

Arizona Property Law Basics for the Southern Arizona Estate Planning Council

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1. Deeds and Other Transfers

Formerly, the word "deed" was synonymous with the word "act," and, as the law recognized a peculiar sanctity in the use of a seal, an act under seal became something finished, sacred and worthy of great respect. Hence a man's act under seal became his deed, and likewise any instrument under seal became his deed, irrespective of the nature of the transaction involved. But the term "deed" is used now in a more limited sense and as meaning a written instrument, duly acknowledged by a competent party, conveying the title to [an interest in] land.

Hood v. Fletcher, 31 Ariz. 456, 459, 254 P. 223, 224 (1927)

1. Deeds and Other Transfers

- Deed = transfer of ownership of real property
 - Vehicle is by “Title” commonly “Pink Slip”
 - Stock or LLC interest is by “Assignment”
 - Money or personal property is by “Transfer” or by “Bill of Sale”
 - Intellectual Property is by “Transfer” of patents, trademarks, design

1. Deeds and Other Transfers

- Arizona Revised Statutes – Title 33 Property
 - Ch. 2, -201 = Estates
 - Ch. 3, -301 = Landlord Tenant
 - Ch. 10, -1301 = Residential Landlord Tenant Act
 - Ch. 11, -1401 = Mobile Home Landlord Tenant Act
 - Ch. 4, -401 = Conveyances and Deeds
 - Ch. 5, -601 = Gifts
 - Ch. 6, -701 = Mortgages (6.1, -801 Deeds of Trust)
 - Ch. 7, -901 = Liens
 - Ch. 20, -2201 = Timeshares

1. Deeds and Other Transfers

- 33-401. Formal requirements of conveyance; writing; subscription; delivery; acknowledgment; defects
 - A. No estate ...shall be conveyed unless the conveyance is by an instrument in writing, subscribed and delivered by the party disposing of the estate, or by his agent [in] writing.
 - *See also* Statute of Frauds, 44-101 No action shall be brought in any court in the following cases unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereunto lawfully authorized:
 - 6. Upon an agreement for leasing for a longer period than one year, or for the sale of real property or an interest therein.
- Spouses need to both sign any interest > 1 year. 25-214(C)
- Presumed transfer of fee title, unless stated 33-432

1. Deeds and Other Transfers

- No requirement of “recording”, just “delivery”
- Pursuant to A.R.S. § 33-412 (B), “[u]nrecorded instruments, as between the parties and their heirs . . . shall be valid and binding.”
- “[O]ur recording statutes are for the protection of persons dealing in real property without actual notice.” *Pinal v. Pomeroy*, 60 Ariz. 448 (1943).

1. Deeds and Other Transfers

- 33-401 (B) Every deed or conveyance of real property must be signed by the grantor and must be duly acknowledged.
 - Statute of Frauds requires mere “writing”, but - 401(B) requires acknowledgement and delivery
 - Acknowledgement “before a proper officer is made as much a prerequisite to the validity of a deed as the signing.” *Lewis v. Herrera*, 208 U.S. 309 (1908)
 - Acknowledgers are listed in 33-511

1. Deeds and Other Transfers

- Exceptions?
 - “[P]art performance can remove the prohibitions of the statute [of frauds] in a proper case.” *Gabitzsch v. Cole*, 95 Ariz. 15, 20 (1963)
 - RESTATEMENT OF TRUSTS 2d § 440 (1959): “Where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase price is paid.”
 - “In absence of fraud, duress, lack of capacity, and undue influence, and where there is consideration, conveyance is valid.” *Gallegos v. Garcia* 14 Ariz.App. 85 (App. 1971).

1. Deeds and Other Transfers

- Forms of Conveyances – 33-402
 - Quitclaim (commonly used, but often should not be)
 - Quitclaim Deed
 - Convey (almost never used, often should be)
 - Deed, but without warranty
 - Convey & Warranty (multiple types and varieties)
 - Warranty, Special Warranty, General Warranty Deed
- Beneficiary Deed
 - 33-405 (one that “expressly states that the deed is effective on the death of the owner”)

1. Deeds and Other Transfers

- What is a quitclaim?
 - No warranty of any kind, of right to convey, against encumbrances, enjoyment, marketability, or even ownership!
 - “For the consideration of _____, I hereby quit claim to A.B. all my interest in the following real property: ____.”
- When should a Quitclaim Deed be used?
 - When multiple parties on title and one removing
 - To disclaim interest to quiet title –12-1103.

