

Which Deed Should I Use?

BY EBEN P. CLARK

This article discusses the four basic deed forms used in Colorado and when to use each form.

Which deed should I use? This is the inevitable question in any transaction in which real property is conveyed, regardless of the form of the transaction or the property to be transferred. Every lawyer, realtor, or other real estate professional has faced this question at some point in time.

This article provides an overview of the different types of deed forms available in Colorado. It describes the basic characteristics of each type of deed, and its appropriateness for various circumstances. This article does not advocate for the use of a single form of deed for a certain transaction. Nor does it seek to provide a formula for determining the appropriate deed form in any specific situation. Such an approach is not realistic, because the decision of which deed to use depends on the property, negotiation positions of the parties, and specific facts in each such transaction. The goal of this article is to guide practitioners in identifying the relevant considerations for choosing which form of deed to use.

Basic Colorado Deed Forms

The four basic deed forms in Colorado are general warranty, special warranty, bargain and sale, and quitclaim.¹ In this order, each provides a decreasing number of title warranties to the buyer.

General Warranty Deed

In Colorado, a general warranty deed includes four statutory warranties.² Citing CRS § 38-30-113, the Colorado Court of Appeals in *Upton v. Griffiths* articulated these warranties as “a promise from the grantor that, at the time of its execution, he was lawfully seized of the estate conveyed, that the estate was free and clear from all encumbrances except as stated, and that he warrants to the grantee the quiet and peaceful possession of the property and will

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defend the title against all persons who may lawfully claim title.”³

CRS § 38-30-113(2) lists the warranties afforded by a general warranty deed as:

- a. That at the time of the making of such instrument he was lawfully seized of an indefeasible estate in fee simple in and to the property therein described and has good right and full power to convey the same;
- b. That the same was free and clear from all encumbrances, except as stated in the instrument; and

- c. That he warrants to the grantee and his heirs and assigns the quiet and peaceable possession of such property and will defend the title thereto against all persons who may lawfully claim the same.

While *Upton* and the Colorado Revised Statutes lay out with particularity the warranties included with a general warranty deed, for comparison purposes it is worth noting that at common law, the standard warranties of title were referred to as six covenants:

1. the covenant of seisin (that the grantor has the very estate it purports to convey);
2. the covenant of right to convey (that the grantor has the right to convey the promised title);
3. the covenant of freedom from encumbrances (warranty by the grantor against encumbrances);
4. the covenant of quiet or peaceable possession (warranty that the grantee will not be evicted by the grantor or another claiming superior title);
5. the covenant of further assurances (covenant of the grantor to execute any document necessary to properly vest title); and
6. the covenant of warranty (warranty that the grantee has title and possession to the property and will not be deprived of possession by persons asserting superior claims of possession or title, and that the grantor will defend title conveyed against such lawful claims).⁴

While many residential transactions are closed using general warranty deeds, in commercial transactions the general warranty deed is relatively rare because of the breadth of these warranties by the grantor.

Special Warranty Deed

In Colorado, the distinction between a general warranty deed and a special warranty deed

lies not in the number of warranties provided, but rather in their scope. A Colorado special warranty deed includes the same four statutory warranties as a general warranty deed; however, the warranty against encumbrances is limited to claims made by or through the grantor. There is no warranty against claims made by or through prior owners or others. This can be understood as the grantor providing a defense against rights or claims made based on interests or defects that arose during the period of the grantor's ownership of the property.⁵ Special warranty deeds are customarily used in commercial transactions and, as discussed below, in areas of the state where there are special title considerations.⁶

Bargain and Sale Deed

A Colorado bargain and sale deed is a grant without covenants or warranties, unless covenants or warranties are expressly stated therein. Put another way, a bargain and sale deed is a deed without implied warranty of any kind. A bargain and sale deed is distinguished from a quitclaim deed (described below) in that a bargain and sale deed conveys both the grantor's interest in the property as of the date of conveyance, as well as any interest in the property that the grantor acquires after the closing. These interests are referred to as "after-acquired" interests or property. For example, after-acquired property might include mineral rights not vested at the time of the grant, or reversionary interests that vest after the grant.⁷ In such cases, the grantor's after-acquired interests are deemed held in trust for the grantee.⁸

Several nuances to the bargain and sale deed merit further explanation. While a bargain and sale deed is generally considered a deed without covenants, there is an argument that it includes a covenant of seisin.⁹ However, the plain language of CRS § 38-30-115 states that a deed with the words "sell and convey" has the same effect as a "bargain and sale deed, without covenants of warranty, at common law." In Colorado, the question whether a bargain and sale deed includes a covenant of seisin remains unresolved and is relevant when considering using this form of deed.

