

II. Instruments to be recorded in the Land Records

A. The three fundamental questions for recording an instrument in the Land Records:

1. Is the instrument "recordable"?
2. Have all prerequisites to recording been satisfied?
3. Have all recording fees and taxes been paid?

B. Meaning of "Recordable"

As used herein, a "recordable" instrument is one which (if presented in proper form after complying with any prerequisite procedures) must be accepted for recording in the Land Records. If an instrument is not "recordable," the clerk is not required to accept it for recording in the Land Records — but the clerk may choose to accept such non-"recordable" instrument in his or her discretion. As used herein, "recordable" addresses the fundamental issue of whether the instrument belongs in the Land Records – and the questions of whether the instrument is in proper form, contains all required information, and has been through all prerequisite steps are treated separately

C. Recordable Instruments

The following types of instruments are "recordable" —

1. RP § 3-101(a) — Deed (which includes instruments commonly referred to as deeds, leases, mortgages, deeds of trust, assignments, releases, and any other instrument that conveys, assigns or transfers an interest in real property or any interest appurtenant to real property)
 - (a) "Deed" is defined in RP § 1-101(c) as including "any deed, grant, mortgage, deed of trust, lease, assignment, and release, pertaining to land or property or any interest therein or appurtenant thereto, including an interest in rents and profits from rents."
 - (b) "Grant" is defined in RP § 1-101(e) as including any "conveyance, assignment, and transfer."
 - (c) "Mortgage" is defined in RP § 1-101(i) as "any mortgage, including a deed in the nature of mortgage."

- (d) "Deed of trust" is defined in RP § 1-101(d) as "only a deed of trust which secures a debt or the performance of an obligation, and does not include a voluntary grant unrelated to security purposes."
 - (e) "Lease" is defined in RP § 1-101(h) as "any oral or written agreement, express or implied, creating a landlord and tenant relationship, including any 'sublease' and any further sublease."
 - (f) "Land" is defined in RP § 1-101(f) as having "the same meaning as property."
 - (g) "Property" is defined in RP § 1-101(k) as "real property or any interest therein or appurtenant thereto."
2. RP § 3-101(e) — Memorandum of Lease
 3. RP § 3-101(f) — Memorandum of Option
 4. RP § 3-102(a)(2) — Certain Specified Instruments
 - (a) Notice of deferred property footage assessment for street construction
 - (b) Boundary survey plat by a professional surveyor
 - (c) Assumption agreement (assuming liability for a debt or other obligation [such as a guaranty] secured by a mortgage or deed of trust)
 - (d) Release of personal liability (with respect to a liability secured by a mortgage or deed of trust)
 - (e) Ground Rent Redemption Certificate or Ground Rent Extinguishment Certificate (issued under RP § 8-110)
 5. Elsewhere in the Maryland Code
 - (a) CL § 9-501(a)(1): Financing statement filed as a fixture filing or filed with respect to "as-extracted collateral or timber to be cut"
 - (b) PUC § 8-106(b)(3): Inquisition for Easement for telegraph, telephone or electric facilities

- (c) RP § 4-107: Power of Attorney that authorizes agent to sell and grant real property
 - (d) RP § 4-107(b)(2): Revocation of Power of Attorney that authorized agent to sell and grant real property (even if the Power of Attorney was not recorded)
 - (e) RP § 9-103(b): Declaration of boundaries of land appurtenant to building (with respect to mechanics' liens)
 - (f) RP § 10-104: Land Installment Contract
 - (g) CA §§ 3-311, 4A-706, 8-501.1(k), 9A-906, 10-208(g), & 12-608: Certificate of Conveyance prepared by SDAT
 - (h) TP § 14-822: Certificate of Sale [under TP § 14-820], plus any Assignment of Certificate of Sale [under TP § 14-821]
 - (h) RP § 14-119: **CARROLL COUNTY ONLY** — Cemetery Location Notice
 - (i) E § 9-679(h): **DORCHESTER COUNTY ONLY** — Lien of the Dorchester County Sanitary Commission for unpaid benefit assessments and other charges
6. RP § 3-102(a)(1): "Any other instrument affecting property, including any contract for the grant of property, or any subordination agreement establishing priorities between interests in property"
- (a) Often referred to as "any instrument that touches and concerns real property"
 - (b) Can be broken into three categories:
 - (i) Instruments that affect title to real property
 - (ii) Instruments that create a lien on real property
 - (iii) Instruments that burden real property with an encumbrance or covenants that "run with the land" or that "binds successors and assigns"
7. Instrument supplementing any of the foregoing

