



Weekly Information Sheet 12

Real Property – Transfer of Title

Conveyances

Generally

There are four major factors to a transfer of real property. They are:

- **Contract**
- **Mortgage**
- **Deed**
- **Recording**

Step One – The Contract

Statute of Frauds:

Statute of Frauds - To comply with the Statute of Frauds, all agreements for the sale of real property must be in writing and signed by the Party to be charged.

Specific Performance:

Specific Performance - To allow for specific performance (where a sale can be enforced by either party, both the buyer and the seller sign a contract to purchase Real Estate).

Attorney Approval Clause:

Attorney Approval Clause - Because most contracts for the purchase of real property are provided to both parties by non lawyer realtors, such contracts contain a standard “attorney approval clause”, which permits the attorney for the buyer to examine the contract, within a specified period of time (usually 5 days) and cancel the contract if disapproved by such lawyer.

Marketable Title:

Right to Pass Free and Clear Title - In the contract, there is an implied warranty to transfer Marketable Title, which is the ability to pass ownership that is free from doubt and free from encumbrances (such as mortgages, liens, easements, covenants, encroachments).

Property Usually Sold “As Is”:

Duty to Disclose - Most contracts provide for the sale of the premises “as is”, but a duty to disclose known defects has been upheld by the courts and is now standard form in nearly all real estate contracts. Active concealment by a seller is, however, deemed fraud. Accordingly, Sellers frequently now also add specific disclaimers of liability, particularly on expensive items like leaky foundations or roofs.

Realtors:

Most buyers find real estate through a Real Estate Agent (also known as a Realtor)

Serve as Agent for the Seller - A realtor is usually hired by, and is an “Agent” for, the seller. A buyer can retain a real estate agent, but such is rare.

Listing Agreement - A Real Estate Agent is hired by means of a written listing agreement. Pursuant to such agreement, the seller is obligated to pay the realtor’s commission, which is usually between 6 to 7 percent of the sale value of the real property.

Real Estate Agents are licensed by the State of New York.

Realtors Work Off Commission - Although a realtor usually works for, and must therefore represent, the seller, because they make their income from a commission on the sale of the property, such realtor has a vested interest in making the buyer happy about the purchase.

Multiple Listings - A realtor may can represent many sellers, and they can offer one buyer several choices, especially through the multiple listing service.

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Step Two – The Mortgage

Mortgage Defined:

The Mortgage is the Legal Instrument by which Real Estate can be Financed.

A mortgage is both a loan contract and a lien.

Elements of a Mortgage:

- **Must be in writing** – Pursuant to the Statute of Frauds
- **Must Describe the Land and the Parties**
- **A Mortgage is a Contract** - Like all contracts, Mortgages can have different terms (duration, interest rates and payment structures) but most clauses contained in the mortgage contract are written pursuant to federal and/or state regulation, causing most Mortgages to be highly uniform. This uniformity enables the mortgage to be sold on the secondary mortgage market (Fannie Mae and Freddie Mac – Federal National Mortgage Assn and Federal Home Mortgage Corp).
- **Mortgage Interest is Tax Deductible** - Under Federal and State tax law, Home Mortgage interest is tax deductible.
- **Most Mortgage payments are Amortized** - Each payment over the term (during each month of 30 or 15 years) is an equal amount.
- **Mortgage Interest Rates are front loaded** - Early payments are much more heavily weighted toward interest than principal, i.e first month 99% interest 1% principal.
- **15 year Mortgages Cheaper** – A 15 year mortgage is far less costly than a 30 year mortgage, due to the fact the buyer pays interest for a shorter period of time, and because of the reduced time the financier has their money at risk.
- **Not Subject to the Homestead Exemption** - Mortgages are an exception to the Homestead Exemption, and can be foreclosed on against tenants by the entirety, as such is a joint creditor execution, where both owners would be required to sign the mortgage.