In addition, at common law and under the Statute of Uses (1535), a bargain and sale deed also required consideration (hence the name "bargain and sale"). The Colorado Court of Appeals has held that the Statute of Uses is in effect in Colorado.¹⁰ However, Colorado courts have also held that a conveyance reciting consideration is valid even though there is no consideration, and the sufficiency of consideration cannot be challenged by a person with no interest in the transaction.¹¹

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Bargain and sale deeds are rarely used in arm's-length transactions in Colorado. They are most often used in transactions among related parties. They are also used where the grantor is not willing to offer warranties, but the buyer anticipates some after-acquired interests.

Quitclaim Deed

A Colorado quitclaim deed conveys only the grantor's then-present interest in the real property, without warranty of any kind. It is the most basic form of transfer and provides grantees with little or no assurance as to what they will receive. A quitclaim deed also does not convey

after-acquired property. As a result, a quitclaim transfer can be characterized as: "I don't know what I have, but whatever it is you can have it." A quitclaim deed can also be viewed as a release or waiver of rights (for example, sometimes a quitclaim deed may be provided to effect a release or termination of an easement).¹² Despite the lack of representation or warranty by the grantor, in Colorado a quitclaim deed does not put a grantee on inquiry notice of potential title defects, and a grantee by quitclaim deed can be a bona fide purchaser for value.¹³

Which Deed Should I Use?

As stated above, deeds are not one-size-fits-all. However, each deed is commonly used for certain types of transactions, and one deed may be preferred over others by a grantor or grantee in some situations.

General Warranty Deed

Many assume the general warranty deed is the standard deed for real estate transactions. In practice, however, the general warranty deed is rarely used in commercial transactions and is increasingly disfavored in residential transactions. So, when should a practitioner select this deed form? When representing the grantor, the answer is only when you absolutely must, which generally means only when the grantee demands it. When representing the grantee, the answer is "always," and the request for a general warranty deed should be the starting point for negotiations.

As noted above, for simple residential transactions, the general warranty remains the standard deed. For relatively simple commercial transactions (those without much potential for competing claims), the general warranty deed may also be used, though doing so is relatively uncommon and likely only appropriate where unique circumstances exist (e.g., inability of the grantee to obtain title insurance). It would be highly irregular for a grantee to demand, much less for a grantor to agree to give, a general warranty deed in a commercial deal of any complexity.

A general warranty deed is also sometimes used for transactions between related entities or related parties, such as intra-family transfers.

This most often occurs with the assumption that it will protect the grantee without the need for the grantee to obtain a new title insurance policy. The rationale is that, if a title defect arises, the grantee can make a claim against the grantor, who can in turn make a claim against its title insurer. By this thinking, the warranties given by the grantor are backed by the grantor's title insurance and may arguably protect the grantee.

Any decision not to obtain new or amended title insurance coverage is a questionable practice for several reasons. First, consideration should be given to whether the subject transaction will terminate coverage under the title policy or whether the grantee could remain covered under the expanded definition of "Insured" in the 2006 standard American Land Title Association (ALTA) policy. Second, depending on the type of transaction, an inexpensive name change endorsement to the existing policy may be available. Third, relying on the old policy to cover a claim may result in inadequate coverage for the grantee because the insured value of property may be out of date. Finally, the theory requires related parties to make claims against one another. This can be expensive and time consuming, may raise claims of collusion, and may strain relationships. It is safer and simpler to update the existing title policy or obtain new coverage. The benefits of this approach far outweigh the risks that would otherwise be assumed by the parties.

Special Warranty Deed

The special warranty deed is slightly more advantageous to grantors than the general warranty deed. It is also the standard in commercial transactions, where the buyer is more sophisticated (or at least more likely to be represented by a real estate attorney). Special warranty deeds are also common in large residential transactions and, increasingly, in sales from developers and builders to homebuyers. Special warranty deeds are also used more frequently in Colorado's mountain communities and other areas of the state where mining or similar claims may exist. This is because many of these areas are potentially subject to governmental grants, site-specific reservations, or dated and sometimes illegible easements and covenants.

