

CONVEYANCE OF TITLE IN NEW MEXICO

NMREC Course No. 21010121
3 Elective Hours



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I. TITLE VESTING - ESTATES

- A. Fee Simple. This is an estate in land in common law. Fee simple ownership of land in most common law countries is usually the most complete ownership interest in real property that a person can have.

Fee simple ownership is an absolute ownership; however, it is limited by the following:

- Taxation
- Eminent Domain
- Police Power
- Escheat

Fee simple ownership can also be limited by certain encumbrances or a condition on the deed.

Fee Simple Absolute: If previous grantors do not create any type of conditions to any of the subsequent grantees regarding the ownership estate of the conveyed property, it is said that the title being conveyed is fee simple absolute.

Fee Simple Defeasible (Determinable): This type of ownership estate is created when a grantor places a condition on a fee simple estate in the deed. A common condition on deeds in certain communities is the sale of liquor on the property. Most deeds with this condition contain a reversionary clause if it is violated.

- B. Leasehold. A form of property tenure in which one party buys the right to occupy land or a building for a given period of time. Terms of a leasehold agreement that creates the leasehold estate are contained in a lease which has elements of contract law and property law.
- C. Equitable. A type of an estate in New Mexico that a buyer has under a New Mexico Real Estate Contract.
- D. Life Estate. An estate in real property designating ownership of land for the duration of a person's life. This estate ends at the death of owner of the life estate (life tenant).

II. CONVEYANCE DOCUMENTS

A. Elements of a Conveyance Document:

- i. Grantor: In a transfer (grant) of real estate, the grantor is the one who makes the transfer (grant) and executed the conveyance document.
- ii. Grantee: In a transfer (grant) of real estate, the grantee is the one to whom the transfer (grant) is made.

Joint Tenants: In a joint tenancy, the grantees own the property as a group; however, the grantees still have the right to individually convey their interest during their lifetime. The most important element of a joint tenancy is the creation of a “right of survivorship.”

Upon the death of one of the joint tenants his/her interest automatically passes to the surviving joint tenant(s). A joint tenant cannot dispose of his/her interest separately by a last will and testament.

In New Mexico, a joint tenancy must be explicitly stated on the conveyance document. In other words, the conveyance document has to clearly state that the grantees own the property as “joint tenants.” The conveyance document need not state “with rights of survivorship” as that right is already implied.

There are a couple of rules when dealing with joint tenancy to remember:

- * Joint Tenants must have equally interest in the property.
- * Joint Tenants must also acquire their interests at the same time under the same document.

A joint tenancy may be terminated by one of the joint tenants conveying his/her interest to a third party without the other joint tenant. In this case, the right of survivorship is terminated by the conveyance.

Tenants in Common: A tenant in common occurs when two or more individuals own property where there is no right of survivorship. A tenant at common may dispose of his/her

interest upon his/her death to heirs or devisees under a will. Interests may be held in unequal shares; for example, “an undivided one-third interest and an undivided two-thirds interest.” If the interests are not specified, the tenants are presumed to hold equal shares in the property.

- iii. Words of Conveyance: According to New Mexico Law, the word “grant” shall be sufficient word of conveyance without the use of “give, bargain, sell and convey”. (§47-1-32 NMSA 1978)
- iv. Legal Description: Conveyance documents must contain descriptions of the real property being conveyed . This description often takes the form of a metes and bounds description using the Public Land Survey system or by referencing a recorded plat/subdivision filed in the office of the County Clerk where the real property is located.
- v. Signatures: All conveyances of real estate must be subscribed (signed) by the grantor or by his legal agent or attorney.
- vi. Acknowledgments: The conveyance document must be properly acknowledged before a notary public prior to recording in the office of the County Clerk.

According to state law and notary must sign and affix his/her official notary seal to the acknowledgment. The notary must also include his/her commission expiration date.

- vii. Delivery/Recording: In New Mexico, all deeds, mortgages, and any other instruments affecting real title are to be recorded in the office of the County Clerk where the real property is located. Such records are notice to the world of the existence and contents of the instruments recorded.

