

Muniments of Title

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A muniment of title is a document that evidences ownership of real estate or personal property.¹ “Muniments of title are deeds, wills, and court judgments *through which a particular land title passes and upon which its validity depends.*”² As attorneys, we need to be fluent in the “why” as well as the “how” and what to do when problems emerge with muniments of title.

This presentation addresses the following questions:

1. What issues should attorneys consider when drafting deeds?
2. What issues should attorneys consider when assisting with conveyances by will?
3. What issues should attorneys consider when drafting dissolution of marriage decrees when real estate is involved?

¹ *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 814 (Iowa 2000) (citing Black’s Law Dictionary 1019 (6th ed. 1990) in defining “muniments of title” as “documentary evidence of title.”)

² *City Of Lake View v. Houston*, No. 07-2026, 2008 WL 5412284, at *5 (Iowa Ct. App. Dec. 31, 2008) (citation omitted) (emphasis in original).

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I. Conveying real estate by deed

A. Statutory framework

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B. Types of deeds

1. Warranty deed. *See* Exhibit 1.
2. Quit claim deed. *See* Exhibit 2.
3. Court officer deed. *See* Exhibit 3.

a. Authority to convey. In order for an executor or administrator to convey real estate on behalf of the estate, the abstract must show that the executor has the authority to convey the real estate – either by the will authorizing the executor to convey real estate without obtaining court approval or by receiving authority from the Court to convey the real estate. Note that conveyances that have been recorded longer than ten years ago, even if the fiduciary lacks court approval, are considered valid.³

4. Trustee warranty deed. *See* Exhibit 4.
5. Special warranty deed. *See* Exhibit 5.

³ Iowa Code § 589.11.

C. Anatomy of a warranty deed

1. Parties

a. **Marital status of grantors.** A deed must recite the marital status of individual grantors. *See* Title Standard 5.3. The marital status of the grantees is not material.

1) If the deed was recorded over ten years ago without a recital of the marital status, no further showing is required unless a suit has been commenced or a claim has been filed in accordance with Iowa Code § 614.15. An affidavit verifying the marital status of the grantors is included as Exhibit 6.

2) Note the option of relying on the acknowledgement when ascertaining the marital status of the grantors. Title Standard 5.1 provides:

Issue: When there is a recitation in the body of a deed or in its acknowledgment that the grantors are husband and wife, may the recitation be relied upon even when it appears from preceding instruments in the chain of title that the name of the spouse of the owner was different?

Standard: Yes

This is an interesting title standard given the fact that the notary public is only tasked with verifying the identity – not the marital status – of the person signing the document,⁴ however, it occasionally proves helpful.

b. **Conveyance by attorney in fact.** A power of attorney does not need to recite the legal description of the real estate if the real estate is their homestead property.⁵ However, the deed should recite that the principal is alive and, if the power of attorney is not durable, a recital that the principal is not under disability.

c. The grantee must be an actual person or entity. A deed to the “estate” of a deceased person is a nullity.⁶

d. Requirements for conveyance by entity type

1) **Partnerships.** The Uniform Partnership Act (Iowa Code Chapter 486A) governs partnerships in Iowa, both general partnerships and limited liability partnerships.

⁴ Iowa Code § 9B.5.

⁵ *See* Iowa Code § 561.13.

⁶ GEORGE F. MADSEN. MARSHALL’S IOWA TITLE OPINIONS AND STANDARDS § 4.2(A) (2d ed. 1978).

a) How title should vest. As noted in the comments to Title Standard 12.1, a sample vesting would be: “Enterprise Associates, a Partnership.”

b) Authority to convey. Conveyances from partnerships are governed by Chapter 12 of the Title Standards. Title Standard 12.1 states:

Real property acquired by a partnership and held in the partnership name may be conveyed only in the partnership name. Any conveyance from the partnership so made and signed by one or more members of the partnership, which conveyance appears to be executed in the usual course of partnership business, shall be presumed to be authorized by the partnership in the absence of knowledge of acts indicating a lack of authority and the recitals in the instrument of conveyance shall be accepted as sufficient evidence of such authority.