D. Deeds – General Warranty, Special or Limited Warranty, or Quitclaim

1. General Warranty – grantor will defend title to the property against all claims (except claims disclosed in the deed or disclosed by reference in the deed) (see RP § 2-105)
2. Special or Limited Warranty – grantor will defend title to the property against all claims allegedly arising by, through, or under the grantor (except claims disclosed in the deed or disclosed by reference in the deed), but will not defend against claims allegedly arising by, through, or under any other person (such as predecessors in title) (see RP § 2-106)
3. Quitclaim – grantor will not defend title to the property; in other words, grantor is basically saying "I'm not saying that I have any ownership interest in the property, but whatever interest I do have in the property (if any) is hereby conveyed"

E. Estates, Tenancies, Legal Title & Beneficial Ownership, and Other Interests

1. Estates –

"Estate" has many different meanings in the law. For example, a "bankruptcy estate" or "decedent's estate" means the totality of assets and liabilities of the bankrupt or decedent, as applicable. But in property law, it means the "kind of interest that an owner has (or owners have) in property" or "the condition or circumstance in which an owner stands with regard to property." In other words, an "estate in property" is the kind of rights included in the ownership interest that an owner has.

(a) Classifications of estates:

(i) Absolute or conditional –

- (1) A "conditional" estate is an ownership interest that can be defeated upon the happening or not happening of some uncertain event. For example, "to John Doe for so long as he lives in the house as his principal residence" creates a conditional estate in John Doe – if he moves out of the house, he loses his ownership interest. Also called a "defeasible" estate ("defeasible" = can be defeated).

NOTE: There can also be a sub-distinction between conditions that automatically defeat the estate (possibilities of reverter) versus those which merely give the right to (but do not require that) the holder of the reversionary interest or remainderman to defeat the estate (rights of entry).

NOTE: RP Title 6 contains statutory limitations on reversions (generally, if the defeasance event does not happen within 30 years, the estate becomes absolute)

NOTE: CJP § 5-114(c) provides that: "Notwithstanding any provision to the contrary in a deed or other written instrument, a failure to comply with a setback line restriction may not cause a forfeiture or reversion of title."

- (2) An "absolute" estate is an ownership interest that is not subject to any uncertain event. For example, "to John Doe for so long as he lives" creates an absolute life estate in John Doe – although the time of death is uncertain, it is certain to occur to John Doe (as far as we know). An "absolute" estate can be "limited" (as strange as that sounds) – a life estate or leasehold estate can be an "absolute" estate.

(ii) Vested or contingent –

- (1) A "vested" estate is an ownership interest definitely held by a person as a present and immediate right (but which may be a right to present or future possession and enjoyment). For example, "to John Doe and his successors and assigns, reserving a life estate to grantor" would create a vested ownership interest in John Doe – an immediate and present ownership right – but John Doe's right to possess and enjoy the property would have to wait until grantor's death
- (2) A "contingent" estate is an ownership interest that is not yet definitely held by a person. For example, "a life estate to John Doe, and then to such of John Doe's children who survive him" would create a vested life estate in John Doe, but the ownership interest in the remainder (*i.e.* who gets possession at his death) is undetermined until John Doe passes and we can then determine which of his children (if any) are still alive. These are the interests that can violate the "Rule Against Perpetuities"

(iii) Present or future/expectant –

- (1) A "present" estate is an ownership interest that includes a present right of use and enjoyment of the property.
- (2) A "future" or "expectant" estate is an ownership interest that may confer a right of use and enjoyment of the property at some later date. Generally, future estates consist of "remainders" and "reversions."
 - (A) A "reversion," "reversionary interest," "possibility of reverter," or "right of entry" is an interest retained by the grantor. For example, if the grantor gives a conditional estate (*see above*) and the condition occurs which defeats the ownership interest granted, then the right of use and possession reverts to the grantor. At common law, such interests could not be transferred, but RP § 6-104 makes them transferrable (which essentially converts them into remainders).
 - (B) A "remainder" is created when the grantor carves out a limited or conditional estate for one person, and then gives the remainder to another. For example, "a life estate to John Doe, the remainder to Richard Roe"

or "to John Doe for so long as he lives in the house, thereafter to Richard Roe."

