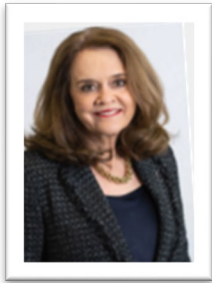


Preparing a Deed

Sara Dysart
Dysart Law, San Antonio



Sara E. Dysart
Attorney at Law
Sole Practitioner



Sara E. Dysart is a graduate of St. Mary's University (BA *magna cum laude* & JD *with distinction*) and UTSA (MA). Sara is a sole practitioner. She is Board Certified in Commercial Real Estate Law and currently serves on the Texas Board of Legal Specialization and its Real Estate Law Advisory Commission. She is a fellow of the American College of Real Estate Lawyers. An advocate of Texas Bar CLE programs, Sara has served as course director for Advanced Real Estate Law, Advanced Real Estate Drafting, Advanced Real Estate Strategies, and Annual Summer School, and is a frequent author and presenter.

Sara is a member of the Board of Directors of Broadway Bank. She serves on the Board of Trustees for St. Mary's University and the Board of Directors of Incarnate Word High School. She is a director of the Texas Bar College, Chair of the Fellows of the Texas Bar Foundation, and Treasurer of Real Estate Probate & Trust Law Section of the State Bar of Texas. She has been Chair of the SBOT Real Estate Forms Committee, Trustee of the Texas Bar Foundation, Director of the SBOT, Co-Chair of the 2015 SBOT Annual Meeting, President of St. Mary's Law Alumni Association, and Chair of the San Antonio Bar Foundation.

Sara is a recipient of the San Antonio Bar Association Lifetime Achievement Award--the Joe Frazier Brown, Sr. Award of Excellence; State Bar of Texas Real Estate Probate and Trust Law Section Lifetime Achievement Award—Real Estate; Texas Board of Legal Specialization Tom Garner Award; San Antonio Council on Alcohol and Drug Awareness Allan K. DuBois Community Champion Award; San Antonio Legal Services Association President's Award; Texas Bar Foundation Terry Lee Grantham Memorial Award; SBOT President's Award; SBOT Presidential Citation; four San Antonio Bar Association President's Awards; San Antonio Business Journal Outstanding Lawyer Award; San Antonio Bar Foundation Peacemaker Award; SBOT CLE staff's Standing Ovation Award; SBOT Advanced Real Estate Weatherbie Workhorse Award; Association of Corporate Counsel South Texas Chapter C. Lee Cusenbary Ethical Life Award; Lawyer's Concerned for Lawyer's Ralph Mock Award; and Bexar County Women's Bar Foundation's Belva Lockwood Outstanding Lawyer.

St. Mary's University honored Sara as a 2019 Distinguished Graduate. St. Mary's University School of Law Alumni Association honored her as the 2021 Distinguished Law Graduate.

Preparing a Deed

I. INTRODUCTION

Any consideration of legal documents from a title insurance perspective might well begin with the objectives set out in a policy of title insurance. Much of the focus in closing a transaction is on the Schedule B items and the requirements of Schedule C. Subsequent to the issuance of the commitment, exclusions and exceptions, together with conditions and stipulations, of the policy are the primary focus.

As a result, the insuring provisions of Schedule A often fail to receive the appropriate amount of attention. However, in essence, the transaction being closed and insured is the heart of the insurance policy, and is addressed in the insuring clause and Schedule A.

The insuring clause of the owner's policy of title insurance insures, as of the date of the policy, against loss or damage sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
5. Lack of good and indefeasible title.

It is also worthwhile to note the "plain English" provisions of the Texas Residential Owner Policy of Title Insurance, in which the policy "insures your title to the land described in Schedule A." "Covered Title Risks" include:

1. Someone else owns an interest in your title.
2. A document is invalid because of improper signature, acknowledgement, delivery, or recording.
9. You do not have good and indefeasible title.

Perhaps more explicitly, the Residential Owners Policy makes the importance of the legal documents clear, including any aspect of a document which may cause it to be invalid. With respect to deeds, the Texas Property Code, Ch. 5, makes it clear that a conveyance of an estate in land must be in writing, and must be subscribed and delivered by the conveyor (or by the conveyor's agent authorized in writing). This paper addresses many aspects of drafting a requested deed.