B. Warranty Deed: The Warranty Deed is the most common type of deed used to convey property. Under a Warranty Deed the grantor warrants that:

- * he/she has clear title and possession of the property or interest conveyed;
- * he/she has the right to convey property to the grantee;

- * there are no liens, mortgages, easements or other interest in the property that diminish the ownership rights of the grantee except those listed in the deed (which is why a Warranty Deed must be taken subject to any existing encumbrance against the title and which is also why the following language should appear after the legal description: “Subject to reservations, restrictions and easements of record, and ad valorem property taxes for the current year and subsequent years.”)
- * the grantees will not be disturbed in their possession of the property in the future by the grantor or someone claiming a title superior to the grantor; and
- * the grantor will defend the grantee’s title against claims of third parties whose interest arose prior to the conveyance.

C. Special Warranty Deed: The Special Warranty Deed contains the same warranties that exist on the Warranty Deed; however, the grantor only warrants the title only against defects and encumbrances created during the time he/she held title. This Special Warranty Deed is frequently used by lenders who are selling REO properties they had previously foreclosed. It is also used in conjunction with a New Mexico Real Estate Contract conveying title from the contract buyer back to the contract seller in the case of default under the Real Estate Contract.

D. Quitclaim Deeds: Quitclaim deeds are used to convey whatever interest a grantor has in a property as of the date the deed. A Quitclaim Deed contains no warranty covenants. A Quitclaim Deed will not convey any after-acquired interest the grantor may subsequently acquire. Quitclaim Deeds are commonly used in inter-family transfers (divorces), to quiet title or establish a property boundary.

Most title insurance underwriters will not insure title acquired by Quitclaim Deed.

E. Special Master’s Deeds: In litigation, such as a foreclosure action or a quiet title suit, the court may order conveyance of property to one of the parties in the suit. A court-appointed special master executes such a deed. Most often Special Master’s Deeds are used in foreclosure suits.

- F. Deed of Distribution/Personal Representative's Deeds: A court order appointing a Personal Representative of a decedent's estate should expressly grant the authority to convey title.
- G. Transfers by Operation of Law: New Mexico Property Law makes provisions for a court decree to operate as a good and sufficient conveyance of title. Most often this decree will be issued based upon a suit that has been brought before the court. Quiet Title Suits and Acts of Condemnation are examples of suits in which the court decree will convey title to one of the parties on the suit.

The important thing to remember about any order of decree issued by a New Mexico State Court is that there is a thirty-day appeal period; therefore, this period will need to have expired without any appeal before relying upon the order of decree. The exception to this is if the order is stipulated.

- H. Transfer on Death Deed: New Mexico Law makes a provision for a grantor to execute a Transfer on Death Deed whereby he/she transfers ownership of his/her interest to a grantee beneficiary/beneficiaries upon his/her death.

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

- What does the Transfer on Death (TOD) deed do? When you die, this deed transfers the described property, subject to any liens or mortgages (or other encumbrances) on the property at your death. Probate is not required. The TOD deed has no effect until you die. You can revoke it at any time. You are also free to transfer the property to someone else during your lifetime. If you do not own any interest in the property when you die, this deed will have no effect.
- How do I make a TOD deed? Complete this form. Have it acknowledged before a notary public or other individual authorized by law to take acknowledgments. Record the form in each county where any part of the property is located. The form has no effect unless it is acknowledged and recorded before your death.
- Is the "legal description" of the property necessary? Yes.
- How do I find the "legal description" of the property? This information may be on the deed you received when you became an owner of the property. This information may also be available in

the office of the county clerk for the county where the property is located. If you are not absolutely sure, consult a lawyer.

