A Paralegal's Guide to Deed Drafting: *People and "Things" That Own Property*

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A PARALEGALS GUIDE TO DEED DRAFTING
PEOPLE AND "THINGS" THAT OWN PROPERTY

The simple answer appears to be that anyone and everything can be an owner and a grantee of a deed that transfers property. This "simplety" is dead wrong!

A. WHO CAN BE A SELLER/TRANSFEROR? WHO CAN BE A BUYER/TRANSFEREE?

Any person or legal entity can hold title to a property. A person must be mentally sound. An entity must legally exist such that there is a person who has the authority and position to convey the property.
Transfers from or to a mentally unsound person may be void, rather than voidable.

B. WHAT HAPPENS WHEN YOU GET THE NAME(S) WRONG?

You make work for attorneys who have to fix it and who might be hired to sue you for getting it wrong! It may take a corrective deed if the person/entity who has to convey or receive the property/deed is willing. It may take a court proceeding and order to "fix" what could have been handled at the outset.

C. WHAT HAPPENS WHEN THE NAMES CHANGE?

It may take a proper recitation, or it may take proper recordation … and don't assume either unless you've done the proper research and talked to the entity that is willing to ensure a proper transfer of property without warts and blemishes.

GREAT FAILS AND WHY WE SHALL NEVER SPEAK OF THIS AGAIN

A. BUYING SWAMP LAND

Does a seller really know what has been sold and does a buyer really know what has been purchased? There are some great internet examples of both extremes. They are comical, but more importantly, they are scary. Don't be an internet story.

B. IT'S ALL IN THE FOLLOW THROUGH IF YOU'RE JUST PASSING BY…

Being good at deed transfer requires a keen and steady hand … and patience and perseverance! The easy part is "finding a form" that looks proper in the applicable forum. The hard part is making sure that all the "fill in the blanks" and "what we're really trying to accomplish here" occurs…without a hitch.

Make a checklist. Be better than Santa (don't make a list and just check it twice).

C. SIX EYES AND THREE MOUTHS MAKES FOR A HAPPY DEED MONSTER…

Being a solo practitioner of any type is great when talking about overhead but lousy when talking about having "someone to bounce issues off of" to make sure things turn out right. Don't be solo if you're choosing to be involved in deed preparation and transactions. It sets you up for the epic fail of "assuming" you're right. Have two other sets of eyes check your work, ask questions, insist on answers. Never let the arrogance of experience and knowledge "cloud" your judgment of making sure everything is properly handled and all bets are not only "off", but the wager office is closed! This is to say that everyone should be accountable for making sure that intake, preparation, attendance at the closing and proper recordation have occurred.

MR. (OR MISS) BAD EXAMPLES:

Egan v. Bauer, 322 N.W.2d 413 (Neb. 1982)

Action, filed on August 7, 1980, alleging professional malpractice consisting of preparation of quit claim deed in December 1977, by which former client asserted that she wanted to leave her husband her property in event of her death, which she asserted was not to be recorded and which was recorded on January 3, 1978 and mailed to former client with recording stamp on it, and alleging that client and her husband were divorced in 1979 and that in October 1979 client received notice from sheriff advising her that he had levied upon property for judgment against her former husband, was barred by statute of limitations

Shoemaker v. Gindlesberger, 887 N.E.2d 1167 (OH 2008)

Held that based on the strict rule of privity, a beneficiary of a decedent's will may not maintain an action for legal malpractice based on negligence, against an attorney who had been retained by the decedent for preparation of the will and for preparation of a deed, as to the preparation of a deed that results in increased tax liability for the decedent's estate.

Denzer v. Rouse, 180 N.W.2d 521 (WI 1970)

held that where attorney's alleged negligence in preparation of deed occurred in 1947 and real estate purchaser's injury from negligence occurred on date of consummation of the real estate transaction in 1947, purchasers' malpractice action against attorney's estate brought more than six years after injury was barred, regardless of date of discovery of injury.

Kalb v. Wise, 2020 WL 6388363 **(ID August 2020)**

Deed conveying mother's interest in mobile home, as part of divorce property settlement agreement, was not a testamentary instrument, and thus mother's attorney who prepared deed did not have duty to beneficiary of mother's will to prepare deed so as to effectuate mother's intent as expressed in testamentary instruments; deed granted recipients sequential life estates in home with remainder interests going to other beneficiaries, and thus home never became part of mother's probate estate.