Schedule A of the policy in turn sets out (i) the name of the insured, (ii) the estate or interest in the land that is covered by the policy, and (iii) "title to the estate or interest in the land is insured as vested in;" The legal documents prepared and utilized at closing must obtain this result, and their importance cannot be overstated. The policy follows from the commitment, and careful review of the commitment is critical when preparing the legal documents.

II. TYPE OF DEED

a. What does the contract require?

- (i) Most transactions require either a general warranty deed or a special warranty deed. Do not rely on the title of the document – look for the warranty language, “by, through, or under, but not otherwise.” This is the language of a special warranty and may not comply.
- (ii) Customary granting language is “grants, sells, and conveys.”
- (iii) The General Warranty

A conveyance can be made with a general warranty, a special or limited warranty, or with no warranty. The grant conveys what it might, and the warranty or lack thereof, does not affect the grant, see *Bess V. Harper*, 441 S.W.2d 825 (Tex. 1969). In a general warranty, Grantor warrants that the title is free of claims by any person whatsoever regardless of whether the claim is derived through an act of Grantor. See *Barfield v. Holland*, 844 S.W.2d 759, 770 (Tex. App. -- Tyler 1992, writ denied). This provision warrants against claims arising from documents or acts existing or occurring either before or during Grantor's period of ownership and dates back to the sovereignty of the land. However, in a special (also known as a limited) warranty, Grantor warrants only against parties claiming by, through, or under Grantor and not otherwise. *Paul v. Houston Oil Co. of Texas*, 211 S.W.2d 345, 356 (Tex. Civ. App. -- Waco 1948, writ ref'd n.r.e.). In a general warranty or limited warranty, Grantor warrants that there are no encumbrances (see annotations to definition of Permitted Exceptions, *supra*) and warrants title to the grantee. Warranty of title is said to encompass the warranty of quiet enjoyment. Jack E. Fields, *Real Estate Deeds and Warranties*, Advanced Real Estate Law Course, State Bar of Texas (1986). Historically, the covenants of seisin and right to convey are synonymous, and in the absence of any qualifying language, are incorporated into every conveyance. *Childress v. Siler*, 272 S.W.2d 417, 420 (Tex. Civ. App. -- Waco 1954, writ ref'd n.r.e.). However, the recent Texas Supreme Court case of *Chicago Title v. Cochran*, 63 Tex. Sup. J. 1421 (Tex. 2020) has thrown this axiom into doubt, essentially holding that a standard Special Warranty did not imply a covenant of seisin and limited the liability of the grantor from a total failure of title arising in the chain prior to the grantor's title. Subsequent discussion has suggested that appropriate drafting and specific mention of the covenant or a recitation indicating that the tract is “property I own” may create a covenant of seisin in connection with a special warranty deed. See State Bar of Texas Real Estate Forms Manual. The covenant of warranty of title is an agreement TLTA Title Insurance & Doc Prep: Preparing a Deed- Page 3 that upon failure of title, the covenantor will compensate for any loss sustained; it is an assurance or guaranty of title - the obligation is that the covenantor/grantor will defend and protect the covenantee/grantee against the rightful claims of all persons. *Barfield*, 844 S.W.2d at 770 (citing *Gibson v. Turner*, 294 S.W.2d 781 [Tex. 1956]). The purpose of a covenant of warranty is to indemnify the covenantee/grantee against loss or injury sustained by a failure or defect in title. *Moore*, 202 S.W.2d at 453. See example attached as Appendix A.

(iv) Implied Covenants

Generally, a warranty deed creates express warranties arising by virtue of the general warranty provision contained in the deed, and also implied warranties that arise by virtue of the "grant" or "convey." Tex. Prop. Code § 5.023 implies by reason of the use of "grant" or "convey" only that "prior to the execution of the conveyance, the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee; and that at the time of the execution of the conveyance, the estate is free from encumbrances." These implied covenants may be the basis for a lawsuit as if they had been expressed in the conveyance. Also, every conveyance of land is presumed to be a fee simple unless stated otherwise. See Tex. Prop. Code § 5.001; *Reeves v. Tawery*, 621 S.W.2d 209 (Tex.Civ.App.-Corpus Christi 1981, writ ref'd n.r.e.). However, a conveyance that purports to transfer a greater right or estate in the property than the grantor possesses transfers only the right or estate that the grantor does possess. See Tex. Prop. Code § 5.003. This does not mean that there may not be an action for breach of warranty, and oftentimes, after-acquired title or springing interests may cure defects in a conveyance.