- **Can I change my mind before I record the TOD deed? Yes. If you have not yet recorded the deed and want to change your mind, simply tear up or otherwise destroy the deed.**
- **How do I "record" the TOD deed? Take the completed and acknowledged form to the office of the county clerk of the county where the property is located. Follow the instructions given by the county clerk to make the form part of the official property records. If the property is in more than one county, you should record the deed in each county.**
- **Can I later revoke the TOD deed if I change my mind? Yes. You can revoke the TOD deed. No one, including the beneficiaries, can prevent you from revoking the deed.**
- **How do I revoke the TOD deed after it is recorded? There are three ways to revoke a recorded TOD deed: (1) Complete and acknowledge a revocation form, and record it in each county where the property is located. (2) Complete and acknowledge a new TOD deed that disposes of the same property, and record it in each county where the property is located. (3) Transfer the property to someone else during your lifetime by a recorded deed that expressly revokes the TOD deed. You may not revoke the TOD deed by will.**
- **I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend or lawyer.**
- **Do I need to tell the beneficiaries about the TOD deed? No, but it is recommended. Secrecy can cause later complications and might make it easier for others to commit fraud.**
- **I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, you are encouraged to consult a lawyer."**

III. NEW MEXICO COMMUNITY PROPERTY

A. History of Community Property: The concept of community property can be traced back to the Spanish influence in New Mexico. There are currently nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin.

B. Basic Elements of Community Property: The following are basic concepts to keep in mind when dealing with community property:

- * There must be a valid marriage. If the parties are not legally married, their property will not be considered “community.” New Mexico does not recognize common law marriages; however, New Mexico recognizes marriages that are valid in other jurisdictions.
- * Property acquired during the marriage by either spouse is presumed to be community property.
- * Community debts are those debts incurred by either spouse during the marriage. Each spouse is fully liable for community debts.
- * Either spouse may manage community property during the marriage; however, New Mexico Law requires the signature of both spouses when conveying interests in real property.
- * Upon divorce, the community property is divided one-half to each spouse.

C. Separate Property: In order to understand community property under New Mexico Law, it is important that we look at the definition for property that is considered separate. In New Mexico, Separate Property is defined as:

- * Property acquired by either spouse before marriage or after decree of dissolution;
- * Property designated as separate property by judicial decree;
- * Property acquired by a spouse through gift, will or intestate succession; and

- * Property designated as separate property by a written agreement between spouses, including a deed or contract concerning property held by the spouses as joint tenants or tenants in common, in which it is designated as separate property. (This is what allows us in New Mexico to use a Sole and Separate Property Agreement and Conveyance.)

It is interesting to note that the definition of “community property” is described as property acquired by either or both spouses during the marriage which is not separate property. An example of a negative definition.

- D. Divorce: In most divorce cases, the courts will divide community real property equally between the spouses. The court may also order a sale with the proceeds to be equally divided or the court may equitably award more to one spouse.

Often, there will be an agreement by which spouses agree to a division of the community property including the real property. This agreement will specify that one spouse will take ownership of the real property. Unless the property agreement and/or court decree completely divests title from one spouse to the other, a title underwriter may require a deed from one spouse to the other.

- E. Death: When we talk about the distribution of a spouse’s community interest at death, the following come into play:
 - i. By Last Will and Testament: A spouse may devise his /her separate property and his/her share of community property by will. If the deceased married the surviving spouse after the will was executed and the spouse received nothing under the will, the surviving spouse may be entitled to an intestate share of the estate.
 - ii. By Intestate Succession: If a person dies without a will (intestate), then the decedent’s entire share of the community property passes to the surviving spouse. If the decedent left no children, then the surviving spouse will receive all of the separate property also. However, if the decedent left children, the surviving spouse will receive one-fourth of the decedent’s separate property.

iii. By Affidavit of Surviving Spouse: Small estates transfer of title to homestead property to the surviving spouse may be completed by affidavit (§45-3-1205 NMSA 1978), which provides:

A. Where a husband and wife own a homestead as community property and when either the husband or wife dies intestate or dies testate and by the husband's or wife's will devises the husband's or wife's interest in the homestead to the surviving spouse, the homestead passes to the survivor and no probate or administration is necessary.

