

## WHEN DOES A DEED CONVEY PROPERTY TO ANOTHER

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I am sometimes asked about the days before Christopher Columbus crossed the ocean blue, how did a buyer of land prove that he or she owned their purchased parcel. Historically, it was called delivery, but what did delivery really mean? During the 15<sup>th</sup> century there was no recording or transfer of paper laying out the land a buyer purchased or was given. The delivery requirement was sufficiently satisfied by the picking up of a clod of dirt and placing it into the hands of the buyer. This form of transfer constituted delivery or conveyance of land from the owner to the buyer. The idea of a written deed recorded with a county did not exist. The area it encompassed was determined by markers on the land (stand of stones, tree or some permanent marker affixed to the ground).

We no longer place a clod of dirt into the hands of the buyer, but do hand to the buyer a piece of paper called a deed. The transfer of a deed constitutes delivery which is a requirement under Florida law. The delivery ceremony is to be performed before the buyer can safely say they own the purchased property. The issue that causes some problems is how is delivery determined. The easiest means is physically handing the document from the seller to the buyer or when the deed is recorded, but what happens if that is not performed.

Suppose you elect to transfer your property to your son or daughter but do not want to give it to them until your death or when some other event takes place (e.g. as a marriage gift). You prepare the deed in advance and when the event takes place you are physically unable to either locate the deed because of some infirmity or cannot perform the transfer. In that situation, the transfer was not complete and the gift never takes place.

Suppose you place the fully executed deed to your son or daughter in your desk drawer which is locked. You don't tell your son or daughter what is in the locked desk drawer. You give to your son or daughter the key to the drawer and instruct them that upon your death they are to open the draw and remove the contents which will be theirs. This is called constructive transfer and would meet the delivery requirements by virtue of having the key to the drawer lock handed over to the son or daughter with the understanding that whatever is in there is theirs following your death.

In one case where this author was involved, a woman and man were having an affair, neither one was married during the course of the affair. The woman had a quit claim deed prepared conveying her property to she and her paramour as joint tenants with right of survivorship in anticipation that they would be married or lovers forever. The deed was never recorded. The couple broke up but they would meet occasionally, have dinner whereupon the woman would tease the ex-boyfriend about conveying the property to him and even showed the envelope containing the deed to her ex-paramour. Somehow or another the paramour got the deed, the woman does not know how, but the paramour stated under oath that she handed it to him (possibly by mistake) one evening during dinner. The woman was unable to recount the events due to a stroke and loss of memory. The court held that voluntary delivery had taken

place even though the intent element had not been proven. Based upon the court's ruling, at the woman's death, the ex-paramour would own the property. The lesson to be learned is not to hold on to deeds if an event does not take place.

What about life estates? A life estate is a convenient means of not having to worry about the transfer of property to another provided the deed is either recorded or the remaindermen have had the deed in their hands. It bypasses probate and upon the death of the grantor, the property, by operation of law, passes to the remainderman. However, there are some potential problems with doing this. The life tenant must continue to maintain the property and avoid waste (e.g. failure to maintain and keep up with the land, taxes or mortgage). In addition, the life tenant must obtain consent from the remaindermen if there is any attempt to make capital improvements to the property; furthermore, the life tenant cannot sell the property without the remaindermen participating and approving the sale. What is often missed is the failure of the life tenant to realize that should the property be sold prior to their death, the profits derived from the sale will be shared with the remaindermen in proportion to said life tenant's age.

An alternative to a life estate is an enhanced life estate (affectionally known as a lady bird deed). This type of deed gives the life tenant the right to remain in control and management of the property by being able to make improvements, sell and mortgage the property without the consent of the remaindermen. This type of deed sounds good but like a standard life estate, it is not without its problems when it comes to liens or judgments. Any lien or judgment against a remainderman will attach to the property at the sale of such property during the life tenants life and at the death of such life tenant. Judgments against a remainderman will not attach to an enhanced life estate provided it is sold prior to the death of the life tenant, but will attach following said life tenant's death.

Is delivery completed when a deed is recorded? The answer is yes provided that the intent of the owner was to release all control of the property at the time of recording. If this is the intent as evidenced by acts of the owner then delivery to release control is met. The intent not to release control can be argued by who records the deed. If a third-party agent records the deed then it is important to understand who instructed the third party to do so.

Delivery of a deed is required in Florida. If you are considering conveying your real property to someone but want to maintain control prior to releasing it, talk to an attorney of your choice and discuss the various means of transferring property upon certain events occurring. Doing so will avoid future misunderstandings and possible litigation.

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