(v) The "Special" Warranty

The special warranty deed is one often utilized by financial institutions and commercial entities. The special warranty language in the deed is limited to claims to title that arise "by, through or under me, but not otherwise." This particularly protects the grantor from liability with respect to defects arising before the grantor received title to the property. See *Owen v. Yocum*, 341 S.W.2d 709 (Tex. Civ. App.-Fort Worth 1960, no writ). Again see Chicago Title, supra and see example attached as Exhibit B.

(vi) Deed Without Warranty

Likewise, a deed is not required to contain a warranty, and the deed may convey title, but without warranty. See Tex. Prop. Code TLTA Title Insurance & Doc Prep: Preparing a Deed- Page 4 § 5.022(b). A grantor may expressly disclaim any warranties, including implied warranties. Tex. Prop. Code § 5.022(c) and *City of Beaumont v. Moore*, 202 S.W.2d 448 (Tex. 1947). Some possible language to insert in lieu of Warranty is:

"provided, however that Grantor does not warrant [his/her/its] title to the property and the conveyance is made without warranty of title, whether express or implied. Grantor expressly disclaims, excepts, and excludes any and all warranties of title or otherwise from this conveyance, including, without limitation, any warranties arising under common law or under Section 5.023 of the Texas Property Code (or its successor) or any other statute."

(vii) The ‘Covenant of Seisin’

As noted, the implied covenant of seisin has recently been challenged in the context of a special warranty deed. In *Cochran Investments, Inc V. Chicago Title Ins. Co.*, 550 S.W.3d 196 (Tex. App. – Houston [14 Dist.] 2018, the Houston Court of Appeals held that a deed implies the covenant of seisin only if the conveyance includes a representation of ownership. A simple special warranty deed did not meet this requirement. The Supreme Court took a slightly different tack and indicated the Special warranty was an exclusion or limitation of liability. Parties may want to include such a representation – taking care not to step into quit claim language. The deed still needs to “grant, sell, and convey” an estate, but it may be prudent or desirable to include language that the estate is owned by the grantor.

b. Is there a prior lien? If so, is the loan to be assumed by Grantee? Or, taken subject to?

(i) Grantee should execute Deed to confirm acceptance of Grantee’s obligations/acceptance of Property encumbered by lien. Texas Property Code Section 5.016 has a number of disclosures and requirements for a conveyance of a residential property encumbered by a lien.

c. Owelty Deed

(i) Is the transfer ordered pursuant to a divorce settlement? If so, did the divorce decree create an owelty situation?

(ii) Is there a partition agreement?

(iii) What is the character of the Property? Is it separate property? If so, will the proposed transfer change the character? The owelty deed and lien are used in connection with a partitioning of co-tenancies in real property. "Owelty" is an adjustment of equities between the parties when the property is unequally divided, or is sold to the other. The owelty lien is an encumbrance similar to a vendor's lien which attempts to encumber the entirety of the property to balance the equities. *Sayers v. Pyland*, 161 S.W.2d 769 (Tex. 1942). This, of course, presents particular problems in the context of homestead, because a lien is being placed upon the entirety of the homestead when only a portion is actually being conveyed. Accordingly, in 1995, the Texas Constitution provided that an owelty lien may be created by written agreement of the parties, or the debt of one spouse in favor of the other resulting from a division or an award of the family homestead in a divorce proceeding. Thus, any time property held in co-tenancy is being conveyed in a manner to one of the co-tenants with a lien upon the entirety of the property, owelty deeds and owelty deeds of trust should be considered.

d. Be careful with Tax Deeds. They are subject to rights of redemption, but only by the taxpayer.

e. “Friendly” deeds between related entities need to be carefully considered. A general warranty deed will preserve title policy coverage but subject the grantor to claims by others later in the chain of title. A special warranty deed will eliminate most, if not all, policy coverage. The T-1 Owners Policy does define “Insured” to include deeds without consideration involving wholly owned entities. Also, some practitioners are experimenting with “limited general warranties.”

