



## **A Primer on Deeds in Texas**

### **INTRODUCTION**

A deed is a written document that conveys legal title to real property. It is different from a promissory note or a real estate lien note, which is a promise to pay a sum of money to a lender; and a deed of trust, which provides a lender with remedies, including foreclosure, if a borrower defaults on a note. These three documents are the three principal documents in most Texas real estate transactions.

There is no “standard form” for a deed. Texas does have, however, certain rules that apply if a deed is to be valid. For example, the intent to convey property must be clear from the wording; the property must be adequately described; and the deed must be signed and acknowledged by the grantor. This article addresses the deeds commonly used in Texas.

### **RECORDING A DEED IS NOT A NECESSITY**

There is no requirement that a deed be recorded in the county clerk's real property records in order to be valid. The deed only needs to be executed and delivered to the grantee. At that time, the transfer is fully effective between grantor (seller) and grantee (buyer). Recording is simply used to give notice to the public of the transfer and, most importantly, establishes priority in the event a questionable seller gives more than one deed to the property. Recording makes it easier for title companies to research and insure the chain of title. Recording also informs the taxing authorities where they should send the ad valorem tax bill.

### **PURCHASE PRICE NOT REQUIRED IN DEEDS**

In Texas, it is customary to recite that the consideration paid is “Ten dollars and other valuable consideration.” While recording gives the public notice that a transaction concerning the property took place, therefore, preserving the chain of title, it is believed that it is not the public’s business what the purchase price was. The parties can always choose to show the actual price if they wish.

### **SIGNING THE DEED**

The deed must be signed before a notary public by the seller. The buyer’s signature is not required unless the deed contains specific agreements on the part of the buyer that the buyer makes in exchange for the transfer. To be enforceable, the specific agreements should be stated in the deed and the buyer should sign it.

### **SALE OF PROPERTY AND EXISTING INDEBTEDNESS**

Title to the property can be transferred even if money is owed to a lender. Title and debt are different concepts. A “subject to deed” refers to acquiring title to property while expressly providing that the buyer assumes no liability for existing debts and liens.

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The following is a sample "subject to" clause that can be included in the deed:

“This conveyance is made subject to any and all indebtedness of Grantor and liens against the Property, including but not limited to that certain indebtedness and liens securing same evidenced by a note in the original principal amount of \$\_\_\_\_, dated \_\_\_\_\_, executed by Grantor and payable to the order of \_\_\_\_\_, which note is secured by a vendor’s lien retained in deed of even date recorded at Clerk’s File No. \_\_\_\_\_ in the Official Records of Real Property of \_\_\_\_\_ County, Texas, and is additionally secured by a deed of trust of even date to \_\_\_\_\_, Trustee, recorded at Clerk’s File No. \_\_\_\_\_ in the Official Records of Real Property of \_\_\_\_\_ County, Texas. Grantee does not assume payment of this or any other indebtedness of Grantor.”

#### “AS IS”

As Alicia Silverstone said in the movie *Clueless*, “as is.” Seriously, what does that even mean (in the real estate context)? There may be times where a grantor may be willing to sell only on an “as is” basis. “As is” refers to the condition of the property rather than the condition of the title. In other words, an “as is” deed may also be a warranty deed – the two are not mutually exclusive. Express and implied warranties of title may be present; however, there are no warranties made as to the state or condition of the land or any improvements upon it.

The following is a sample of an “as is” clause in a deed:

“The Property is conveyed and accepted "AS IS," in its present physical condition, with all faults and defects, known or unknown, and without warranties, express or implied, except for warranties of title as may be expressly set forth and limited herein.”

#### GENERAL WARRANTY DEED

The term “warranty deed” is used to refer to a deed that contains both express and implied warranties. A general warranty deed is the preferred form of deed for a buyer because it expressly warrants the entire chain of title, all the way back to the sovereign, and binds the grantor to defend against any title defects, even if those defects were created prior to the grantor’s period of ownership. The following is a sample general warranty clause:

“Grantor binds Grantor and Grantor’s heirs, executors, administrators, successors and assigns to warrant and forever defend all and singular the Property to Grantee and Grantee’s heirs, executors, administrators, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.”

“Covenant of seisin”, an implied warranty, provides that the grantor presently owns the property that is conveyed, i.e., he has not previously conveyed it to someone else. “Covenant against encumbrances” refers to undisclosed liens that diminish the monetary value of the land. Section 5.023 of the Texas Property Code details these implied warranties.