Kailikea v. Hapa, 13 Haw. 459 (HA 1901)

This is a suit in equity wherein the relief prayed for is that the court declare null and void a certain deed executed on or about the thirty-first day of March 1894, by complainant Kailikea (w) to respondent John Hapa. The grounds alleged in support of the prayer are that Kailikea, who is now about forty years of age, "was born an idiot and has remained non compos mentis from her birth to the present time," and that the respondent named procured the execution of the deed by fraudulent pretenses and deceit. The consideration named in the deed is one hundred dollars, while the value of the land thereby conveyed is alleged in the bill to be one thousand dollars. It further appears from the bill that Hapa subsequently conveyed the land in question to respondent Kapali, the latter, it is averred, taking with full knowledge of Kailikea's mental unsoundness and of the fraud alleged to have been practiced upon her.

The answer of Kapali (Hapa filed no answer) denies the truth of the averments of idiocy and mental unsoundness of Kailikea and of fraud and admits that the consideration of the deed was one hundred dollars and the value of the land six hundred dollars. The court below granted a decree as prayed for and from that decree the case comes on appeal to this court.

The main issue in the case is as to whether or not Kailikea was, at the time of the execution of the deed, an idiot or mentally incapable of making a contract. On this issue considerable evidence was adduced by the parties herein. To review this evidence in detail seems to us to be unnecessary. While the allegation of idiocy, if that term means a total lack of understanding from birth, has not, in our opinion, been satisfactorily established, still we are satisfied upon all the evidence and find that ever since her early childhood Kailikea has been and at the time of the execution of the deed was mentally unsound to such a degree that she was incapable of executing a valid deed. We are satisfied, further, from the evidence that Hapa, who is the half-brother of Kailikea, and Kapali had, at the time of the making of the deeds under consideration, full knowledge of Kailikea's mental

condition and incapacity.
In view of these facts the deeds were properly declared null and void and ordered cancelled and set aside. The decree appealed from is affirmed.

Campbell v. Kerrick, 142 Ky. 279 (KY 1911)

A conveyance by an insane person is merely voidable, but the facts that the grantee did not know of the insanity and that the conveyance was obtained without fraud and for an adequate consideration does not prevent an avoidance thereof.

"The contract of a person of unsound mind, like that of an infant, is not void, but voidable only, if made before inquest. If a second purchaser for value and without notice purchases from a first purchaser who is charged with notice, he thereby becomes a bona fide purchaser and is entitled to protection. Where a deed is not void ab initio, but only voidable the title passes to the grantee, and consequently a sale by him to a bona fide purchaser without notice passes the title."

It is not alleged in the petition that the appellee Isaac Tabb knew when he purchased the land from Kerrick that appellant was of unsound mind or incapable of making a contract when he sold and conveyed the land to Kerrick, or that he was a party to or knew of the alleged fraud by which the latter obtained the deed from appellant; it is not even alleged that appellant was a person of unsound mind or incapable of contracting when Kerrick sold and conveyed the land to the appellee Tabb, or, if such was then his condition, that it was known to Tabb. He must therefore be regarded a bona fide purchaser of the land and without notice of appellant's alleged mental incapacity to contract when he sold it to Kerrick.

Memmer v. United States, 2020 WL 6437749 (USCtClaims November 2, 2020)

In this Rails-to-Trails case, plaintiffs own real property adjacent to railroad lines in southwestern Indiana. They contend that the United States violated the Just Compensation Clause of the Fifth Amendment to the United States Constitution by authorizing the conversion of the railroad lines into recreational trails pursuant to the National Trail Systems Act ("Trails Act"), thus acquiring their property by inverse condemnation. This case presents an issue of first impression: whether there is a compensable taking in the situation in which the issuance of a Notice of Interim Trail Use or Abandonment ("NITU") did not lead to a trail-use agreement, the NITU expired, and the railroad company did not file a notice of consummation of abandonment despite having no intention to use its line.

At the time the deeds were executed, Indiana law provided:

> Any conveyance of lands worded in substance as follows: "A.B. conveys and warrants to C.D." [here describe the premises] "for the sum of" [here insert the consideration] the said conveyance being dated and duly signed, sealed and acknowledged by the grantor, shall be deemed and held to be a conveyance in fee simple to the grantee, his heirs and assigns ....