III. RECITALS

- a. Not required but can be used to explain the transaction.
 - (i) Grantor conveying less than 100% of Grantor’s interest in the Property
 - (ii) Grantor identified on Deed but not included in chain of title.
- b. “As Is” conveyances – have Grantee execute the deed to confirm acceptance.

IV. CONSIDERATION

- a. True Consideration for the transfer:
 - (i) Is it a gift? If you use a Cash Deed, you may turn separate property into community property.
 - (ii) Fulfillment of an obligation (under a Contract for Deed or other agreement)
 - (iii) Does loan amount exceed purchase price? If so, limit the vendor’s lien in the Deed. However, note that a standard deed references the lender’s deed of trust. If there is additional collateral securing the purchase, that deed of trust should also be referenced.

- b. Is consideration required?

If a deed is used purely as a conveyance, consideration is not required. *Crane v. Glenney*, 352 S.W.2d 773 (Tex.Civ.App.-Houston 1961, ref. n.r.e.); this allows for the unqualified use of a gift deed, *Kunkel v. Kunkel*, 515 S.W.2d 941 (Tex.Civ.App.-Amarillo 1974, ref. n.r.e.); nor is it required for a quit claim. *Ervin v. Ervin*, 624 S.W.2d 264 (Tex.Civ.App.-Eastland 1981, err. dis.)

The use of the term \$10.00 and other good and valuable consideration permits oral testimony to evidence the true consideration if necessary to show the contractual nature of the transaction. *Latham v. Dement*, 409 S.W.2d 429 (Tex.Civ.App.-Dallas 1966, ref. n.r.e.). See example attached as Appendix C.

Consideration for a correction deed is the correction itself. *Tatum v. Blackstock*, 418 S.W.2d 269 (Tex.Civ.App.-Waco 1967, ref. n.r.e.).

- c. Nor is a date required. *Rosestone Properties v. Schlieman*, 662 S.W.2d 49 (Tex.Civ.App.-San Antonio 1982, ref. n.r.e.)

V. PARTIES TO DEED – MUST HAVE A GRANTOR AND GRANTEE

a. Grantor

(i) Is the Grantor married? Does spouse need to join in the conveyance? See Texas Family Code §5.001.

(ii) Is the Grantor an Entity? Who has the authority to sign on behalf of the Entity? If the grantor is an entity, an individual acting on behalf of the entity must have authority according to the organizational documents. Every entity in the State of Texas will have written organizational documents, with the exception of a general partnership which may be oral. In that case, all partners should sign. Many organizational documents will require a meeting and resolution of directors, managers, members, or the like, and that resolution must be obtained. Also, when dealing with limited partnerships, keep in mind that often one partner or limited partner may have veto power or required approval, and that approval must be obtained. Finally, the entity must be properly created and in good standing, authorized by the State to conduct business. This will require checking with the State to assure the entity's authority to do business. If the entity has dissolved, then, at a minimum, its owners, or the heirs of those owners, must join in any conveyance.

Texas Property Code Section 2.019, effective September 1, 2019, permits an "Affidavit of Authority to Transfer" for use by an LLC, Limited Partnership, or Professional entity for transfers not exceeding &1,000,000.00. This section may be useful for qualified entities that do not have current documentation or authority documents, but are otherwise in good standing. A number of qualifications for the signator and transferor must be met. The affidavit must be recorded, and it is valid for one year, unless earlier terminated by recording a written termination.

(iii) Check the Grantor against the contract and commitment.

(iv) Associations and Churches

An association is a group of persons without a charter acting together for the achievement of a common purpose. It is not a corporation or a partnership. An association is often used synonymously with "society." In dealing with an "association," it is critical to determine just what kind of entity, if any, is involved. One should be certain to make the appropriate inquiries to determine for sure that the organization is not incorporated and does not have recognized formalities for ownership.