Types of Mortgages:

- **First and Second Mortgages** – A property may contain more than one mortgage. The first mortgage is the first in time (and usually the first in right). The second or secondary mortgage (often a home equity loan) is financing on an amount between the amount of the first mortgage and the amount of the value of the home (i.e. the equity).
- **Amortized Mortgage** – A mortgage for a specified term (usually 15 or 30 years) with the monthly payments amortized over the period of the loan in equal amounts.
- **Balloon Payment Mortgage** - A mortgage for a specified term of years, where after a period of equal loan payments, a single, large balloon payment is due upon the conclusion of the loan.
- **Assumed Mortgage** – A mortgage taken by a previous owner of the property that is assumed (i.e. taken over) by a subsequent owner.
- **Purchase Money Mortgage** – A mortgage loan made by the owner of the property to the purchaser of the property for a portion of the purchase price.

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Step Three – The Deed

Deed Defined:

The Deed is the Legal Instrument by which the title to the Real Property is passed. (We no longer do livery of seisin).

Elements of a Deed:

- **Must be in writing** – Pursuant to the Statute of Frauds
- **Must Describe the Land and the Parties** – Words of Purchase and Limitation
- **Must provide “words of intent”** – How the property is transferred and held – i.e. fee simple absolute or any terms of limitation.
- **Consideration is Unnecessary** - Since the Deed merely represents the title and not the contract or agreement under which terms it is passed.
- **Seal and Attestation are also Unnecessary** - But can be required for recording.
- **A Signature is Required from the Grantor** - A grantee’s signature is not required even if it contains covenants, since their acceptance of the deed is deemed acceptance of the covenants or limitations contained in the deed.

Delivery of a Deed:

- **A deed must be delivered and accepted to be effective**
- **Title to property passes upon effective delivery** – Consequently, returning it back to the grantor has no effect, since title has already passed.
- **Physical or manual (through the mail or courier) delivery is required.**
- **Delivery is presumed if:**
 - *Handed to grantee,*
 - *Delivery is acknowledged before a notary, or*
 - *The deed is recorded.*

Types of Deeds:

There are three types of deeds characteristically used to convey property interests. To remember them think of Harry Potter (*Gryffindor is Stupendous at Quidditch*)

1. **The General Warranty Deed** – Contains all important title covenants
2. **The Special Warranty Deed (often statutory)** – Contains limited assurances
3. **The Quit Claim Deed** – Contains no covenants or assurances

The major difference between these deeds is the scope of assurances (covenants for title) they give to the grantee and the grantee’s successors regarding the title being conveyed.

Real Property – Title Issues

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Step Four – Recording

Recording Defined:

Recording is the legal process whereby the world is given notice of:

- A conveyance of real property, and
- Under what limitations or encumbrances (if any) the new ownership will exist. (We no longer beat up the child).

Elements of Recording:

- **At Common Law** - In nearly all cases, priority was given to the grantee first in time. First in Time was considered first in right.
- **Example** - If A conveyed Blackacre to B and then made an identical conveyance to C, B would prevail over C on the theory that after the first conveyance A had no interest left.
- **Recording Acts** - Statutes known as "recording acts" require a grantee to make some sort of recordation so as to give "notice to the world" that title to certain property has already been conveyed, and thus to put subsequent purchasers on guard. These statutes are in effect in some form in every state.
- **What Recording Acts Do** - Basically, these statutes set up a system by which any instrument affecting title to property can be recorded in the county where the property is.
- **Purpose of Recording Acts** – To provide discoverable notice. Although recordation is not essential to the validity of a deed, its notice protects the grantee from future fraud.

Requirements for Recordation:

- **What Can Be Recorded** - Any Instrument Affecting an Interest in Land. As a result, practically every kind of *deed, mortgage, contract to convey*, or other instrument creating or affecting an interest in land can be recorded.
- **Grantor Must Acknowledge Deed** - Most recording statutes provide that, in order to be recorded, a deed must be acknowledged by the grantor before a notary public. This requirement offers some protection against forgery. Problems may arise if the recorder records a deed that has not been acknowledged or has been improperly acknowledged.
- **Payment of All Necessary Fees and Charges** – The recording party must pay all required fees, taxes and charges associated with recording, as collected by the County Clerk.

Mechanics of Recording:

- **Filing Copy** - The grantee or her agent normally presents the deed to the county recorder (the County Clerk in New York), who photographs it, and files the copy in the official records. These records are kept chronologically.

Indexing - The county recorder also indexes the deed to permit title searches. The usual indexes are the grantor-grantee and grantee-grantor indexes, which are arranged by reference. These indexes are often now available on the internet.