See also Title Standard 12.2. Title Standard 10.7 was revised March 2014 as follows:

To what extent may Iowa Code § 614.14A be relied upon as a statute of limitations to bar claims seeking to invalidate a deed or real estate contract by a corporation, limited liability company, partnership, cooperative or association based on the allegation that the execution of the instrument was not authorized by the entity?

Standard:

If a deed or real estate contract was recorded prior to July 1, 2013, an action seeking to invalidate the instrument based on the allegation that it was not authorized by the entity is barred after **June 30, 2018**.

If a deed or real estate contract was recorded on or after July 1, 2013, an action seeking to invalidate the instrument based on the allegation that it was not authorized by the entity is barred after two years from the date of recording of the instrument.

c) Structuring the deed. The comments to Title Standard 12.1 provide that the deed may be signed by one or all of the partners.

d) Signature of spouses. There are no marital rights of the spouse of a partner.⁷

2) Corporations

a) Authority to convey. There is a presumption that a corporation is authorized to convey real estate.⁸ However, if the abstract reports

⁷ Title Standard 12.3.

⁸ Title Standards 3.1 and 3.3.

the articles of incorporation, the examining attorney should note any limitations on the authority to convey real estate.⁹

b) Foreign corporations. No additional showing is required.¹⁰

c) Corporate seals. For a corporation having a seal, it may, but need not be attached to the deed.¹¹ A deed does not need to recite that a corporation does not have a seal.¹²

d) Conveyance by a dissolved corporation. A dissolved corporation may carry activities “appropriate to wind up and liquidate its business and affairs” including [d]isposing of its properties that will not be distributed in kind to its shareholders.”¹³

3) **Limited liability companies**

a) Authority to convey. Title Standard 15.3 provides:

15.3 PROBLEM:

Rev. 3/14

If an instrument affecting real estate is executed by a limited liability company, is it necessary to obtain a showing from its certificate of organization, operating agreement, or a duly authorized company resolution that the individual who executed the instrument was authorized to do so?

STANDARD:

NOTE: There are two standards that follow. Because of substantive Iowa Code amendments that became effective on July 1, 2013, there is a standard applicable to instruments executed on or after July 1, 2013, and a different standard applicable to instruments executed prior to July 1, 2013.

⁹ *Id.*

¹⁰ Title Standard 3.2.

¹¹ Iowa Code § 558.2.

¹² Iowa Code § 558.3.

¹³ Iowa Code § 490.1405(1)(b).

FOR INSTRUMENTS EXECUTED ON OR AFTER JULY 1, 2013:

No. However, if the limited liability company's certificate of organization, operating agreement, statement of authority or a duly authorized company resolution are shown in the abstract, the examiner is bound to take notice of any limitations contained in any such documents with respect to the powers of the individual to execute the instrument on behalf of the company.

Authority:

Iowa Code § 489.407 (2013)

2013 Iowa Acts (85 G.A.), ch. 108, § 2 (amending Iowa Code § 489.302)

2013 Iowa Acts (85 G.A.), ch. 108, § 4 (to be codified as Iowa Code § 489.407A)

2013 Iowa Acts (85 G.A.), ch. 108, § 5 (to be codified as Iowa Code § 558.72)

FOR INSTRUMENTS EXECUTED PRIOR TO JULY 1, 2013:

Real property acquired by a limited liability company ("LLC") and held in the LLC name may be conveyed only in the LLC name. Any conveyance from an LLC that is managed by its members so made and signed by a majority of the members and containing a recitation that the conveyance is being made in the ordinary course of the LLC's business or affairs shall be presumed to be authorized by the LLC in the absence of knowledge of acts, facts, or restrictions indicating a lack of authority. Any conveyance from an LLC that is managed by managers so made and signed by a majority of the managers and containing a recitation that the conveyance is being made in the ordinary course of the LLC's business or affairs shall be presumed to be authorized by the LLC in the absence of knowledge of acts, facts, or restrictions indicating a lack of authority.

The record must disclose: (1) whether the LLC is member-managed or manager-managed; (2) whether the conveyance is in the ordinary course of LLC's business or affairs; and (3) the authority of the signer to act on behalf of the LLC.