Ind. Rev. Stat. ch. 23, § 12 (1852) (recodified at Ind. Rev. Stat. ch. 18, § 2927 (1881)). Further, "if it be the intention of the grantor to convey any lesser estate, it shall be so expressed in the deed." Id. § 14 (recodified at Ind. Rev. Stat. ch. 18, § 2929 (1881)). Of course, not all deeds conform to the statutory language. With respect to such deeds:

> There are several rules of construction to be used when construing the meaning of a particular deed. The object of deed construction is to ascertain the intent of the parties. In so doing, a deed is to be regarded in its entirety and the parts are to be construed together so that no part is rejected. Where there is no ambiguity in the deed, the intention of the parties must be determined from the language of the deed alone....
>
> A deed that conveys a right generally conveys only an easement. The general rule is that a conveyance to a railroad of a strip, piece, or parcel of land, without additional language as to the use or purpose to which the land is to be put or in other ways limiting the estate conveyed, is to be construed as passing an estate in fee, but reference to a right-of-way in such a conveyance generally leads to its construction as conveying only an easement.

Brown v. Penn Cent. Corp., 510 N.E.2d 641, 643-44 (Ind. 1987) (citations omitted); accord Ross, Inc. v. Legler, 245 Ind. 655, 199 N.E.2d 346, 348 (1964) ("A deed, when the interest conveyed is defined or described as a 'right of way,' conveys only an easement in which title reverts to the grantor, his heirs or assigns upon the abandonment of such right-of-way."); Richard S. Brunt Tr. v. Plantz, 458 N.E.2d 251, 256 (Ind. Ct. App. 1983) (considering a deed in which the grantors "convey[ed] and quit claim[ed] ..., for railroad purposes, the following real estate," and holding that "[r]eference to the intended use of the land indicate[d] that an easement was conveyed" because "the grantors would have no reason to specify the use if conveying a fee simple"). But see Poznic v. Porter Cnty. Dev. Corp., 779 N.E.2d 1185, 1190-92 (Ind. Ct. App. 2002) (holding that a deed that conveyed to the railroad company "[f]orever, a strip of land for railroad purposes" conveyed a fee simple and, in so holding, declined to treat the phrase "for railroad purposes" as limiting language, noted that the deed did not include a statement indicating that the deed would be void if the strip of land was not used for railroad purposes, and remarked that the deed did not include the

term "right-of-way").

***9** "Deeds generally contain three important clauses: the granting clause, the habendum clause, and the descriptive clause."[8] Clark, 737 N.E.2d at 758. Reference to a "right-of-way" may appear in any of them. See, e.g., Ross, Inc., 199 N.E.2d at 349 (rejecting, as "an overrefinement of the rules of construction," the contention that use of the term "right-of-way" in the descriptive clause of a deed is meaningless when the term is not included in the deed's granting clause or habendum clause, and holding that "[t]he description clause of a deed may be employed to describe the quality as well as the dimensions and quantity of the estate conveyed"); CSX Transp., Inc. v. Rabold, 691 N.E.2d 1275, 1278 (Ind. Ct. App. 1998) (holding that when the term "right-of-way" is used in the descriptive clause "in reference to the subject matter of the deed," and the deed does not contain the term "fee simple," the deed conveys an easement); see also Prior v. Quackenbush, 29 Ind. 475, 478 (1868) ("The office of the habendum is properly to determine what estate or interest is granted by the deed, though this may be performed, and sometimes is performed, by the premises, in which case the habendum may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises." (internal quotation marks omitted)); Claridge v. Phelps, 105 Ind.App. 344, 11 N.E.2d 503, 504 (1937) ("[W]hen the granting clause of a deed is general or indefinite respecting the estate in the lands conveyed, it may be defined, qualified, and controlled by the habendum."). But see Clark, 737 N.E.2d at 758 (remarking that when the term "right-of-way" appears "outside of the granting clause, the term is of limited value because it has two meanings[:] 1) a right to cross over the land of another, an easement, and 2) the strip of land upon which a railroad is constructed"). Indeed, even if the granting clause "favors the construction of the deed as conveying a fee simple absolute to the railroad company, such language is just a factor in determining whether the parties intended to grant a fee or an easement"; courts will also examine "other parts of the deed to see if the grantor expressed an intention to convey a lesser estate than fee simple." Tazian v. Cline, 686 N.E.2d 95, 98 (Ind. 1997).