In general, an unincorporated association may not hold title to real property. In such a situation, in order to hold property, title must be held by the individuals collectively, in the name of a trustee or trustees, pursuant to TUNA, infra, or the members may incorporate. Certain fraternal orders may be organized for charitable benevolent purposes and may be incorporated. Tex. Rev. Civ. Stat. art. 1399, et seq. Non-profit

institutions, including those devoted to charitable, benevolent, religious, patriotic, civic, cultural, missionary, education, scientific, social, fraternal, athletic or aesthetic purposes may be organized under the Texas Non-Profit Corporation Act. Tex. Rev. Civ. Stat. Ann. art. 1396.

Certain organized churches have hierarchal organizations, including formal written procedures. In other churches, such as the Roman Catholic Church, only one person is authorized to execute documents regarding real property. A good reference for associations, particularly churches or religious societies, may be found in the 1994 Land Title Institute materials. See M. Baucum, Churches & Other Associations, Texas Land Title Institute, December 1994. Some example forms are attached as an appendix to that article. Most underwriters will also provide sample forms.

The following guidelines are suggested:

Find out who is in charge of the organization and to whom this person reports. Be sure to determine whether or not the organization is incorporated.

Obtain a copy of the charter or other organizational documents. Additionally, review the title history to determine how the property has been transferred or encumbered in the past.

If there are formal organizational procedures, determine and follow those rules. If it is a recognized church, follow the rules set out there. Most underwriters have forms for the Methodist Church, Church of the Nazarene, Presbyterian Church, Church of Jesus Christ of Latter Day Saints, Lutheran Church, Episcopal Church, Assembly of God, Baptist Church, Pentecostal Church of God of America, Church of Christ, and Christian Church. One should take care in connection with determining the organizational affiliation of churches in Texas as there are many independent churches without a formal alliance but which utilize common names. Also, you will find on frequent occasions, churches acting independently in name and acts, but which are aligned with a formal organization.

Most actions will require member approval. A resolution will be required.

Again, remember that the members may establish a corporation or a trust. Otherwise, all members will have to sign. A determining factor, and one of which you should be aware, is the manner in which the entity took title or has encumbered title, if it has already done so. A complete chain of title needs to be maintained, particularly if the entity has organizational changes after taking title.

(v) Texas Unincorporated Non-Profit Association Act

Also in 1995, the Texas Legislature passed the Texas Unincorporated Non-Profit Association Act (TUNA). Previously, an unincorporated association was not a recognized legal entity in Texas, and issues often arose as to its authority to acquire, hold and

transfer property. If proper steps are taken, TUNA makes unincorporated non-profit associations of three or more members legal entities under Texas law, and establishes rules regarding power and authority to hold real property.

Pursuant to TUNA, an unincorporated non-profit association may acquire, hold, encumber or transfer real property in its own name. To transfer real property, an unincorporated non-profit association must file a Statement of Authority with the county. The statement must set forth the name of the association, its address and the name or title of the person authorized to transfer property. This statement of authority must be executed by someone other than the person who is authorized to deal with the real property. This statement of authority will be conclusive in favor of the person who gives value without notice that the person lacks authority.

Additionally, an unincorporated non-profit association may be liable for, and enforce its rights, under contract. A judgment against an unincorporated non-profit association may not be satisfied against a member, unless the judgment is also against that member.

Unincorporated non-profit associations are required to keep books and records for a minimum of three years after the end of the fiscal year.

Any closing relying on this Act and a Statement of Authority should ensure that the Statement of Authority:

is recorded in the Real Property Records and within the past five years;

is executed by someone other than the person authorized and making the transfer;

has not been amended or canceled.

A copy of the Articles of Association should be reviewed.

b. Assumed Name/Doing Business As

(i) A conveyance must be from a person or entity. Keep in mind that a d/b/a is neither – it is merely an assumed name. Therefore, when you identify the grantor in the deed, make sure that you refer to the grantor by the grantor’s name followed by “d/b/a grantor’s assumed name.”

(ii) You should verify that the assumed name certificate is properly filed with the Secretary of State and that it meets the requirements of Texas Business and Commerce Code §71.051 (person) or §71.101 (entities).

c. Grantee

(i) Who is identified as a purchaser on the contract?

(ii) What if the deed of trust includes persons who are not identified as purchasers on the contract?