Grantors therefore do not want to take on the risk and liability arising from these earlier transfers and encumbrances.

Quitclaim Deed

A quitclaim deed is commonly used in three general circumstances. The first is as a deed of utility or convenience, where the various warranties are unimportant. Practitioners typically select a quitclaim deed for gifts, estate transfers, and related party transfers.

The second circumstance is in the case of a release, waiver, or reconveyance. These are situations in which the grantor may be returning an interest or acknowledging the lack of an interest in the real property. For example, the language of an easement, long-term ground lease, or preemptive right (e.g., right of first refusal) often requires the grantee/tenant to execute a quitclaim deed to the grantor/landlord upon the termination of the easement, right, or lease. Similarly, a quitclaim deed is appropriate in the settlement of lawsuits when a party has decided to waive or surrender its claim, or in the divorce process when a ruling or settlement has awarded ownership of marital property to one party.

The third application of a quitclaim deed is likely the most obvious. A quitclaim deed is appropriate when there are acknowledged questions regarding a grantor's right or title in the property, such as known third-party claims, conflicting surveys or legal descriptions, disputed rights of way, or a gap, gore, or hiatus. For example, often a grantor is willing to grant warranties of title as to a principal parcel, but not as to questionable adjoining property; or only to a legal description as contained in its vesting deed, but not a subsequent as-surveyed legal description. In such circumstances, the grantor is well advised to execute two deeds: a form of warranty deed for the principal parcel or former property description, and a quitclaim deed for the adjoining property or later property description.

Bargain and Sale Deed

As noted above, a Colorado bargain and sale deed is similar to a quitclaim deed, with the additional conveyance of any after-acquired

property or interests. A bargain and sale deed is most often used in two circumstances: in a quitclaim-like transaction, where the grantor is not willing to give warranties, but is willing to grant the grantee any rights the grantor later acquires; and when there are anticipated after-acquired rights, such as where the grantor may or will later acquire an additional interest that should logically follow the property. This latter scenario may exist in the context of property that has not yet vested, reversionary interests, where there are pending claims or litigation, or where the seller has not occupied the property and knows little about it.

However, as noted above, the name "bargain and sale" originates from common law and the Statute of Uses (1535), which required consideration to be paid for a transfer under this form of deed. Whether this is a requirement under Colorado law remains an open question that is relevant when considering the use of the deed. If consideration is required to use this form of deed, then a bargain and sale deed could not be used for no-consideration transfers such as transfers among related entities and transfers to family members, trusts, and other estate planning vehicles.

Different Deeds for Different Property

When a transaction involves water rights, mineral interests, or special grantors, additional considerations factor into the question of which deed to use.

Water Rights

For water rights conveyances in Colorado, attorneys typically prefer to use a deed without warranties of title, such as a quitclaim or bargain and sale deed. Sellers and their attorneys are generally hesitant to warrant title to water rights because water rights can pass separate and apart from the real property upon which they were originally decreed. This makes tracing title to water rights notoriously difficult, and title companies generally will not issue title insurance for water rights. Therefore, water rights are most commonly conveyed with a quitclaim or bargain and sale deed.

When the water rights conveyed are shares in a mutual ditch company, the shares or share

certificates themselves are personal property, but the underlying water rights the shares represent are real property. Therefore, it is good practice either to convey the shares in a single document designated as both “deed and assignment,” or to deed the water rights and separately assign the share certificate. In transactions where there may be significant or valuable infrastructure associated with the water rights, it is also good practice to use a separate bill of sale to convey the water infrastructure. Further, where appropriate, it is good practice to include in the conveyance instrument catch-all “any and all” water rights language in connection with the real property to which the water rights are appurtenant and include a specific legal description of the real property as an exhibit to the water deed.

Mineral Interests

Ownership of fee title to real property carries with it ownership of the underlying minerals unless there has been a severance. Severance can occur by effect of the statute under which the property was transferred from the sovereign or by a private conveyance or reservation. Absent a severance, conveyance of land by its legal description, without reference to the mineral interests, passes title to both the land and any mineral deposits. Once severed, however, there are multiple, separate, and distinct interests in the same land, and those interests can thereafter be separately conveyed. Therefore, two questions arise when deciding which deed to use for mineral rights: (1) how to convey a real property interest with or without the underlying minerals, and (2) how to convey mineral interests alone after severance.

