

Transfer of Title of Real Property

By

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A. Voluntary Transfers

1. Legal Requirements for an effective conveyance.

In Utah, ownership of real property, land and water rights, is transferred by a written and signed conveyance typically a deed. Prescribed forms of Quit Claim, special warranty and Warranty deeds are found in the Utah Code, *see UCA §57-1-12, 12.5 and 13*. (A copy of these forms is included in the seminar materials.) While a conveyance must be in writing and signed to meet the requirements of the statute of frauds, UCA §25-5-4, there can be many defects in deeds and conveyances. In many cases, when real property is passed to another person the legal description found in the deed may have a defect. These defects include legal descriptions that do not close. The Utah Supreme Court recently explained this defect:

Often deeds are legally described by metes and bounds, which is a description of the boundary line by length and direction. To properly close, the metes and bounds boundary description must begin and end at the same geographical point. To say a deed “fails to close” is to say that the legal description of the boundary of a parcel of property does not completely describe the metes and bounds properly so that the boundary completely encompasses the parcel and returns to the point of the boundary description's inception.

Ault v. Holden, 2002 UT 33, ¶11 n.8, 44 P.3d 781. When a deed does not close, but is sufficiently definite to convey property, a question may still arise as to where the true boundary should be located.

Another problem caused by a deed defect can be a conflict between elements of the legal description. For instance, a deed may describe a boundary in two different ways, such as with a metes and bounds description and by reference to a landmark, i.e., “thence South 07°54’36” West along a ditch 680.8 feet . . . to the point of beginning.” *Khalsa v. Ward*, 2004 UT App 393, ¶8 n.1, 101 P.3d 843. If the metes and bounds description places the boundary short of the landmark, an ambiguity arises regarding the correct boundary. *Id.* ¶¶2-4.

There are several doctrines that are applicable to these problems.

a. Deed Construction

“Deed construction is a proceeding in law,” in which “the court ‘will determine the parties’ intent from the plain language of the four corners of the deed.’” *RHN Corp. v. Viebel*, 2004 UT 60, ¶40, 96 P.2d 935 (quoting *Ault v. Holden*, 2002 UT 33, ¶38, 44 P.3d 781). “A court may also look to extrinsic evidence if the deed is ambiguous.” *Id.*

In a deed construction case, a court reviews a deed and attempts to ascertain the parties’ intent from the deed and finally resolve any ambiguity that may have arisen in the deed language. “A court is limited to interpreting only the language contained in the deed,” it does not “add new terms to a deed or alter the original language of a deed to conform to the parties’ intent.” *Id.* ¶41.

In a deed construction action, a court applies specific rules of construction to the interpretation of legal descriptions. “Generally, ‘in interpreting legal descriptions, a call to a monument or marker takes precedence over courses and distances.’” *Clark v. Smay*, 2005 UT App. 36, ¶8 (*Mahas v. Rindlisbacher*, 808 P.2d 1025, 1026 (Utah 1990)); *see also Khalsa v. Ward*, 2004 UT App. 393, ¶8, 101 P.3d 843. Additionally, “where . . . land is conveyed and described with reference to a map or plat, such map or plat is regarded as incorporated in the deed.” *Coop v. George A. Lowe Co.*, 71 Utah 145, 263 P. 485, 487 (1927). Map references generally control a metes and bound description. *See Iselin v. C.W. Hunter Co.*, 173 F.2d 388, 392 (5th Cir. 1949) (“Ordinarily, in case of inconsistency or repugnancy, a general description in a deed gives way to a description by metes and bounds, and the latter gives way to a map that is used by reference to identify the land intended to be conveyed.”); *Mazzucco v. Eastman*, 236 N.Y.S.2d 986, 988 (N.Y. Equity 1960) (“It is a well-established principle of law that when there is a conflict between a specific description by metes and bounds and a lot as shown upon a map by which a tract of land is conveyed, the latter provision will control.”). Metes and bounds descriptions control general descriptions.

Thus, the order of precedence in deed construction is:

1. Calls to natural or artificial monuments
2. Maps incorporated in the conveying document
3. Meets and bounds descriptions
4. General descriptions

It must be remembered, however, that all such rules of construction are presumptions and those presumptions may be overcome if, in the particular case, “the presumption is unreasonable.”

Clark, 2005 UT App 36, ¶¶ 9, 15 (citing *Khalsa v. Ward*, 2004 UT App 393, ¶8, 101 P.3d 843) (involving depiction of creek in subdivision plat that was “roughly drawn” on the map, “not called to in the subdivision plat,” and excluded “angles or measurements connecting the creek to the boundaries”).