(iii) The grantee also presents some problems peculiar to title insurance. Arguably, a deed cannot pass title to a grantee that is not in existence. *Wilson v. Deering, Inc.*, 415 S.W.2d 475 (Tex.Civ.App.- Eastland 1967, no writ). Likewise, a conveyance to a fictitious person is inoperative. *Jones v. Ware*, 230 S.W. 1008 (Tex.Civ.App.-Texarkana 1921, no writ). This presents a particular problem in the event of straw buyers and the insuring of a deed of trust lien to a lender. However, again, arguably, a grantee does exist in those circumstances, and is not a fictitious person. The straw buyer does exist, and title was vested in the grantee identified at closing, and a lien has been created against the property. There was also an intent to convey the property, and there is not a forgery which obviously would cause the deed to be void.

(iv) A minor point, but an important one in connection with the preparation of deeds and recording. Tex. Prop. Code § 11.003 requires that each instrument conveying an interest in real property, in order to be recorded, must include "a mailing address of each grantee appear[ing] in the instrument, or in a separate writing signed by the grantor or grantee and attached to the instrument."

VI. WHAT IF ONE OF THE PARTIES IS A TRUST/ESTATE/GUARDIAN?

a. Conveyances to and from a Trust

(i) Trustee of the Trust must have the authority to act on behalf of the Trust and must be identified on the Deed. Use a certificate of trust?

(ii) Review Certificate of Trust in order to properly identify Trustee and Trust on Deed.

(iii) A trust is simply a fiduciary relationship in which, a trustee holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another. A legal estate is vested in the trustee, and the equitable title is vested in the beneficiary. Thus a deed to a trust should name the trustee(s) as the grantee(s). The settlor, or creator of the trust, may be the trustee, and the settlor or trustee may also be a beneficiary. A trust where legal title and all of the equitable interest reside in one person is not a trust. In a situation where this has occurred, the trustee should convey title as trustee and as an individual.

A trust, whose property consists of real property, is created by a writing evidencing the terms of the trust and bearing the signature of the settlor. The most common trust is an express trust, arising by an express agreement or by the direct and positive acts of the parties by some writing, will or deed. A trust can be created by operation of law, typically a court order.

In the situation of an express trust, the primary inquiry will be the powers of the trustee pursuant to the writing.

A trust often encountered in real estate transactions is the blind trust. Here, the property is conveyed or transferred to a trustee in trust but the conveyance or transfer does not disclose the trust or identify the beneficiaries. When title to the property is held in this manner, the trustee may convey, transfer or encumber the title of the property without subsequent question by a person who claims to be a beneficiary under the trust or who claims by, through, or under an undisclosed beneficiary.

A problem which may arise is the death of a blind trustee who is a title holder of record. In order to convey the property, one needs to determine and provide satisfactory proof as to the real parties in interest. Those parties may then convey the property. Obviously, if a trust agreement exists, it may well provide for handling in the event of the death of the trustee.

A word of caution, however, is appropriate when there is actual knowledge of a trust agreement. Where a trust is known to exist, this provision of the Texas Trust Code is not applicable. See Texas Property Code §§ 101.001, 114.0821. The purpose of the Texas Trust Code was to eliminate the requirements to determine whether or not a trust, in fact, exists and any limitations on authority which might exist under such trust.

Also note that the blind trust statute ceases to apply if there is an identification of the beneficiary in the deed into the trustee or a subsequent document filed of record.

b. Conveyances from Estates

(i) Is the Executor Independent? If so, no need to reference court order. But I still like to reference the civil action.

(ii) Is the Executor Dependent? If so, the Deed needs to reference the court order confirming sale.

(iii) The death of a potential grantor also presents peculiar challenges in that title is deemed in Texas to have passed at death. Tex. Probate Code § 37. However, in the event of a will, the will must be probated for it to have effect. The will may create an independent executor with power of sale, an independent executor without power of sale, or a dependent administration. The will and probate must be carefully examined for the authority of the individual or individuals acting on behalf of the estate. One must take particular care in the event of an independent executor seeking to sell property of the estate in the absence of an explicit power of sale in the will.