(c) Kinds of Estates:

(i) Fee Simple –

- (1) Fee Simple Absolute – This is generally what is meant when someone says "fee simple" or "fee" ownership. The person or persons owning property in absolute fee simple vests the right of use and possession of the entire property in the owners, and such owners have the unconditional power to dispose of the property while alive.
- (2) Fee Simple Defeasible – This is a conditional estate (also called a "fee simple conditional"). The ownership interest can be defeated upon the occurrence (or non-occurrence) of a specified event. If the defeasance event occurs, ownership reverts to the grantor. If the defeasance event never occurs, the ownership remains in the grantee.
- (3) Fee Simple Determinable – This is closer to an estate for years or leasehold estate, but rather than expire after a set passage of time, the ownership interest expires upon the occurrence of a specified (and expected) event. A life estate can be classified as a "fee simple determinable."

(ii) Estates for a Term & Leaseholds –

- (1) Estate for a Term – Although rare, an estate for years can be created. Unlike a leasehold estate, a true "estate for years" is not defeasible. It vests in the grantee and lasts for the term stated, no matter what. For example, "an estate for 10 years to John Doe" is not conditional on continued performance under any lease agreement, nor would it be defeated by John Doe's death (if John Doe died before the term was up, the remainder of the term would pass to his heirs/legatees like other property interests).
- (2) Leases – Leases are a mixture of contract and property law. A leasehold estate is like an estate for a term that is defeasible for failure by the lessee to perform under the contractual agreement. Thus the remedies for breach of a lease are a mixture of property remedies with contractual remedies – sometimes these are recognized as different components, but are often mixed together in a confused jumble.

NOTE: In Maryland, we usually use the term "ground lease" to describe a perpetually-renewable long term lease as to which special rules apply. The phrase is also used in Maryland and other jurisdictions to describe a lease of the land only (on which the lessee will put improvements, which improvements the lessee owns in fee simple).

- (iii) Life Estate – Any estate in which the duration is limited to the life of either (1) the person holding the life estate, or (2) another person. For example, "to John Doe, for the life of Jane Doe" is a life estate. Usually it is a kind of fee simple determinable, but it could be used as a grant out of an estate less than fee – such as a life estate under a ground lease.

2. Tenancies – when estates are owned by more than one person

"Tenancy" adds another level of abstraction to ownership interests in property. Any estate can be held by more than one person (or what seems like more than one person).

- (a) Tenancy in Common – Each tenant has an undivided interest in the entire estate held in common. All have the same right of use and possession (to the extent afforded by their estate), but otherwise their interests are separate and distinct. The interests can be in different percentages of the whole. Tenancy in common only requires the "unity of possession" (see joint tenancy *below*). A tenancy in common interest is separately conveyable and inheritable.
- (b) Joint Tenancy with Right of Survivorship – This form of ownership is disfavored (but not prohibited) under Maryland law (see RP § 2-117 for the presumption against joint tenancy). In this tenancy, each tenant has an undivided interest in the entire estate as in tenancy in common (e.g. each has the same right of use and possession to the extent afforded by their estate), but there are some key differences.

First, a joint tenancy must comply with the "four unities" – unity of interest (same estate), unity of time (conveyed in one deed), unity of title (vesting at the same time), and unity of possession (with equal right of undivided possession). If any tenant destroys a unity (such as by granting a lien to, or having a lien attach to, just his interest), the joint tenancy is destroyed as to that tenant. That tenant is then a tenant in common with the remaining joint tenancy.

Second, if the joint tenancy hasn't been destroyed before a joint tenant dies, his interest doesn't pass to his heirs or legatees, but

rather such interest is immediately extinguished. This is the "right of survivorship" included in joint tenancy. Thus, whichever joint tenant survives the others becomes the sole owner as every other interest is extinguished.