B. Six months after the death of a decedent, the surviving spouse may record with the county clerk in the county in which the homestead is located an affidavit describing the real property and stating that:

(1) six months have elapsed since the death of the decedent as shown on the death certificate;

(2) the affiant and the decedent were at the time of the death of the decedent married and owned the homestead as community property;

(3) a copy of the deed with a legal description of the homestead is attached to the affidavit;

(4) but for the homestead, the decedent's estate need not be subject to any judicial probate proceeding either in district court or probate court;

(5) no application or petition for appointment of a personal representative or for admittance of a will to probate is pending or has been granted in any jurisdiction;

(6) funeral expenses, expenses of last illness and all unsecured debts of the decedent have been paid;

(7) the affiant is the surviving spouse of the decedent and is entitled to title to the homestead by intestate succession as provided in Section [45-2-102](#) NMSA 1978 or by devise under a valid last will of the decedent, the original of which is attached to the affidavit;

(8) no other person has a right to the interest of the decedent in the described property;

(9) no federal or state tax is due on the decedent's estate; and

(10) the affiant affirms that all statements in the affidavit are true and correct and further acknowledges that any false statement may subject the person to penalties relating to perjury and subornation of perjury.

C. As used in this section, "homestead" means the principal place of residence of the decedent or surviving spouse or the last

principal place of residence if neither the decedent nor the surviving spouse is residing in that residence because of illness or incapacitation and that consists of one or more dwellings together with appurtenant structures, the land underlying both the dwellings and the appurtenant structures and a quantity of land reasonably necessary for parking and other uses that facilitates the use of the dwellings and appurtenant structures, and provided the full value of this property as assessed for property taxation purposes does not exceed five hundred thousand dollars (\$500,000).

- F. Conveyance of Community Property: All transfers of community property in New Mexico required joinder of both spouses. Any transfer of community property without the joinder of both spouses is void, except for transfers to the other spouse, purchase money mortgages and documents signed under a valid power of attorney from one spouse to another; however, any conveyance signed by only one spouse may be ratified by the non-signing spouse at any time in writing.

A minor person may join with their spouse in valid execution of documents in a transaction requiring joinder. If a spouse is a prisoner of war or missing in action, the law provides for a process by which a court will allow a spouse in New Mexico to convey property without joinder.

IV. ENTITIES CONVEYING TITLE

CORPORATIONS

When dealing with property that is to be conveyed by a corporation, the basic minimum requirements are:

- A copy of the articles of incorporation showing when the corporation was created;
- A certificate from the Secretary of State showing the corporation is in good standing;
- A copy of the by-laws of the corporation to determine if shareholder consent to sale or encumber the corporate real property is necessary;
- A corporate resolution granting authority to the signing individual(s) to act on behalf of said corporation; and
- Use of proper acknowledgment for a corporation.

In New Mexico, a search can be made through the Secretary of State website to determine if a corporation is in good standing.

The link to the website is <https://portal.sos.state.nm.us/BFS/online/corporationbusinesssearch>

LIMITED LIABILITY COMPANIES

Limited liability companies (LLC) exist only under state statute. Limited liability companies are created by filing articles of organization with the Public Regulation Commission. Under New Mexico Law, the members or a designated manager of the company has the authority to act on behalf of the LLC unless otherwise provided for in the agreement.

At a minimum the following will need to be reviewed prior to an LLC conveying property:

- Confirmation that the LLC is a valid entity
- Review of the Articles of Organization
- Determination as to who has the authority to convey the real property.

Again, with a New Mexico Corporation, a search can be made through the Secretary of State website to determine if a New Mexico Limited Liability Company has been registered with their office.

The website like is <https://portal.sos.state.nm.us/BFS/online/corporationbusinesssearch>

PARTNERSHIPS

In New Mexico both general partnerships and limited partnerships may hold title to real property.

- A. General Partnership: General partnerships are created, recognized and governed by common law and statute. New Mexico has adopted the Uniform Partnership Act, §54-1A-101, *et. seq.* NMSA 1978.