Absent actual or constructive knowledge to the contrary, and unless a properly filed and recorded Statement of Authority contradicts any of the following showings, evidence of the foregoing matters may be provided of record by one or more of the following: (a) the LLC's written operating agreement; (b) a duly filed and recorded Statement of Authority ; (c) an affidavit signed by a person with knowledge; or (d) a recitation contained in the instrument of conveyance (including the acknowledgement of such instrument). Any instrument of conveyance signed by the person or persons (whether members, managers, or officers) so authorized of record shall be presumed to be authorized by the LLC. If the transaction is not in the ordinary course of business, the consent of all members is required.

Authority:

Iowa Code §§ 489.407(1) and .302 (2013), prior to the enactment of 2013 Iowa Acts (85 G.A.), ch. 108, H.F. 566.

COMMENT:

Iowa Code Chapter 489 (2009) enacts the Revised Uniform Limited Liability Company Act. After January 1, 2011, Chapter 489 governs LLCs. Effective on July 1, 2013, a number of provisions of the Iowa Code relating to LLCs were amended, including §§ 489.302, 489.407, 489.407A, 558.72 and 614.14A. 2013 Iowa Acts (85 G.A.), ch. 108, H.F. 566.

Real property acquired by a limited liability company (“LLC”) and held in the LLC name may be conveyed only in the LLC name. An LLC may be either member-managed or manager-managed. An instrument of conveyance on behalf of an LLC is authorized either: (a) as provided in the operating agreement, (b) as provided in a statement of authority filed with the Secretary of State and county recorder, or (c) with consent of all members in a member-managed LLC or consent of a majority of all managers in a manager-managed LLC. 2013 Iowa Acts (85 G.A.), ch. 108, § 4 (to be codified as Iowa Code § 489.407A).

One of the 2013 amendments was the addition of statutory warranties providing that an instrument of conveyance from an LLC, unless clearly and conspicuously provided to the contrary in the instrument, includes a warranty to the transferee by the person executing the instrument that the person executing the instrument has been duly authorized by the LLC and has the legal capacity to execute the instrument. 2013 Iowa Acts (85 G.A.), ch. 108, § 5 (to be codified as Iowa Code § 558.72). The title examiner may rely upon the statutory warranties as if such warranties were set forth in writing in the conveyance instrument itself.

2013 Iowa Acts (85 G.A.), ch. 108, § 6 (to be codified as Iowa Code § 614.14A) provides a statute of limitations barring claims seeking to invalidate a deed or real estate contract by an LLC based on the allegation that the execution of the instrument was not authorized by the LLC. *See* Title Standard 10.7 and Comment.

b) Foreign limited liability companies. No additional showing is required.¹⁴

¹⁴ Title Standard 15.2.

4) **Municipal corporation,¹⁵ a county,¹⁶ or school district¹⁷**

a) Required showing. The following must be shown of record:

- 1) The resolution to sell the property,
- 2) Proof of publication of the notice, and
- 3) The resolution of the entity following the hearing.

5) **Trusts.** Unlike conveyances from a partnership, corporation, or limited liability company, where the authority to convey is presumed, a deed executed by a trustee must be accompanied by affidavits from both the grantor and grantee pursuant to Iowa Code § 614.14. *See* Exhibits 7 and 8. Section 616.14(7) was added to resolve a division of opinion in the Bar as to the effect of a conveyance to a *trust* rather than a *trustee*. Subsection 7 states: “An interest in real estate currently or previously held of record by a trust shall be deemed to be held of record by the trustee of such trust.”

6) **Churches.** It is prudent to require a showing of the authority of those acting on behalf of a church or other religious organization when conveying real estate.¹⁸ *See* Exhibit 9.

7) **Uniform unincorporated nonprofit associations.** Iowa Code § 501B.6 provides these associations the authority to acquire and transfer interests in real property.

8) **State of Iowa and federal government.** No required showing.

e. **Variation of entity name.** Conveyances and mortgage releases by entities routinely vary. Title Standard 3.4 allows for minor variation (*e.g.*, use

¹⁵ Iowa Code § 364.7. *See also* Marshall §§ 17.2(c) and 17.2(c)(2) and Title Standard 2.1.