1. Deeds and Other Transfers

- Problems with Quitclaim Deed?
 - Should be used to disclaim interest
 - e.g. denounce inheritance, clarify lack of claim or interest, solidify interest in party with title
 - Should not be used to transfer.
 - Title insurer may not accept = effectively unsellable.
 - **Might not** terminate joint tenancy
 - *See 33-431(E) “the right of survivorship is extinguished as provided in section 14-2804 or on the recordation ..[of].. an affidavit entitled “affidavit terminating right of survivorship” executed by any joint tenant under oath”*

1. Deeds and Other Transfers

- Conveyances without warranty of title
 - Typically titled simply “Deed”
 - “For the consideration of _____, I hereby convey to A.B. the following real property (describing it).”
- Very rare, but useful when needed to validly transfer title, disclaim warranty of title
 - May be used for gift where party wants no claims

1. Deeds and Other Transfers

- Conveyances with warranty of title
 - There is no obligation to warrant title, but no restraint and other forms “shall not be invalidated.” 33-434.
 - “General Warranty Deed” or simply “Warranty Deed”
 - Transferor covenants the quality of title, including warranties of seisin, quiet enjoyment, right to convey, freedom from encumbrances, and defense of title against all claims.
 - Transferor agrees to pay and defend against all title claims
 - “Special Warranty Deed”
 - Warrants title, but only against claims or defects that occurred during transferor’s ownership.
 - Most appropriate for short term owners PRs, Trustees... also the standard for commercial transactions.

1. Deeds and Other Transfers

- Beneficiary Deed – 33-405 (2001)
 - “[D]eed that conveys an interest in real property, to a grantee beneficiary designated by the owner and that expressly states that the deed is effective on the death of the owner”
 - Non-probate transfer; trumps a will
 - May have multiple and back-up recipients. 33-405(B-C)
 - Property must be owned by individual, not trust or LLC or other entity; must be “effective on death of owner.”
 - Can convey to trustee of a trust.

1. Deeds and Other Transfers

- Beneficiary Deed (cont'd)
 - No signature or agreement of beneficiary
 - Must be executed **and** recorded before the death
 - Also provides for revocation, 33-405(L), which also must be recorded prior to death
 - A newer recorded version cancels prior recording w/out need to withdraw or terminate prior
 - Upon death, must record certified death certificate and affidavit to complete transfer
 - May be disclaimed and fall to probate estate

1. Deeds and Other Transfers

- Other Deeds?
 - Sheriff's Deed.
 - Follows a judicial foreclosure after tax, HOA, lien judgment
 - Owner may have redemption rights for up to year
 - Trustee's Deed
 - Follows non-judicial foreclosure of Deed of Trust
 - Deed in Lieu of Foreclosure
 - Special District Sale Deeds
 - Under Title 48, various special districts have power of sale
 - Distribution Deed or (different type of) Trustee's Deed
 - Deed distributing real property by trustee of trust or personal representative of estate.

1. Deeds and Other Transfers

- How may title be held?
 - Individually
 - Single person or married person as separate property
 - By entity *e.g.* XZY Inc. or ABC LLC
 - As trustee *e.g.* John Smith as Trustee of LMN Trust
 - Multiple parties as:
 - Tenants in common
 - Joint tenants w/ ROS
 - Community Property
 - Community Property w/ ROS

1. Deeds and Other Transfers

- Title Held Individually
 - If married, advisable to have spouse's disclaimer of interest recorded by "Disclaimer Deed"
 - Married persons can transfer separate property 33-451
 - Needed to comply with 25-214(c) that community has no interest; title companies will demand
 - Rights differ significantly from quitclaim deed; rebuts presumption of CP. *Bender*, 123 Ariz. 90 (App.1979) (No CP \$ used to purchase, but CP paid mortgage and taxes so community entitled to credit)