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## SPECIAL WARRANTY DEED

In the case of a special warranty deed, title is warranted only from the grantor – and no further back than that. The grantor’s liability for title defects is, therefore, expressly limited to his period of ownership. The following is a sample special warranty clause:

“Grantor binds Grantor and Grantor’s heirs, executors, administrators, successors and assigns to warrant and forever defend all and singular the Property to Grantee and Grantee’s heirs, executors, administrators, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, when the claim is by, through, or under Grantor, but not otherwise, except as to the Reservations from Conveyance and the exceptions to Conveyance and Warranty.”

## DEED WITHOUT WARRANTIES

A deed without warranties is a conveyance of real property without warranties, express or implied, as to any matters whatsoever. This is a sample of a no-warranties conveyance clause: "Grantor, for the consideration and subject to the Reservations from Conveyance and Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’s heirs, executors, administrators, successors, and assigns forever, without express or implied warranty. All warranties that might arise by common law as well as the warranties in Section 5.023 of the Texas Property Code (or its successor) are excluded."

## QUITCLAIM DEED

A quitclaim deed is not a true deed at all. Rather, it merely conveys whatever interest the grantor may have in a certain property. A true deed should always be obtained from one or more persons in the property’s history. If a grantor is unable or unwilling to provide any warranties, then a deed without warranties should be used instead of a quitclaim.

## ASSUMPTION DEED

Assumption deeds contain covenants of general or special warranty. The difference is that assumption deeds expressly provide that the grantee will assume liability for and promise to pay one or more existing liens against the property. The consideration clause in an assumption deed may read as follows:

“Ten dollars (\$10.00) and other valuable consideration, the receipt and value of which is hereby acknowledged, including Grantee’s assumption of and promise to pay, according to its terms, all principal and interest remaining unpaid on that certain note (the "Assumed Note") in the original principal amount of \$\_\_\_\_\_, dated \_\_\_\_\_, executed by \_\_\_\_\_ and payable to the order of \_\_\_\_\_ (said payee together with its successors and assigns being referred to herein as "Lender"), subsequently assigned to and now held by \_\_\_\_\_. The Assumed Note is secured by an express vendor’s lien and superior title retained in deed of even date recorded at Clerk’s File No. \_\_\_\_\_ in

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the Official Records of Real Property of \_\_\_\_\_ County, Texas, and is additionally secured by a deed of trust of even date (the "Deed of Trust") in favor of \_\_\_\_\_, Trustee, recorded at Clerk's File No. \_\_\_\_\_ in the Official Records of Real Property of \_\_\_\_\_ County, Texas. As further consideration, Grantee promises to keep and perform all of the covenants and obligations of the Grantor contained in the Assumed Note and the Deed of Trust and to indemnify, defend, and hold Grantor harmless from any loss, attorney's fees, expenses, or claims attributable to a breach or default of any provision of this assumption by Grantee. Grantee shall commence payments on the Assumed Note on or before the next regular due date under the Assumed Note."

Under an assumption deed, the grantee becomes obligated to the grantor – but, it should be pointed out, not to the lender, since the grantee has not signed the note. Similarly, the grantor has not been released from the lender's note, unless the lender has approved the assumption and expressly released the grantor in writing.

#### **WRAPAROUND DEED**

A wraparound transaction or "wrap" is a form of creative seller-financing that leaves the original loan and lien on the property in place when the property is sold. The buyer makes a down payment and signs a new note to the seller (the "wraparound note") for the balance of the sale price. This wraparound note, secured by a new deed of trust (the "wraparound deed of trust"), becomes a junior lien on the property. The buyer makes monthly payments to the seller on the wraparound note and the seller in turn makes payments to the original lender. The original lender's note is referred to as the "wrapped note," and it remains secured by the "wrapped deed of trust." The buyer receives a "wraparound deed" which places title to the property in the name of the buyer.

The consideration clause in a wraparound deed may read as follows:

"Ten dollars (\$10.00) and other valuable consideration, including execution of a note (the "Wraparound Note") of even date in the principal amount of \$\_\_\_\_\_, executed by Grantee, and payable to the order of Grantor. The Wraparound Note is secured by a vendor's lien retained in this Wraparound Deed and by a Wraparound Deed of Trust of even date from Grantee to Sean Clemmensen, Trustee."