¹⁶ Iowa Code § 331.361.

¹⁷ Iowa Code § 297.22 *et seq.*

¹⁸ *See* Marshall § 4.7.

or nonuse of “company” or “incorporated”; the interchange of “&” and “and”) and the inclusion or omission of the location of the entity. If the variation is too large to ignore, then there should be recitals which show the relationships (*e.g.*, First World Universal Bank, Inc., f/k/a Hometown Savings Bank, Inc.). Before trying to obtain a corrective document, consult with the local abstracters to determine whether an affidavit has already been filed in the county which explains the name variation.

f. **Variation of individual name.** Chapter 8 of the Title Standards provides direction for different situations involving variations in individual names. *Minor variations that do not rise to the level of an objection are* (1) surnames that are spelled differently, but sound the same (8.1); (2) inclusion or omission of a middle initial (8.2); abbreviation or spelling out of a name (8.3); (3) variations between a name in the body of a deed and how it is signed where the acknowledgment agrees with either (8.6); and (4) inclusion or omission of descriptive phrases and words (*e.g.*, Jane Doe, wife of John Doe, or Dr. or Mr.) (8.7). *Variations that are objectionable are* (1) changes due to marriage (and by implication divorce) (8.4); and (2) variations in designations such as “Jr.” and “Sr.” where questions of identity are raised (8.7). Resolution of these objections may be by reliance on recital in a conveyance (*e.g.*, Jane Doe, f/k/a Jane Smith) (8.5), affidavits of identity which state the maker’s knowledge in the transaction (8.8), or affidavits of possession under Iowa Code § 614.17A where 10 years have passed since the discrepancy (8.10).

g. **Leaving a blank for grantee’s name.** In some instances (*e.g.*, transactions involving a relocation company representing a seller prior to identifying a buyer, a company handling a property coming from a sheriff’s sale, or uncertainty about how a buyer wishes to take title), when the deed is executed, the grantee’s name is left blank. The grantor must provide authority as to the completion of the deed in order to be valid.¹⁹ Where the grantor dies prior to completion of the deed, the deed is a nullity.²⁰

¹⁹ 23 Am Jur 2D Deeds § 189 (1983).

²⁰ *Id.*

Practice pointer: handling a deed with a blank grantee. If you are closing a transaction where the grantee is blank, you should have documentation that the grantor, or someone acting with the grantor's authority, approved the designation of the grantee.

2. **Words of grant.** To transfer title, "an instrument must contain apt words of grant which manifest the grantor's intent to make a present conveyance of the land by his deed, as distinguished from an intention to convey it at some future time."²¹

3. **Legal description.** The general rule for the sufficiency of a legal description is that a surveyor or engineer, with the aid of extrinsic evidence if needed, can locate the land and establish its boundaries.²²

Practice pointer: carefully proof lengthy legal descriptions. It is imperative that legal descriptions be accurate in instruments impacting the chain of title. Even a small error can create a stray instrument that adversely impacts the chain of title of another property. Metes and bounds descriptions are particularly challenging in this regard. Most abstractors are willing to e-mail longer legal descriptions for preparing deeds or title opinions. Consider pasting long legal descriptions in your e-mail with your title opinion to help the attorney who will prepare the deed.

Practice pointer: source of legal description. When drafting an instrument of conveyance (or a title opinion), do not use the legal description on the cover of an abstract or the county assessor's website. The legal description might have changed without the abstract cover being updated. It is best to use the legal description from the last continuation of the abstract or the deed where the grantors took title.

4. **Notary forms.** 9B.16. Short forms.

The following short form certificates of notarial acts are sufficient for the purposes indicated, if completed with the information required by section 9B.16,

²¹ *Id.* at § 19. *See Sharp v. Bailey*, 14 Iowa 387, 388-89 (1862).

²² *Id.* at § 50.

subsection 1. Note that the acknowledgement should *not* recite the marital status as this is not something required under Iowa Code § 9B.5. The Bar form for the warranty deed has recently been modified to remove the recital of marital status.

a. For an acknowledgment in an individual capacity:

State of _____
(County) of _____

This record was acknowledged before me on _____,
20____ by _____.