1. Deeds and Other Transfers

- Title Taken by Entity
 - Deed must reflect corporate capacity.
 - LLCs – Manager can validly sign. All Members may sign, a single Member *may* sign, but may lack authority.
 - Partnerships – GP can validly sign *or* all LPs *or* per partnership agreement
 - Corporations – Officer/Director can validly sign or any party with corporate resolution

1. Deeds and Other Transfers

- Taking or disposing of title as trustee of trust
 - Trustee takes title in his/her/its name “in capacity as Trustee of the XYZ Trust U/A/D mm/dd/YYYY.”
 - Signature block should reflect Trustee status.
 - No need to update deed upon change of Trustee, but may record “Certification of Trust” prior to disposition or transfer of property
 - 14-11013 sets out requirements of document that certify existence of trust but not “dispositive terms” and provides right to rely by recipient

1. Deeds and Other Transfers

- Multiple Parties Holding Title
 - Each manner of holding title has distinct rights, methods of termination, tax basis, etc.
 - Presumption and default is “Tenants in Common”, unless specific intent reflected on deed to hold title differently between parties
 - Possible exception: “H & W, married persons” may denote CP without expressly saying as such
 - But will not denote CPWROS without express “WROS”

1. Deeds and Other Transfers

- Tenancy in Common
 - By default, each “TIC” will own an undivided interest, but deed may specify % ownership
 - Each TIC generally has right to use entire property
 - Created by “order or contract” in divorce 14-2804
 - Divorce revokes “disposition or apportionment of property” in favor of divorced spouse
 - “Severs the interests of the former spouses ... as joint tenants with right of survivorship” or CPWROS

1. Deeds and Other Transfers

- Joint Tenancy WROS
 - Generally same rights as TIC, but w/ survivorship.
 - Arizona has done away with many JT formalities
 - No strawmen, no rigorous “four unities”
 - Requires clear evidence of intent to take as JTWROS
 - Severing WROS
 - Complete sale or other total disposition
 - WROS severed by divorce. 14-2804
 - But not necessarily as to other title holders, 33-431(B)
 - By death of title holder
 - Otherwise, must record an "affidavit terminating right of survivorship" to sever JT and WROS

1. Deeds and Other Transfers

- Pitfalls of Joint Tenancy?
 - Will trump estate planning b/c property never passes to decedent's estate or trust
 - Married joint tenants hold title to respective interests as separate property, *Russo v. Russo*
 - In *Heinig*, creditor attached JT titled marital residence for judgment against husband not against community
 - However, language of deed held not controlling and party may prove property is really CP despite title

1. Deeds and Other Transfers

- Title held as Community Property
 - Can only exist with regard to a valid marriage
 - Invalid marriage means title becomes TIC
 - May be w/ or w/o ROS; never a presumption, rather must explicitly state ROS
 - For CPWROS to terminate, can only occur:
 - Upon death – surviving spouse records affidavit
 - Upon divorce - 14-2804
 - Recording "affidavit terminating right of survivorship" 33-431(D), which reverts interest to TIC

1. Deeds and Other Transfers

- Why CPWROS, Not Joint Tenancy?
 - Clarifies community interest in title to property
 - Provides additional creditor protection against individually incurred debts
 - Flows from valid marriage, meaning invalid marriage converts title into TIC
 - Invalid marriage for JTWROS is irrelevant; stays JTWROS

1. Deeds and Other Transfers

- Other Transfers?
 - A “Contract for Sale” 33-741
 - “a contract for conveyance of real property, a contract for deed, a contract to convey, an agreement for sale or any similar contract” *i.e.* installment contract
 - Contract (or memo) recorded; deed upon full payment
 - Buyer has certain rights following default, based upon % of price actually paid, including redemption and how quickly seller may recover