Additionally, keep in mind that an administration can be opened for up to four (4) years after death. Tex. Probate Code §§ 73, 74. Transfers by heirs of a deceased within the four (4) year period are inherently risky in the absence of a probated will or court approval. When

circumstances justify it, or four (4) years have passed, most title companies utilize an Affidavit of Heirship to give comfort as to the grantor's authority.

c. Conveyances by Guardians

(i) Reference the court order authorizing the sale in the deed. Additionally, in Texas, Court approval may be required in many situations where a disability is present. The disability may be mental incompetence, minority status, guardianship, or even a receivership. In those cases, a standard procedure must be followed, including application to the Court, Order of Sale, Report of Sale, and the Order Confirming Sale which should be referenced in the conveyancing document.

VII. PROPERTY DESCRIPTION

a. What does the Grantor intend to convey? Review the contract.

b. Does the legal description adequately describe the Property? Does it close? If there is a survey, does it match? If you are not using a survey description, why not?

c. Any estates or interests being excepted or reserved from the conveyance must also be adequately described.

(i) Mineral reservations – the deed should also specify whether surface rights are being waived. Remember, if the Grantor does not own all of the minerals, he/she cannot waive all of the surface rights. Best practice is to have grantee sign acceptance. Understand the TREC addendum – it is not fully consistent with traditional mineral law definitions.

(ii) Title exceptions – does the contract require that Deed specifically list the permitted exceptions (generally do not include unrecorded items from the title commitment).

d. Can the description be found on the ground?

VIII. EXCEPTIONS TO WARRANTY

a. Types – Easements, Minerals?

b. But not “matters of record”

c. No warranty is legally required. Tex. Prop. Code §5.022(b)

d. Exceptions and Reservations. An exception is an exclusion from the grant and operates for the benefit of the grantor only, to the extent that the ownership is forfeited in the grantor. *Coyne v. Butler*, 396 S.W.2d 474 (Tex.Civ.App.-Corpus Christi 1965).

e. A “subject to” clause should primarily be used to inform the grantee and limit the warranty for interests already outstanding. See *Gonzalez v. Janssen*, 553 S.W.3d 633 (Tex. App. – San Antonio 2018) Accepting a deed “subject to” acknowledges the existence of the recorded interests or restrictions, but does not prevent a grantee from challenging them. See *Jue T. Garcias Enter. V. Snadon*, 751 S.W.2d 914 (Tex.App. – Dallas 1988).

IX. RESERVATIONS FROM CONVEYANCE

- a. Easements retained by Grantor
- b. Royalty, other mineral interest

c. A reservation is a creation by and on behalf of the grantor of a right issuing out of what is granted. *York v. Kenilworth*, 614 S.W.2d 468 (Tex.Civ.App.-Waco 1981, writ ref'd, n.r.e.). In the absence of language to the contrary, a general warranty passes the interest of the grantor without reservation or exception. Tex. Prop. Code § 5.001; *Garbin v. Hudson*, 353 S.W.2d 508 (Tex.Civ.App.-Texarkana 1961, ref. n.r.e.). If the reservation or exception is in favor of a stranger to the deed, it creates no interest in the stranger. *Large v. T. Mayfield, Inc.*, 646 S.W.2d 292 (Tex.Civ.App.-Dallas 1983, ref'd n.r.e.). The grantor should take care to clearly state all reservations. See *Combest V. Mustang Minerals, LLC*, 502 S.W.3d 173 (Tex. App – San Antonio 2016, pet. denied).

X. HANDLING TAXES

- a. Prorating? What about exemptions?
- b. Rollback? What does contract say?
- c. Mailing address issues

XI. OTHER ISSUES

- a. Subdivision issue? See Local Government Code Sections 212.004 and 232.001
- b. Proper acknowledgment. See Texas Property Code Sections 12.001 and 13.001, and Texas Civil Practice and Remedies Code Section 121.
- c. Confidentiality Notice. See Texas Property Code Section 11.008.
- d. Correction Instruments. See Texas Property Code Sections 5.027-50.31. A substantive change requires re-execution by all parties.
- e. Contracts for Deed. A deed is still required. There are numerous requirements applicable to residential property. See Texas Property Code Sections 5.061 – 5.066.