Similar to the discussion on water rights, there is not a broadly applicable standard form of deed for mineral transfers. Mineral transfers are similar to other real property transactions in that the form of deed is dictated by the circumstances and relative bargaining power of the parties. Title insurance is not generally available for mineral interests, so grantors are usually loath to give the warranties that are a part of general or special warranty deeds. However, unlike water rights, title to minerals can be searched and confirmed based on the legal

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description of the land and the grantor-grantee index (though this process requires special expertise and can be costly and time consuming). Very often, a standard form of deed is revised and labelled a “Mineral Deed,” but the basic conveyancing language remains the same. In these circumstances, practitioners should remember that the operative conveyancing language in the deed (and not the document’s title) will determine the warranties given and interests conveyed.

Whether the deed is for the surface or underlying minerals, care must be taken in describing the minerals granted or reserved. The words “all minerals” are generally considered

to include oil and gas, but “oil, gas, and other minerals” may be construed as being limited to oil and gas, hydrocarbons, and other substances associated with the oil and gas production. Good practice dictates using broad general language describing the minerals *and* specifically listing minerals or types of minerals intended to be conveyed or reserved. For example, whether being reserved or conveyed, the description can state:

metals, ores, minerals, and mineral substances of every kind and character whatsoever, precious and base, metallic and non-metallic, and including by way of illustration and not by limitation, oil, gas, and associated hydrocarbons; coal; gold and silver; uranium and other fissionable materials; sand and gravel; and industrial minerals, whether or not similar to the foregoing.

Typically, a general grant or reservation of “minerals” does not include sand and gravel or energy from geothermal resources. Further, the drafter of a deed for minerals must address (1) whether the reservation or conveyance is of a fee interest in the minerals or a royalty interest, and (2) conveyances of fractional interests. With regard to fractional mineral interests, care must be taken to specify whether the fractional interest conveyed is a fraction of what the grantor owns, or a fraction of the entire mineral estate.

The owner of severed mineral interests is deemed by law to have an implied easement to enter upon and use the surface of the land to reach, develop, and extract minerals.¹⁴ Nevertheless, best practices dictate including express language granting or reserving “the right to prospect or explore for, mine and remove the same and the right of ingress and egress, plus use of the surface for mining purposes” or similar language to make clear that there are surface use rights appurtenant to the mineral estate. The right of the mineral owner to use the surface does not include the right to destroy or interfere with the surface owner’s right to use the surface. For example, if open pit or strip mining is contemplated, that must be expressly reserved or conveyed in the deed. Likewise, if title warranties are given in a conveyance of severed minerals, the grantor should include

an exception in the grant for the right of the fee owner to reasonable use of the surface.

Special Deeds for Special Grantors

In addition to the typical deed forms described above, Colorado has several specially titled forms of deed to convey property under specific circumstances. Because these deed forms apply only to certain grantors (and, in substance, generally qualify as either a bargain and sale or a quitclaim deed), their use generally does not require a detailed analysis.

When dealing with probate, a practitioner may be presented with or requested to prepare a “personal representative’s deed” (PR’s deed). A PR’s deed is not a formally recognized deed form in Colorado, but is instead a bargain and sale deed used only by the court-appointed personal representative of a deceased to distribute real property not otherwise disposed of by the

deceased’s will or other estate planning vehicle. The grantor under a PR’s deed must be the personal representative of the estate and must be acting under letters testamentary issued by a court of competent jurisdiction.

Similarly, practitioners may see forms and references to a “trustee’s deed.” In fact, there are no special attributes to a trustee’s deed, other than the fact that the grantor is a trustee and is acting on behalf of the specified trust. But note that when conveying trust property, the trustee may record a Statement of Authority reciting the trustee’s authority to act on behalf of the trust in dealing with the property.¹⁵ A Statement of Authority will generally be required by any title insurer. Beyond this fact, a trustee’s deed is in the form provided by CRS § 38-30-113, and it is regarded as conveying the same interests (and lack of covenant or warranty) as a bargain and sale deed.