#### **FORECLOSURE DEED OR TRUSTEE'S DEED**

A trustee's deed is delivered by a lender's trustee to the successful bidder at a foreclosure sale. The lender bids the amount of the debt (plus accrued fees and costs) and acquires the property. If the sale generates proceeds in excess of the debt, the trustee must distribute the excess funds to other lienholders in order of seniority and the remaining balance, if any, to the borrower. Prop. Code 51.009 states that a buyer at a foreclosure sale "acquires the foreclosed property 'as is' without any expressed or implied warranties, except as to warranties of title, and at the purchaser's own risk; and is not a consumer." Even with these limitations, a foreclosure deed is probably the cleanest title obtainable, even though it does not eliminate taxes owed.

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## DEEDS AND DIVORCE

When divorces occur, a special warranty deed should contain the following additional clause:

“Consideration for this transaction is the division of property pursuant to a Final Decree of Divorce dated \_\_\_\_\_ entered in Cause No. \_\_\_\_\_, IN THE MATTER OF THE MARRIAGE OF \_\_\_\_\_ AND \_\_\_\_\_, in the \_\_\_\_\_ District Court of \_\_\_\_\_ County, Texas.”

The deed may also include an “owelty of partition” that creates a lien in favor of the grantor to secure payment of a certain sum from the other spouse. This is used to equalize the overall division of property. A divorce decree is not sufficient to transfer title. A special warranty deed and usually a deed of trust to secure assumption should be executed.

## DEED IN LIEU OF FORECLOSURE

A deed in lieu of foreclosure is a specialized instrument designed to transfer property to a lender in satisfaction of a debt and in exchange for a full and complete release. These deeds begin with a general statement such as:

“This Deed is executed and delivered by Grantor and accepted by Grantee in lieu of Grantee demanding and collecting the Indebtedness and in lieu of the necessity for Grantee to give notice of default, notice of intent to accelerate, notice of acceleration, notice of posting for foreclosure, and conduct of a foreclosure sale of the Property.”

Few lenders today accept these as a means of avoiding foreclosure. The reason is that the foreclosure process itself is advantageous to the lender – it cleans up the title by eliminating junior liens, and it establishes a deficiency (the difference between the price at foreclosure and the balance on the note) for which the lender can then sue the borrower.

## CORRECTION DEED

A correction deed relates back in time to the original deed that contained some sort of error or mutual mistake. The original deed may have been any of the types of deeds discussed above. The correction deed corrects the mistake but leaves the other terms of the conveyance intact. The most common mistake is an error in describing the property. Generally, a correction deed should be signed by both the grantor and grantee, and should usually be executed if an error in a previous deed is found.

The following is a sample correction deed clause:

“This deed is made as a correction deed (“Correction Deed”) to that certain General Warranty Deed (“Corrected Deed”) dated \_\_\_\_\_, executed by Grantor herein to Grantee herein, and recorded under Clerk’s File No. \_\_\_\_\_ in the Official Records of Real Property of \_\_\_\_\_ County, Texas, for the purpose of correcting the following: [e.g., error in the property description]. This Correction Deed correctly describes the Property that was intended to be conveyed and should have been conveyed

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by the Corrected Deed. Other than this stated correction, this Correction Deed is intended to restate in all respects the Corrected Deed, and the effective date of this Correction Deed relates back to the effective date of the Corrected Deed.”

#### DEEDS AND CO-OWNERSHIP

Co-ownership in Texas is presumed to be as “tenants in common,” which means that the heirs of each owner will inherit that owner’s respective interest upon death. The decedent’s interest passes vertically. This is contrasted with “joint tenancy with rights of survivorship”, which provides that a co-owner will inherit the other co-owner’s interest upon death.

#### FRAUDULENT DEEDS

Fraudulent deeds are void. Action must be taken in order to establish that the deed is fraudulent. A county clerk should take action if there is “a reasonable basis to believe in good faith that document or instrument previously filed or recorded or offered or submitted for filing or for recording is fraudulent.” *See Texas Government Code Section 51.901.* The aggrieved party may file an affidavit that includes the property’s legal description, send a copy of the affidavit to the perpetrating party, and demand that the fraudulent deed be cancelled.

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