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Which Way Do I Go? Title Issues Affecting Deeds of Gift, Enhanced Life Estate Deeds, Executors Deeds, Administrator's Deeds and Transfer on Death Deeds

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WHICH WAY DO I GO? TITLE ISSUES AFFECTING DEEDS OF GIFT, ENHANCED LIFE ESTATE DEEDS AND TRANSFER ON DEATH DEEDS.

Estate planning for clients involves a variety of techniques. Included in the planning must be a conscious effort to protect and pass the home and land of the clients to their family and/or other beneficiaries. There are a number of ways to accomplish this, but which is the best? How can an attorney provide the best service to his or her client with regard to the real estate? Does the attorney have to probate the estate? Should the attorney have the client gift the property? Should he prepare an enhanced life estate deed? What about the new transfer on death deed? Which is best and which way do we go?

I. DEFINITIONS

First, the important stuff: the definitions:

What is a Grantor?

A grantor is the person who owns an interest in property. In a deed, this is the person conveying the interest to another person.

What is a Grantee?

A grantee is the person who is receiving the interest in property conveyed by the Grantor.

What is a deed?

A deed is a document that conveys title to real property. When people are selling property, the typical form of deed used is a statutory warranty deed. The basic form of a deed is set out in Texas Property Code § 5.022. This type of deed conveys a fee simple estate in property with a covenant of general warranty.

What is a warranty of Title?

When the Grantor conveys property using a deed that contains a general warranty of title, that Grantor is stating that the property is not subject to any encumbrances except those specifically set forth in the deed. If other encumbrances arise, then the Grantor can be held liable for any damages that encumbrance causes.

When a Grantor conveys property using a deed that contains a special warranty of title, the Grantor is warranting the title of the property against any encumbrance put on the property during the time that the Grantor owned the property which is not specifically set forth in the deed. In the situations where a special warranty deed is used, the Grantee cannot hold the Grantor responsible for any encumbrance that was placed on the property before the Grantor owned the property. In a general warranty deed, the Grantor can be held responsible for any encumbrance on the property, regardless of when such encumbrance was placed on the property.

For example, if Daffy Duck conveys her property to Donald Duck by general warranty deed and fails to except from the warranty of title a pipeline that is located across the property, Daffy Duck could be liable to Donald Duck for any damages caused by such pipeline. However, if Daffy Duck had conveyed to Donald Duck by a special warranty deed then Daffy would not be liable for damages caused by a pipeline placed on the property by a prior owner.

The difference between the general warranty deed and the special warranty deed is found in the granting clause. A general warranty deed will have a granting clause that reads as follows:

> "Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty."

This language is set forth in the State Bar of Texas Real Estate Manual.

The special warranty deed will have the following granting clause:

> "Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully

> claiming or to claim the same or any part thereof *when the claim is by, through, or under Grantor but not otherwise,* except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty."

In addition to the above, a person can convey property without a warranty of title. With this type of deed, the Grantor is conveying what they own but not warranting that they own anything.

In the case of a deed without warranty, the following language would be included:

> "Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever, without express or implied warranty. All warranties that might arise by common law as well as the warranties in section 5.023 of the Texas Property Code (or its successor) are excluded.
>
> This conveyance is intended to include any property interests obtained by after-acquired title."

All of the above deeds will convey after-acquired title. The doctrine of after-acquired title states that if a person conveys property without property title, any title in such property acquired after the conveyance by the Grantor vests in the Grantee.

Finally, in certain situations, the parties will use a quitclaim deed. The important thing to remember about a quitclaim deed is that it does not convey title and it does not convey after acquired title. A quitclaim deed is a deed used when you want to make sure someone does not make a claim on title. For example, we will sometimes use a quitclaim deed in an heirship proceeding when legally we know that the property passes to the surviving spouse but a title examiner may need extra assurance that the litigious stepchildren are not going to make a claim. In some situations, title companies do not like quitclaim deeds and will not always insure title if a quitclaim is in the chain of title.

What is a deed of Gift?

A deed of gift is a document that conveys the title to real property for the consideration of only the love and affection that a Grantor feels for a Grantee. It typically recites the terms "love and affection" in the consideration clause. A Deed of Gift can have no warranty, a special warranty or a general warranty.

What is an Executor's/Administrator's Deed?

An executor's deed is a deed given by the executor of an estate in order to convey real property. An administrator's deed is a deed given by an administrator of an estate to convey real property. An independent executor's authorization to execute a deed can either be given by a last will and testament or by the Court depending on the authority granted in a will or pled by the applicant. An administrator and a dependent executor must obtain court authority before conveying property. An example of an Executor's Deed is attached as Exhibit C. An example of an Administrator's Deed is attached as Exhibit D.

What is a Transfer on Death Deed?

In 2015 the Texas Legislature passed Senate Bill 462 which added a new Chapter 114 to the Texas Estates Code. This chapter created the statutory transfer on death deed. The transfer on death deed is a statutory form under which an individual may transfer that individual's interest in real property to one or more beneficiaries at the transferor's death. According to Chapter 114, the deed must comply with the following:

A. The transfer on death deed must be executed and acknowledged on or after September 1, 2015 by a transferor who dies on or after September 1, 2015. [1]
B. The transfer on death deed cannot be executed using a power of attorney.[2]
C. The transfer on death deed must contain the essential elements and formalities of a recordable deed[3] – be in writing, be signed by the Grantor, be notarized, have a property description, contain the address of the Grantee.
D. State that the transfer is to occur on the transferor's death.[4]
E. Be recorded before the transferor's death in the deed records in the county clerk's office of the county where the real property is located.[5]
F. A transfer on death deed is effective without consideration or notice or delivery to or

[1] Texas Estates Code Section 114.003
[2] Texas Estates Code Section 114.054(b)
[3] Texas Estates Code Section 114.055
[4] Texas Estates Code Section 114.055(2)
[5] Texas Estates Code Section 114.055(3)

Title search: Which Way Do I Go? Title Issues Affecting Deeds of Gift, Enhanced Life Estate Deeds, Executors Deeds, Administrator's Deeds and Transfer on Death Deeds

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