2. Mortgages and Other Liens

- Deed of Trust v. Mortgage
 - 99% of all Arizona lending on real property is DOT
 - Obligation to pay per “Note” secured by a technical holding of title by “Trustee” until paid
 - Mortgage probably only by mistake (out of state lender or unsophisticated party)
 - All DoTs are mortgages, not all mortgages are DOTs

2. Mortgages and Other Liens

- Mortgages
 - “Any interest in real property capable of being transferred may be mortgaged” 33-701
 - Includes any transfer that is subject to right of retaking possession for failure to pay
 - Must be foreclosed by lawsuit 33-721
 - Redemption allowed even after judgment, prior to sheriff's sale of property
 - Debtor may request “valuation hearing”

2. Mortgages and Other Liens

- Nearly every “mortgage” is really a promissory note (not recorded) secured by a DOT (recorded)
 - Other obligations may be secured 33-805
- Trustee technically holds title pending payment, then released to trustor (owner)
 - Trustee must be licensed in AZ as attorney, bank, insurance co., broker or escrow company. 33-803
- Beneficiary is party owed on note (e.g. bank)
- Trustor is actual owner on title per deed.

2. Mortgages and Other Liens

- Deed of Trust
 - May be foreclosed by non-judicial Trustee's sale
 - > 90 days after recordation of "notice of sale"; 30-day notice
 - Sale is a public sale, commonly on courthouse steps or in the office of the trustee; continued until time of sale 33-810
 - However, if DOT defective, must judicially foreclose 33-721
 - "Trustee's Sale" has conclusive effect with no right of redemption, 33-811; unlike other foreclosures
 - Any objection must be raised prior to sale and an injunction must be obtained before sale
 - Bankruptcy, likewise, will postpone sale

2. Mortgages and Other Liens

- Deed of Trust (cont'd)
 - Beneficiary (lender) has 90 days from sale to file suit to recover any “deficiency” 33-814
 - Limitations period is an “Anti-deficiency protection”
 - Deficiency = amount owed @ sale – (> of either *i.e.* fair market value (“FMV”) or *ii.* amount paid at sale)
 - FMV = “the most probable price ... after deduction of prior liens and encumbrances ... for which the real property or interest therein would sell after reasonable exposure in the market under conditions requisite to fair sale”
 - Example: \$300k owed, but at sale lender retakes with credit bid of \$175k, but property FMV \$250k = \$50k judgment
 - Right to valuation hearing cannot be waived. *CSA 13-101 Loop, LLC v. Loop 101, LLC* (Ct.App. 2014)

2. Mortgages and Other Liens

- Deed of Trust (cont'd)
 - Other primary anti-deficiency protection provides for no deficiency at all for most homeowners, if:
 - 1) Purchase money loan (or refinance thereof); 2) SFR or duplex; and 3) less than 2.5 acres
 - Lender is only entitled to recover property
 - Also prevents lender from taking additional security besides residence
 - Regardless of the language in the DOT, this protection cannot be waived. *Parkway Bank & Trust Co. v. Zivkovic*, (Ct. App. 2013)
 - But guarantors may waive such protections. *Arizona Bank & Trust v. James R. Barrons Trust*, (Ct. App. 2015)

2. Mortgages and Other Liens

- Deed of Trust (cont'd)
 - What about 2nd Position DOT?
 - If loan is a “purchase money” loan pursuant to 33-729, whatever its position, §33-814(G) protection applies.
 - So, both first and second under an 80 / 15 acquisition loan would be protected from any deficiency
 - Anti-deficiency protection extends to any re-finance of the purchase money portion...but not additional \$
 - If 2nd is HELOC or “pool loan” obtained after purchase, it is not entitled to such protection

2. Mortgages and Other Liens

- Judgment lien
 - Recording of valid judgment w/ “Information Statement” per 33-967 creates a lien against debtor’s property in that county. 33-961
 - Valid for 10 years, unless renewed per 33-964 or released by “Satisfaction of Judgment”
 - However, does not attach to Homestead pursuant to 33-1101 up to \$400k (as of 2022) in proceeds