(signature of notarial officer)

(Seal, if any)

Title (and Rank)
[My commission expires: ____]

b. For an acknowledgment in a representative capacity:

State of _____
(County) of _____

This record was acknowledged before me on _____,
20____ by _____ (name(s) of person(s)) as
_____ (type of authority, *e.g.*, officer, trustee, etc.)
of _____ (name of party on behalf of whom
instrument was executed).

(signature of notarial officer)

(Seal, if any)

Title (and Rank)
[My commission expires: ____]

D. Appurtenant and incidental property rights, exceptions, and reservations

1. Unless there are exceptions, a deed conveys not only the title to the land, but also any improvements.²³ An appurtenance, as related to property, is a thing belonging to a property “as principal and which passes as an incident to the principal thing.”²⁴

2. A recital that is frequently included on deeds is that the deed is “subject to any easements, restrictions, and covenants of record.” This is not necessary. “It is well established that all easements appurtenant to land conveyed pass to the grantee unless a contrary intention is disclosed by the deed of conveyance, notwithstanding the deed does not purport expressly to include appurtenances.”²⁵ If the contrary was position was true, deeds that do not include such a recital would pass the title without easements or restrictive covenants.

Practice pointer: when a deed should provide recitals. There are occasions where a legal description should include a recital that the real estate is conveyed subject to an easement. This is where the easement is created by reservation in a deed. Sample language (preferably in bold type):

This deed is given subject to an easement reserved in the warranty deed filed _____ in Book _____, Page _____ of the county records.

Practice pointer: use separate instruments to create easements. Easements created by reservation in a deed are more easily missed by abstractors and examining attorneys. The better practice is to use a separate instrument to create an easement. This also allows for a maintenance agreement where needed.

²³ *Schlitz v. Ferguson*, 231 N.W. 358 (Iowa 1930). *See generally* 23 Am Jur 2D Deeds §§ 65-71 (1983).

²⁴ 23 Am Jur 2D Deeds § 66 (1983).

²⁵ *Id.* at § 67.

E. Consideration. The adequacy of consideration is a factor where there the deed might be regarded as fraudulent such as to avoid the claims of a creditor or in determining whether the deed was given because of undue influence or some other factor which calls the validity of the deed into question.²⁶ It is not necessary to recite the nature or amount of consideration on the face of a deed.²⁷ Most deeds will include the recital that the deed is given “for valuable consideration” or “\$1 and other valuable consideration.”

F. Execution, delivery, and acceptance

1. Variation between date of deed and date of recording. The lapse of time between delivery and filing of a deed does not create an objection to title. “The presumption of delivery exists even though the recording is after the grantor’s death but is rebuttable and the burden is on the party asserting nondelivery to so prove by clear, satisfactory, and convincing evidence.”²⁸

2. Important case.

a. *Once a grantor delivers a deed, the grantor no longer has any interest to convey. The addition of a grantee to a deed constitutes a nullity as to that addition. McNertney v Kahler, 710 N.W.2d 209, 212 (Iowa 2006).*²⁹ In this case, a deed from Gerald Menke to Harold McNertney in fulfillment of contract was held in escrow. Once the deed came out of escrow, the phrase “and Thomas Kahler as joint tenants and not as tenants in common with full rights of survivorship” was added to the grantee line of the deed.³⁰ Harold died. The executor of Harold’s estate challenged the addition of Kahler’s name as a grantee. This case is also important for considering what alterations to

²⁶ *Id.* at § 89.

²⁷ *Helms v. Helten*, 290 N.W.2d 876, 881 (Iowa 1980).

²⁸ Title Standard 4.10. *See also* Marshall § 4.10(A).

²⁹ The Court relied on *Ransier v. Vanorsdol*, 50 Iowa 130, 134 (1878): “For if the grantee of land alter or destroy his title deed, yet his title to the land is not gone. It passed to him by the deed. The deed has performed its office as an instrument of conveyance, and its continued existence is not necessary to the continuance of title in the grantee, but the estate remains in him until it has passed to another by some mode of conveyance recognized by the law.” *McNertney v Kahler*, 710 N.W.2d 209, 212 (Iowa 2006).