2. Types of Deeds

Utah law prescribes three basic types of deeds. Quit claim deeds only convey whatever title, if any, the grantor has at the time of conveyance, *see UCA § 57-1-13*. Warranty Deeds provide a number of warranties, title, application, possession, authority and no encumbrances, *see UCA § 57-1-12*. Finally, Special Warranty deeds warrant the title and against any defect in title caused by grantor, *see UCA § 57-1-12.5*.

B. Involuntary Transfers

1. Foreclosure of Mortgages or Deed of Trust

In Utah, Trust Deeds are the preferred way to use real property to secure a loan or debt. One of the advantages of a Trust Deed over a Mortgage is the ability to foreclose a Trust Deed without going to court. Trust Deeds are governed by UCA § 57-1-19 through 44. However, Mortgages may be used if the ease of a non-judicial foreclosure is not a goal.

2. Mechanics’ Lien Foreclosures

Utah like virtually everywhere else allows contractors, subcontractors and material suppliers to file a lien if they are not paid. Issues often arise due to the fact that the lien claimant has 90 days to file the lien, yet the priority of the lien relates back to the date that work was commenced or materials provided. Thus, an unsuspecting purchase of newly improved property

may unwittingly purchase the property or accept it as security for a loan believing that it is unencumbered and then find out a lien, filed after the purchase or loan, has priority.

Mechanics and Materialmens Liens are governed by UCA Title 38 Chapter 1. The subject is complex enough for an entire CLE program, and too complex to be discussed in detail here.

3. Foreclosures of Tax and Other Liens

Tax and other liens may also exist. They should be of record with the County Recorder and thus are readily discoverable. Tax liens for real property taxes are foreclosed through a public tax sale process after five (5) years of delinquency. Most other liens must be judicially foreclosed.

4. Adverse Possession

Another doctrine that may be useful in the boundary dispute arena is the doctrine of adverse possession. In Utah Adverse Possession is statutory. The statutes governing adverse possession are found at UCA 78B-2-208 through 220. The chief stumbling block to proving an adverse possession claim is the requirement that the party claiming adverse possession or his predecessors have paid all taxes levied and assessed on the property. See UCA 78B-2-214 & 215. The courts have required that all of the taxes assessed and levied. Payment of a portion of the taxes, for example taxes on the improvements is not sufficient. See *Marchant v. Park City* 788 p2d 520 (Utah 1990) and *Nyman v. Anchor Development* 2003 Ut 27, 73 p3d 357 (Utah 2003).

As observed by the Utah Supreme Court:

In Utah, a person without legal title is deemed "to have been under and in subordination to" the owner with legal title unless that person has adversely possessed the property. When an occupant has entered into possession of property under a claim of title, the occupant may establish adverse possession by demonstrating that (1) the property was "occupied and claimed for the period of seven years continuously," (2) the party, his predecessors and grantors have paid all taxes which have been levied and assessed [on the property]," and (3) the property was, in pertinent part, "usually cultivated or improved," protected by a substantial inclosure[,] or "used . . . for the ordinary use of the occupant."^[1]

Given the requirement that parties pay the taxes on a parcel of property for the period of occupancy, the doctrine of adverse possession has limited applicability.

5. Condemnation

Real property or an interest in real property, i.e. easement, may also be obtained through the condemnation process. Obviously, governmental agencies, if given the authority, may take private property for public purposes. The main statutes governing eminent domain are found in Title 78B Chapter 6 Sections 501-522. These statutes provide the types of public uses that eminent domain may be exercised for as well as the various governmental entities which may exercise eminent domain. See UCA 78B-6-501. Also, except for public buildings and grounds, permanent buildings, reservoirs and dams, permanent flood control structures, mining purposes only an easement may be taken. See UCA 78B-6-502. Under the general power of condemnation, private entities such as mines and water users have used the condemnation power to obtain property and are specifically authorized to do so.^[2]

6. Reversion and Forfeitures of Title

There are two types of reversionary or forfeiture clauses recognized in Utah. A fee simple determinable is an interest that “terminates automatically upon the stated event, without any exercise of election by the person who will succeed to the interest.” *Forsgren v. Sollie*, 659 P.2d 1068, 1069 n.2 (Utah 1983). “A fee simple subject to a condition subsequent is an interest in which, upon the occurrence or nonoccurrence of a stated event, the grantor or his successor has the power, at his option, to terminate the estate and reacquire the property.” *Id.* The reversionary provision contained in deeds may create either a fee simple determinable, or a fee simple subject to a condition subsequent. See also *Allen v. Hall*, 2006 UT 70, ¶¶ 13-16, 148 P.3d 939 (holding that a similarly-worded provision created a fee simple determinable).