3. Undoing the Deed

- What if a deed/lien should not be there?
 - A.R.S. 33-420 provides expedited “special action” remedy against wrongful “purporting to claim an interest in, or a lien or encumbrance against”
 - May be “forged, groundless, contains a material misstatement or false claim or is otherwise invalid”
 - Includes remedies for a wrongful deed, lien, or *lis pendens* as well as removing once proper, but now stale (invalid) liens or *lis pendens*

3. Undoing the Deed

- 33-420 provides for statutory damages of greater of treble actual damages or \$5k for knowingly false liens + attorneys fees.
 - Knowing may not be a high standard, it may self prove knowledge. *Delmastro v. Taco Bell*, 228 Ariz. 134
 - Statute also provides expedited special action process
- If encumbrance was once valid 33-420(c) allows written demand to remove and, if not removed after 20 days, can recover > \$1k or treble
 - Can combine (a) & (c) and claim \$6k in damages

3. Undoing the Deed

- “[M]arital partners may in Arizona validly divide their property ... by a post-nuptial agreement, [subject to] built-in safeguards that the agreement must be free from any taint of fraud, coercion or undue influence; that the wife acted with full knowledge of the property involved and her rights therein, and that the settlement was fair and equitable.” *Harber*, 104 Ariz. 79 (1969)

3. Undoing the Deed

- *Harber* requires “heightened standard” of clear and convincing evidence to support
- “[P]oints to no authority, and we are aware of none, that precludes application of *Harber's Estate*” applying to LLC operating agreement. *Austin*, 237 Ariz. 201
 - Deed or disclaimer may be post-nuptial?

3. Undoing the Deed

- Per 14-2804, divorce revokes “disposition or apportionment of property” and “severs the interests of the former spouses” as ROS
- “Automatic revocation mandated by this section cannot be avoided by spousal inaction ... redesignation must be in writing and ... [meet] applicable requirements.”
Lamparella, 210 Ariz. 246

3. Undoing the Deed

- What if property owned H & W & W's Mom?
 - Is it TIC or H&W's interest as CP?
 - Then becomes or remains TIC
 - Is it JTWROS or H&W's interest as CPWROS?
 - Then H&W's interest becomes TIC
 - But what about v. W's mom?
 - Could a court change status of W's mom's ownership without her being in front of the Court?

3. Undoing the Deed

- If H1&W1 and H2&W2 all own as JTWROS?
 - Couple 1 divorces, then ROS terminates only as between H1 and W1
 - H2 dies, then owned by H1&W1 as TIC and between W2 & (H1 W1) as JTWROS
 - So if W2 dies next, H1 and W1 own property outright

3. Undoing the Deed

- Used to be...
 - *In re Estelle's Estate* (Ct.App 1979), "Joint tenancy requires the presence of the four unities: time, title, possession, and interest. Severance or destruction of one or more of these unities results in a destruction of the joint tenancy"
- But after 2013 amendment to 33-431
 - JTWROS is only terminated by divorce, transfer, or recording "Affidavit"

3. Undoing the Deed

- Must TICs suffer ownership together? No.
 - As with any property interest, it may be sold
 - TICs have absolute right to “partition” per 12-1211
 - “The right of partition is an incident of common ownership authorized explicitly by statute.” *Occhino*, 164 Ariz. 482
 - Property is divided ... or more commonly sold and proceeds divided

3. Undoing the Deed

- Proceeds are generally divided among the owners "according to their respective interests." A.R.S. § 12-1218(C).
- But, when one party has paid an obligation owed equally by another party, she is entitled to recover from the other for his respective share. *In re Marriage of Berger*, 140 Ariz. 156

3. Undoing the Deed

- Equity may alter ownership per a deed
 - Fraud, duress, mutual mistake
 - Adverse possession
 - "Ordinarily, when[property] is purchased in the name of one person with money furnished by another, a resulting trust arises in favor of the person furnishing the purchase money." *Toth* , 190 Ariz. 218 (1997)
 - [A] constructive trust will arise whenever the circumstances make it in equitable that the property should be retained by the one who holds the legal title....varieties of these trusts are practically without limit. *Linder*, 85 Ariz. 118 (1958)

Questions?