A Colorado beneficiary deed is an estate planning tool that passes title to real property outside of probate upon the death of the grantor.¹⁶ Because of its character as an estate planning tool rather than a form a practitioner might select in a real estate transaction, an in-depth description of the beneficiary deed is beyond the scope of this article. The Colorado beneficiary deed statute sets out in detail the characteristics, applications, and effects of this form of deed.¹⁷

Finally, Colorado statutes define several forms of deed for use by specific public actors: the confirmation deed, defined in CRS § 38-38-502; the sheriff’s deed, defined in CRS § 38-38-503; and the treasurer’s deed, defined in CRS § 39-11-135. Each has a narrow application and can only be executed by the specified officer, so a detailed discussion is not included here. In practice, each is regarded as a bargain and sale

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deed, transferring the described interest and any after-acquired interest without warranty or recourse against the grantor.¹⁸

Standard Forms for Deeds

Though the Colorado Revised Statutes provide forms of deeds and required language for certain deed types, there are no Colorado Real Estate Commission approved forms of deeds. Colorado Bar Association CLE publishes a set of commonly used forms (Bradforms), and title companies often have their own forms (though discussion of the extent to which a non-lawyer may prepare or complete conveyance documents is a subject for another article). Practitioners may choose such forms as a starting point for their transactions or use their own forms containing the operative language necessary for the type of deed intended.

Conclusion

When considering which form of deed to use, practitioners must recognize that all transfers are unique. Consideration should be given to the warranties sought to be conveyed (or not conveyed), the character of the rights being conveyed (surface, water, etc.), and the negotiating positions of the parties. Standard forms for conveyances are a start, but each deed must be tailored to the distinct characteristics of each transaction. ^{CL}

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NOTES

1. Colorado also recognizes a variety of other types, such as the "beneficiary deed," "trustee deed," "confirmation deed," and "sheriff's deed." Given their narrow applications, these are discussed only briefly at the end of this article.
2. See *Upton v. Giffitts*, 831 P.2d 504, 505 (Colo. App. 1992).
3. *Id.*
4. Smith, *Survey of the Law of Real Property* 187 (West Publishing Co. 1956).
5. See *Colo. Land & Res., Inc. v. Credithrift of America, Inc.*, 778 P.2d 320, 323 (Colo. App. 1989).
6. Where a special warranty deed is used, it is technically unnecessary to include a list of "permitted exceptions" for any recorded documents that predate the grantor's acquisition of the property. That said, it remains customary for permitted exception lists or exhibits to include all recorded documents, not just those created during the grantor's period of ownership.
7. See *Tuttle v. Burrows*, 852 P.2d 1314 (Colo. App. 1992).
8. See CRS § 38-30-104.
9. This might be the case if the Statute of Anne (6 Anne. C. 35 (1707)) applies. See *Douglass v.*

Lewis, 131 U.S. 75 (1889).

10. See *Teller v. Hill*, 72 P. 811 (Colo. App. 1903).

11. See *Stewart v. Bd. of Comm'rs of Phillips Cty.*, 250 P. 562 (Colo. 1926); *Cooley v. Murray*, 52 P. 1108 (Colo. App. 1898).

12. See *Tuttle*, 852 P.2d 1314.

13. See *Bradbury v. Davis*, 5 Colo. 265 (1880); *Kelsey v. Norris*, 125 P. 111 (Colo. 1912).

14. See *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 926 (Colo. 1997).

15. CRS § 38-30-108.5.

16. CRS §§ 15-15-401 et seq.; CRS § 38-30-113.5.

17. See *id.*

18. Though beyond the scope of this article, it is interesting to note that pursuant to statute, a confirmation or sheriff's deed is not necessary to vest title to property following a foreclosure. Instead, under the applicable Colorado statutes, title passes to the successful bidder at sale on the expiration of all cure and redemption periods. See CRS § 38-38-501. Colorado's race-notice statute and the realities of obtaining title insurance, however, make it advisable to be certain the foreclosing officer issues and records a deed as soon as possible after lapse of the redemption periods.



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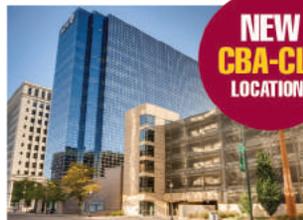
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