³⁰ *Id.* at 211.

a delivered deed are possible without voiding the instrument. The case did not address whether scrivener errors can be corrected on a deed.

Practice pointer: use a quit claim deed to avoid a *McNertney* outcome. The outcome in *McNertney* could have easily been avoided by a quit claim deed from McNertney to establish a joint tenancy between McNertney and Kahler.

Practice pointer: correcting scrivener errors in delivered deeds. Be very cautious with any alterations to an executed and delivered deed. If you can determine that a scrivener's error exists based on the intent of the parties as reflected in the purchase agreement, correcting the mistake would not appear to violate *McNertney* as there was not a *per se* prohibition against any changes. With changes beyond scrivener errors, it would be best to have the grantors execute a revised deed.

G. Problems with deeds.

1. Stray deeds. A stray deed is a deed that has no interest in the real estate. It is resolved pursuant to Iowa Land Title Standard 4.5 by one of the following:

- a. An affidavit or disclaimer showing no interest in the property from the grantee of the deed;
- b. A corrected deed setting out the true facts and stating that the description in the prior deed was in error;
- c. If neither (a) or (b) can be obtained, then an affidavit of a person having personal knowledge of the facts.

See Exhibit 10.

2. Errors in recorded deeds. There may be situations where an error can be remedied with an affidavit. *See Exhibit 11.* In other instances, judicial reformation of the deed may be needed.

3. Important case.

a. *Reformation of a deed is warranted where the party seeking reformation shows "the deed does not reflect the true intent of the parties, either because of fraud or duress, mutual mistake of fact, mistake of law, or mistake of one party and fraud or inequitable conduct on the part of the other."* *Goche v. WMG, L.C.*,

No. 18-0793, 2019 WL 1057105, at *6 (Iowa Ct. App. Mar. 6, 2019) (citation omitted). In this case, a limited liability company owned by four siblings voted three-to-one to convey the company's real estate subject to existing liens and special assessments. The property was subject to a special assessment of \$31,572.59.³¹ The warranty deed to the disgruntled sibling mistakenly recited that it was "free and clear of all liens and encumbrances."³² The district court refused to reform the deed and granted a motion for summary judgment in favor of the disgruntled sibling. The Court of Appeals reversed. The Court did not take up the possibility of the disgruntled sibling disclaiming the property should the district court reform the deed. This case may return to the appellate courts.

Practice pointer: cover sheets. Cover sheets are not required and only serve to add an extra \$5 to the recording costs paid by the buyer. Use them only when you have a document to record that lacks the required three-inch margin and required recording information.

Practice pointer: guardianships and presumption of capacity. In some instances, a titleholder will have a guardianship but not a conservatorship. The presence of a guardianship does not negate the presumption of capacity to execute a deed.

³¹ *Goche v. WMG, L.C.*, No. 18-0793, 2019 WL 1057105, at *3 (Iowa Ct. App. Mar. 6, 2019)

³² *Id.*

II. Conveying real estate by will

A. Statutory framework

Iowa Code § 633.350 Title to decedent's estate--when property passes--possession and control thereof--liability for administration expenses, debts, and family allowance

Except as otherwise provided in this probate code, when a person dies, the title to the person's property, real and personal, passes to the person to whom it is devised by the person's last will, or, in the absence of such disposition, to the persons who succeed to the estate as provided in this probate code, but all of the property shall be subject to the possession of the personal representative as provided in section 633.351 and to the control of the court for the purposes of administration, sale, or other disposition under the provisions of law, and such property, except homestead and other exempt property, shall be chargeable with the payment of debts and charges of the estate. There shall be no priority as between real and personal property, except as provided in this probate code or by the will of the decedent. If real property is titled at any time in a decedent's estate, such property shall be treated as titled in the name of the personal representative of the estate.

B. When real estate passes by will

A will disposes of a testator's property upon the testator's death.³³ "He that hath an estate, that he can will to whom he pleases, or, if he make no will, that will descend to his heirs at law, assuredly hath a fee."³⁴ Various issues arise regarding the disposition of the property.