C. Private Covenants and Restrictions (CC&Rs)

The property may also be encumbered by private covenants and restrictions, also known as Covenants, Conditions and Restrictions, i.e. CC&Rs. They are the private equivalent of zoning and control use of the property.

Utah Code Annotated § 57-1-12.5. Form of special warranty deed

(1) Conveyances of land may be substantially in the following form:

SPECIAL WARRANTY DEED

____ (here insert name), grantor, of _____ (insert place of residence), hereby conveys and warrants against all who claim by, through, or under the grantor to ____ (insert name), grantee, of _____ (insert place of residence), for the sum of ____ dollars, the following described tract ____ of land in ____ County, Utah, to wit: (here describe the property).

Witness the hand of said grantor this _____ (month\day\year).

(2) A special warranty deed when executed as required by law shall have the effect of:

(a) a conveyance in fee simple to the grantee, the grantee's heirs, and assigns, of the property names in the special warranty deed, together with all the appurtenances, rights, and privileges belonging to the property; and

(b) a covenant from the grantor, the grantor's heirs, and personal representatives, that:

(i) the granted property is free from all encumbrances made by that grantor; and

(ii) the grantor, the grantor's heirs, and personal representatives will forever warrant and defend the title of the property in the grantee, the grantee's heirs, and assigns against any lawful claim and demand of the grantor and any person claiming or to claim by, through, or under the grantor.

(3) Any exceptions to a covenant described in Subsection (2)(b) may be briefly inserted in the deed following the description of the land.

Utah Code Annotated § 57-1-12. Form of warranty deed.

(1) Conveyances of land may be substantially in the following form:

WARRANTY DEED

_____ (here insert name), grantor, of _____ (insert place of residence), hereby conveys and warrants to _____ (insert name), grantee, of _____ (inset place of residence), for the sum of

____ dollars, the following described tract ____ of land in ____ County, Utah, to with: (here describe the premises).

Witness the hand of said grantor this _____ (month\day\year).

(2) A warranty deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee, the grantee's heirs, and assigns:

(a) of the premises named in the warranty deed;

(b) of all the appurtenances, rights, and privileges belonging to the premises named in the warranty deed; and

(c) with covenants from the grantor, the grantor's heirs, and personal representatives, that:

(i) the grantor lawfully owns fee simple title to and has the right to immediate possession of the premises;

(ii) the grantor has good right to convey the premises;

(iii) the grantor guarantees the grantee the grantee's heirs, and assigns in the quiet possession of the premises;

(iv) the premises are free from all encumbrances; and

(v) the grantor, the grantor's heirs, and personal representatives will forever warrant and defend the title of the premises in the grantee, the grantee's heirs, and assigns against all lawful claims whatsoever.

(3) Any exception to the covenants described in Subsection (2)(c) may be briefly inserted in the warranty deed following the description of the land.

Utah Code Annotated § 57-1-13. Form of quitclaim deed.

Conveyances of land may also be substantially in the following form:

QUITCLAIM DEED

_____ (here insert name), grantor, of _____ (insert place of residence), hereby quitclaims to _____ (insert name), grantee, of _____ (here insert place of residence), for the sum of ____ dollars, the following described tract _____ of land in _____ County, Utah, to wit: (here describe the premises).

Witness the hand of said grantor this _____ (month\day\year).

A quitclaim deed when executed as required by law shall have the effect of a conveyance of all right, title, interest, and estate of the grantor in and to the premises therein described and all rights, privileges, and appurtenances thereunto belonging, at the date of the conveyance.

[1] Salt Lake County v. Metro West Ready Mix, Inc., 2004 UT 23, ¶22, 89 P.3d 155 (citations omitted). See also Massey v. Griffiths, 2007 UT 10, 152 P.3d 312.

[2] Utah Code Ann. §§ 73-1-6; 78B-6-501(5)-(7); *Jacobsen v. Memmott*, 354 P.2d 569 (1960); *Highland Boy Gold Mining Co. v. Strickley*, 78 P. 296 (1904), *affirmed* 200 U.S. 527 (1905).