Under the act all partners have the authority to act on behalf of the partnership; however, prior to a partnership conveying property the partnership should be reviewed at a minimum to determine the following:

- How the conveyance should be made;
- Who has the authority to sign on behalf of the partnership

In most cases if there is no specific provision for sale or encumbrance of the partnership property, all partners may be required to sign the conveyance document.

TITLE ALERT: In the case where there is not a written partnership agreement, a title company will contact its underwriting counsel to obtain approval before insuring real property in which a partnership owns real property.

- B. Limited Partnership: Limited partnerships are created and exist only under state statute. A limited partnership is created by filing a certificate with the Secretary of State. Limited partnerships are comprised of one or more general partners and one or more limited partners. In most cases, the general partner usually has authority to act on behalf of the limited partnership. The limited partners have no authority to act for the partnership.

The following should be reviewed at a minimum when a limited partnership conveys partnership real property:

- Partnership Certificate and Agreement
- Validity of Partnership

In most cases a determination will need to be made as to whether all parties must consent to a conveyance of partnership real property.

A search can be made of the Secretary of State's website to determine if a New Mexico Limited Partnership is properly registered.

The website link is <https://portal.sos.state.nm.us/BFS/online/BusinessSearch> . Below is a sample of a registered New Mexico Limited Partnership:

Limited Partnership - Domestic - Information

File Number:	LPD2004110102
Status:	Active
Creation Date:	11/1/2004
State of Partnership.:	NM

TRUSTS

In New Mexico, there exists no authority for a trust to hold title to real property. Title to real property should always vest in the Trustee!

When conveying title held by a trustee on behalf of a trust, the trust agreement must be in writing and a copy of the trust should be reviewed. A trustee may also provide a certification of trust pursuant to §46A-10-1013 NMSA 1978. This certification is contain the following:

- 1. that the trust exists and the date the trust instrument was executed;**
- 2. the identity of the settlor;**
- 3. the identity and address of the currently acting trustee;**
- 4. the powers of the trustee;**
- 5. the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;**
- 6. the authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee**
- 7. the trust's taxpayer identification number;**
- 8. the manner of taking title to trust property; and**
- 9. if any action is to be undertaken through an agent, that delegation of the action to an agent is not prohibited by the trust agreement.**

CHURCHES

Real property that is held by a church can often present a challenging situation when the church is to convey that real property.

In order to be considered marketable, title to church property should be vested either in the trustees of the church (unincorporated churches), a corporation (incorporated churches), or in a bishop or other applicable church official (corporation sole churches). Some considerations to be addressed in dealing with churches include:

- Incorporated churches are treated the same way as any other incorporated company.
- Most unincorporated religious organizations are either Ecclesiastical or Congregational in structure
 - Ecclesiastical: When title is held by a religious organization that is subordinate to a general church organization which includes one or more levels of superior governing bodies, the controlling organization will have adopted a written constitution or similar enactment which address the owning, mortgaging and disposition of property. Title may be vested in trustees and any action by the trustees must be supported by an authorizing resolution of the church membership. If title is held in the name of a bishop, an affidavit should be obtained that the individual signing on behalf of the bishop is in fact the person holding that office at the time.
 - Congregational: Property is held by a wholly independent church. Trustees are usually authorized to act upon the majority vote of the members present at a duly called meeting. The church by-laws or other regulations for meetings should be reviewed and a copy of the resolution authorizing the transaction should be reviewed.

GOVERNMENTAL ENTITIES

Federal, state, county and city governments and agencies may hold title to real property. In those cases where the government is conveying title, the following needs to be reviewed:

- a resolution, ordinance or statute permitting the conveyance; and
- documentation establishing authority for the individual to signing on behalf of the entity.

***TITLE ALERT:** If the governmental entity acquired title through seizure or forfeiture, underwriting approval most often will be required in order to insure title. Many underwriters will refuse to insure title recently acquired under tax or drug seizure without a quiet title judgment.*