOIS . . . *the Illinois Real Estate Transfer Tax Act imposes a tax on conveying title to real estate in the amount of \$0.50 per \$500, and in all Illinois counties there is an additional transfer tax of \$0.25 per \$500. Total tax to state and county combined is \$0.75 per \$500 or fraction thereof. Fifty percent of the tax collected is deposited into the Illinois Affordable Housing Trust Fund; 35 percent is deposited into the Open Space Land Acquisition and Development Fund; and the remaining 15 percent goes to the Natural Areas Acquisition Fund. The seller generally pays the state and county transfer tax.*

The transfer tax must be paid before the recording of the deed (or before transferring the beneficial interest in a land trust) by purchase of transfer tax stamps from the county recorder. Stamps may be affixed to the deed either before or after recording.

The amount of consideration used for determining transfer taxes must be shown on the form entitled "Real Estate Transfer Declaration". The form must be signed by the buyer and seller or their agents, and it provides for the inclusion of the property description, manner of conveyance and financing used. A completed real estate transfer declaration must accompany every deed presented to the recorder for recording. A willful falsification or omission of any of the required data constitutes a Class B misdemeanor punishable by up to six months in jail. The information contained on the form is not confidential and is available for inspection by the public.

Exempted from the transfer tax are deeds such as those conveying real estate from or between any governmental bodies; those held by charitable, religious or educational institutions; those securing debts or releasing property as security for a debt; partitions; tax deeds; deeds pursuant to mergers of corporations; deeds from subsidiary to parent corporations for cancellation of stock; and deeds subject to federal documentary stamp tax. When the actual consideration for conveyance is less than \$100, the transfer is considered a gift and is exempt from tax. An Exemption Statement is usually typed on an exempted deed and signed before the deed is recorded.

III. Involuntary Alienation

A. Transfer by Adverse Possession

An individual who makes a claim to certain property, takes possession of it and, most important, uses it, may take title away from an owner who fails to use or inspect the property for a period of years.

IN ILLINOIS . . . *the period of uninterrupted possession required to claim title by adverse possession is 20 years. However, if the claimant has color of title and pays the real estate taxes on the property, while satisfying*

the other statutory requirements, the possessory period may be shortened to seven years.

IV. Transfer of a Deceased Person's Property

- A person who dies *testate* has prepared a will indicating how his or her property will be disposed of.
- The real estate and personal property of a person who dies *intestate* (without a will) pass to the decedent's heirs according to the state's statute of descent and distribution.

IN ILLINOIS . . . *when the owner of real estate dies, how title to the property was held, rather than the laws of descent and distribution or the presence of a will, may dictate who the new owners will be.*

- *If the property was owned by a husband and wife in tenancy by the entirety or was held in joint tenancy, the surviving spouse (or other owner) will automatically be the new owner. If the property was held as a life estate, it automatically reverts to the new owner. In any case, no probate is required.*
- *If the property was not held in joint tenancy, tenancy by the entirety or a life estate, and the owner left a valid will (died testate), the devisees named will own the real estate.*
- *If the owner died without a will (intestate), relatives will inherit the property according to the Illinois Law of Descent. In effect the state makes a will for such decedents.*
- *If the owner died without a will (intestate) and left no heirs, the property will escheat to the Illinois county it lies in.*

A. Transfer of Title by Will

A will is a testamentary instrument: it takes effect only after the testator's death. The parties named in a will have no rights or interests as long as the party who made the will lives; they acquire interest or title only after the owner's death.

- The gift of real property by will is a *devise*.
- A person who receives property by will is a *devisee*.
- *Probate* is a legal procedure for verifying a will and accounting for assets.

1. Legal requirements for making a will

IN ILLINOIS . . . *any person 18 or older, who is of sound mind and memory, may make a will. A will must be in writing and signed and declared by the maker (the testator) in the presence of two or more witnesses to be his or her last will and testament. Witnesses cannot be beneficiaries under the will because their gifts may be voided by the probate court.*

A modification of, an amendment of or an addition to a previously executed will may be set forth in a separate document called a codicil.

- *Holographic will: written in the testator's own handwriting, unwitnessed*
- *Nuncupative will: given orally by a testator*

(Illinois courts do not recognize nuncupative or holographic wills.)

On the death of a testator, his or her will must be filed and a petition for probate initiated in the circuit court of the county in which the decedent resided. For six months after the executor has been appointed and the decedent's property has been inventoried, claims may be presented to the executor for debts owed by the deceased. Payment of approved claims and estate taxes is made, and the remaining assets are distributed. Upon completion of this probate process, the executor's final account is filed with the court and the executor is discharged. The real estate is considered free from debts, claims or taxes of the decedent.

A surviving spouse who is disinherited by the decedent has a statutory right to renounce the will and claim a share of the estate, as follows:

- *If the deceased left no child or descendant(s) of a child, one-half of the personal estate and one-half of each parcel of real estate goes to the spouse.*
- *If the deceased left spouse and descendants, one-third of the personal estate and one-third of each parcel of real estate goes to the spouse.*
- *The will remains operative with respect to the balance of the estate.*

2. Transfer of Title by Descent

IN ILLINOIS . . . *the Illinois Law of Descent and Distribution (in the Illinois Probate Act) provides for the distribution of real estate located in Illinois owned by a deceased resident or nonresident who did not leave a valid will.*

The estate of an intestate decedent must be probated to determine which statutory heirs will inherit, as well as to inventory the assets of and claims against the estate. Any heir or other interested person may petition the circuit court of the county in which the decedent last resided to probate the estate. Proof of heirship must be presented to the court. Probate generally proceeds as if the decedent had left a valid will.

B. Probate Proceedings

Probate is a formal judicial process that:

- proves or confirms the validity of a will,
- determines the precise assets of the deceased person, and
- identifies the persons to whom the assets are to pass.

The purpose of probate is to see that the assets are distributed correctly.

Discussion Questions

1. What is the reason for all of the procedural requirements for transferring property by deed and will?
2. Discuss the policy considerations that might underlie the distributions under the statute of descent: why are the distributions made in the way they are?