- (c) Tenancy by the Entireties – This form is similar to joint tenancy in some respects, but arises from a different foundation. This is ownership of an estate by a marital unit. In this respect, the marital unit is viewed as one person. Subject to federal liens (which are subject to federal common law, which has less and less respect for entireties because few states have such tenancies), neither spouse can destroy the tenancy – only the marital unit (both spouses acting together) can encumber or convey it. However, like a joint tenancy, the "right of survivorship" is included – so that when one spouse dies, that deceased spouse's interest is extinguished (thus leaving the other spouse as the sole owner). Upon a divorce, the "unity of marriage" is destroyed and the tenancy by the entireties automatically becomes a tenancy in common with each former spouse as an equal cotenant.
- (d) Tenancy in Partnership – Prior to the Revised Uniform Partnership Act, a partnership was not a separate "person" from the partners comprising it. Thus property for a partnership would be titled in the names of the partners "as tenants in partnership." Now that a partnership is its own separate legal person, it can hold title in its own name and "tenancy in partnership" is converted to ownership by the partnership in its own name. There are still times where someone may convey "to A and B, as partners," but now the legal owner is the partnership of A and B (thus A and B do not have a tenancy in the estate conveyed, but rather have the beneficial interest in the estate through their partnership's ownership of the estate).

3. Legal title and beneficial ownership –

Record legal title can be held by a person other than the "true" or "beneficial" owner. Sometimes a "nominee" holds record title (often because the real owner doesn't want his or her name on record – or, for stock, because the stock is registered in the name of a nominee company and then the beneficial interest is traded without having to make changes in the stock records). Sometimes legal title is held by a "trustee" in trust for the beneficiary of the trust.

4. Other Interests –

(a) Easements

- (i) Easement - generally, a right of use of or over the real property of another person, such as a right of way; a right to run or use pipes, wires, or other utility services – a burden on a piece of real property for the benefit of either a non-owner or another piece of real property
- (ii) Easement appurtenant - an easement that benefits a particular tract of land; the beneficial rights to the easement become part of the rights included in the ownership of the benefitted parcel
- (iii) Easement in gross (personal easements) - an easement that benefits a particular person, and usually ends with the death of the grantee (such as a right given to a particular person to come onto a property and take water from a spring)
- (iv) Easement by prescription - an easement appurtenant that arises from use of the burdened property for 20 years under "color of right" (similar to adverse possession, but legally imposes the burden of an easement rather than legally investing title)
- (v) Easement by necessity (implied easement) - an easement appurtenant for a right of way and/or utility services when conveyed land is shut off from access to any public right of way by land retained by the grantor
- (vi) Negative Easement - an easement that prohibits certain uses of the burdened parcel, rather than permitting a use on or over the burdened parcel (such as a negative easement for "light and air" by which one owner burdens his property for the benefit of another property by agreeing to not build on his property any structure that would obstruct light and air from reaching the benefitted parcel) – this differs from a restrictive covenant in that there is no requirement of "privity of estate"

(b) Covenants

- (i) Covenant - an agreement, convention or promise contained in a deed or other instrument of writing, by which the owner (usually the grantee) agrees to do or not do something
- (ii) Real covenant - a covenant which becomes bound with the ownership of real property (and which

cannot be separated from it or transferred without it)

Essentials: (1) the maker of the covenant must intend that it run with the land; (2) the subject matter of the covenant must affect or concern the land with which it is intended to run; and (3) there must be "privity of estate" between the party seeking to enforce it and the party allegedly burdened by it

"Privity of Estate" - mutual or successive relation to the same right in property; the party seeking to enforce a real covenant must be a successor assign to the original person(s) to whom the promise was made, while the person against whom the promise is to be enforced must be a successor or assign to the original person(s) who made the promise

(iii) Restrictive covenant - a covenant by which the owner of property agrees to conditions, limitations and/or prohibitions on the use of the property

NOTE: restrictive covenants which limit or prohibit use of property on basis of race, skin color, ethnicity, national origin, etc. are unenforceable

(c) Licenses - a license is a mere personal or revocable privilege to go on the licensor's land for a certain purpose, but which does not operate to confer any title or estate in the land to the licensee; such privilege is personal to the licensee – it cannot be assigned or inherited

NOTE: generally, an instrument giving only a license is not recordable - but can be recorded if license is coupled with an interest in the land itself

NOTE: the most common license of real property is the license given to a customer to enter upon and/or into a place of business