f. Delivery. A deed must be delivered in order to be operative. Recording of the deed is *prima facie* evidence that delivery has been effected. *Austin v. Bice*, 586 S.W.2d 931 (Tex.Civ.App.—Waco 1979, no writ). Keep in mind that in order to record a legal document, it must be properly acknowledged, Tex. Prop. Code § 12.001 and Tex. Civ. Prac. & Rem. Code Ch. 121, and must contain the promulgated "Notice of Confidentiality Rights" on the first page. Tex. Prop. Code § 11.08.

g. Habendum Clause. There are no Texas cases specifically requiring the inclusion of a "habendum" clause in a deed; however, the issue has been examined by Texas courts in connection with conveyancing instruments. The purpose of the habendum clause is to define the estate to be taken by a grantee and is customarily introduced in the instrument by the words "to have and to hold." It has been held that the customary habendum clause is not necessary for the validity of a conveyancing instrument so long as the necessary information can be obtained from the instrument as a whole. *Harris v. Strawbridge*, 330 S.W.2d 911, 915 (Tex. Civ. App. -- Houston, 1959, writ ref'd n.r.e.) (holding that "[i]f from the whole instrument we can ascertain a grantor and a grantee and there are operative words or words of grant showing an intention by the grantor to convey title to land which is sufficiently described to the grantee, and it is signed and acknowledged by the grantor, it is a deed"). The Texas Supreme Court has held that in the event of a conflict between the habendum clause and the granting clause, the granting clause prevails. *Veltmann v. Damon*, 701 S.W.2d 247, 248 (Tex. 1985).

h. Divorce. Property held as a community which is in the process of divorce, or has been subject to a divorce creates its own particular problems. If the divorce is final, ideally, the property interests have been transferred by special warranty deeds or the like. It is possible to transfer title within the divorce decree, but it should be done with granting language and additionally language divesting the other of the property interest. That Divorce Decree should be recorded to evidence the transfer of title. Additionally, care should be taken in the event of a default divorce, especially checking for effective service within the first two (2) years. If the divorce is not final, both parties should execute the legal documents. Some title insurers will insure a purchase by one divorcing spouse, including a warranty deed with vendor's lien, because of the existence of a vendor's lien, but it does have additional risk. An additional concern during the pendency of a divorce is the possible existence of a receivership. If a receivership has been established and the property placed with the receiver, even both members of the community together lack authority to convey or pledge the property.

i. Transfer on Death Deeds (TODD). As of September 1, 2015, the Texas Legislature has approved the use of a (TODD) instrument to operate as a type of "will substitute" for real property, allowing a property owner to transfer real property to a named beneficiary upon the owner's death without the need for the beneficiary to go through probate administration. See Tex. Estates Code § 114.001 et seq.

A TODD must contain the essential elements and formalities of a recordable deed and state that the transfer of an interest in real property to the designated beneficiary is to occur at the transferor's death. It is effective without consideration or notice to the beneficiary. The document must be recorded before the death of the transferor, but it does not become effective until death. More recent legislation has created the ability to name multipole and alternate beneficiaries. Unless specified otherwise, if a beneficiary predeceases the grantor the interest is distributed among the

remaining beneficiaries. In addition a beneficiary may now disclaim an interest under a TODD, in the manner set out in the Estates Code.

A TODD is revocable by recording one of the following in the county where the deed is recorded before the death of transferor: (i) a subsequent TODD that revokes the previous one expressly or by inconsistency, (ii) an instrument of revocation that expressly revokes part or all of the TODD, or (iii) the transfer of the property to another party before death. A will may not revoke or supersede a TODD.

Note: A TODD does not create a legal or equitable interest in the beneficiary during the transferor's lifetime, and it does not affect the transferor's homestead rights, exemptions, or rights to transfer the property during his or her lifetime. In addition, importantly, a power of attorney may not be used to create a TODD.

XII. CONCLUSION

Preparing a deed begins with following the contract, if one exists, and then ensuring consistency with the commitment, survey, and deed of trust. Changes to the "deal" that affect the deed should be evidenced by an amendment to the contract. If the deed includes provisions, limitations, and the like, it may be appropriate to have the grantee sign the deed to accept it.