In addition to language expressly defining or describing the interest conveyed, evidence of the parties' intent to convey an easement may appear in the title of the deed. See Clark, 737 N.E.2d at 758 (remarking that although "the cover and title of the instrument" are not considered "where the granting language is clear and unambiguous[,] ... the title may provide additional evidence of intent where the language of the deed is unclear").

Such evidence may also include the amount or type of consideration described in the deed. See Tazian, 686 N.E.2d at 99 ("When attempting to ascertain the intent of the parties to a conveyance to a railroad, appellate courts of this state look at the consideration paid to the grantee railroad."); Richard S. Brunt Tr., 458 N.E.2d at 255 ("[W]here the consideration is nominal or where the only consideration is the benefit to be derived by the grantor from the construction of the railroad rather than the full market value for the interest acquired reflects the intent to create an easement."). However, neither the title of the deed nor the consideration described therein conclusively establishes the conveyance of an easement. See Clark, 737 N.E.2d at 758 ("[T]he title ... is not dispositive of the nature of the conveyance."), 759 ("[L]ack of consideration or nominal consideration alone is not sufficient cause for setting aside a deed. ... [N]ominal monetary consideration, alone, does not make the instrument ambiguous, nor does it create an easement."); Richard S. Brunt Tr., 458 N.E.2d at 255 ("Although such consideration is not by itself persuasive that the parties intended to convey an easement, it is just one more factor held to indicate an easement ....").

Ultimately, in construing deeds purporting to convey property interests to a railroad company, courts must be cognizant that:

> Public policy does not favor the conveyance of strips of land by simple titles to railroad companies for right-of-way purposes, either by deed or condemnation. This policy is based upon the fact that the alienation of such strips or belts of land from and across the primary or parent bodies of the land from which they are severed, is obviously not necessary to the purpose for which such conveyances are made after abandonment of the intended uses as expressed in the conveyance, and that thereafter such severance generally operates adversely to the normal and best use of all the property involved. Therefore, where there is ambiguity as to the character of the interest or title conveyed such ambiguity will generally be construed in favor of the original grantors, their heirs and assigns.

***10** Ross, Inc., 199 N.E.2d at 348; see also Penn Cent. Corp. v. U.S. R.R. Vest Corp., 955 F.2d 1158, 1160 (7th Cir. 1992) ("The presumption is that a deed to a railroad ... conveys a right of way, that is, an easement, terminable when the acquirer's use terminates, rather than a fee simple.").

Schlossberg v. Estate of Kaporovsky, 2020 WL 4496139 (Fla. 4th DCA August 5, 2020)

Held that:

[1] trustee and settlor were authorized to execute quit claim deed

transferring condominium to themselves, thus, trustee's sale of condominium was valid, and

[2] purported purchaser was entitled to status of a bona fide purchaser for value.

Generally, void deeds are limited to forged deeds or deeds that violate the constitutional protection of homestead.

A deed of a person alleged to be incompetent or procured by fraud, overreaching, or undue influence is voidable but is not void ab initio.

To be a bona fide purchaser, three conditions must be satisfied: the purchaser must have (1) acquired the legal title to the property in question; (2) paid value therefore; and (3) been innocent of knowledge of the equity against the property at the time when consideration was paid, and title acquired.

Purported purchaser of condominium unit, which had been transferred from revocable trust to settlor and trustee, was entitled to status of a bona fide purchaser for value and was thus to protection from claim that deed was void or voidable, where purchaser's title to the property was valid, purchaser purchased condominium for value, and there was no claim that purchaser had any knowledge of alleged undue influence with respect to transfer of condominium from revocable trust to settlor and trustee.

Ex parte Lindsey, 298 So.3d 1061 (AL January 10, 2020)

Attorney's purported client raised a new issue in her second amended complaint based on legal-malpractice claim under the Alabama Legal Services Liability Act (ALSLA), and thus the second amended complaint started a 30-day window for purported client to make a jury demand as to the new issue raised in the second amended complaint, which was that attorney improperly represented both purported client and vendor; original and first amended complaints stated that the claim was based on allegation that attorney breached his duty of care when he misrepresented that property that purported client purchased was free and clear of any encumbrances to the title, which was an issue on which purported client had waived a jury trial for failing to make a timely demand for one.