In a 1940 decision, the Iowa Supreme provided a helpful summary of the history of disposal of real estate by will:

It is not sufficient that the interest be a mere sentimental one, but it must be an interest which is beneficial to the objector in a pecuniary way. A will contest, as we now know it, was unknown to the common law, notwithstanding the right to dispose of property at death was known to the Egyptians 3,000 years before Christ, and that the Code of Hammurabi, King of Babylon, made provision for both testate and intestate succession. There can be little doubt that testamentary disposition was known to the Assynians, the Hebrew (Genesis 48-22), the Greeks (Plutarch's Life of Solon), and the Romans (Laws of the Twelve Tables). But it was not until the Justinian Code (A.D. 534) that wills resembling the modern will

³³ *Matter of Arends' Estate*, 311 N.W.2d 686, 688 (Iowa Ct. App. 1981) (holding that a joint will does not dispose of the survivor's property once the first joint testator dies).

³⁴ *Goldsmith v. Petersen*, 141 N.W. 60, 63 (Iowa 1913) (citing *Fairfax v. Brown*, 60 Md. 50).

were evolved. It was from the Roman law that the ecclesiastical courts of England drew heavily on the subject of testaments. *See Maine's Ancient Law; Reppy & Thompson, History of Wills*, 3. For many centuries in England, the term “testament” referred only to a disposition of personal property, and the term “will” was applied only to such disposition of real estate. The ecclesiastical courts had jurisdiction over the former, and the civil courts, over the latter. Probate of testaments was by the “common form”, practically without notice, or by the “solemn form”, by which it was necessary to notify next of kin. The ecclesiastical courts might probate a will covering both personal and real property, but the authenticity of the probate respecting the real estate was not recognized by the civil courts. A special proceeding to contest a will was unknown to the common law, because proceedings to probate a will of real estate were unknown to the common law. On the death of such a testator, the devisee procured the will and went into possession of the land. If his title was questioned by partition, ejectment, or other proceeding in court, he defended by offering the will in evidence as a muniment of title, and proved its execution as he would a deed. Thus it happened that in one court his will might be sustained, and in another court, denied. Courts of chancery repeatedly held that comprehensive as was their jurisdiction, it did not include the power to validate or invalidate wills. Statutes covering the subject matter were later enacted, and since many of these were enacted prior to the colonization of this country by the English, they became part of the common law of this country.³⁵

Thus, a “Last Will and Testament” may convey real estate (by will) and personal property (by testament).

1. Important cases

- a. *Devisees under a will receive title to real estate subject to the right of the personal representative to sell the real estate during the probate proceedings. DeLong v. Scott*, 217 N.W.2d 635 (Iowa 1974). Stella Barron died testate in 1955. Her devisees were her four children. The will provided the executrix with authority to convey the real estate without court approval. The executrix conveyed the real estate to Phyllis DeLong and the estate was closed. In 1972, DeLong entered into a purchase agreement to sell the real estate to Winston Scott. Scott’s attorney argued that title passed to the four devisees and that clear title would only come from them. The Court held “The rule has long been established in Iowa that title to a decedent's real property passes instantly to devisees under his will and, in the absence of a will, to statutory heirs, subject

³⁵ *In re Duffy's Estate*, 292 N.W. 165, 167–68 (Iowa 1940) (citations omitted).

to possession by the decedent's personal representative during probate proceedings for purposes of administration, sale, or other disposition under provisions of law.”³⁶

b. *In a case where an attorney-in-fact conveyed devised real estate to provide for the health care needs of the principal who was competent but was unaware of the sale, there was no ademption³⁷ and the devisee was entitled to proceeds which had not been expended on the support of the testator. In re Estate of Anton, 731 N.W.2d 19, 28 (Iowa 2007).* In 1981, Mary Anton executed a will which bequeathed a one-half interest in a duplex to her step-daughter Gretchen Coy. Mary was involved in a serious car accident and was eventually moved to a care facility. Her assets were gradually sold by her attorney-in-fact with Mary’s general knowledge. The Court held: “An expression of intent in the indefinite future to sell assets for support is not sufficient to cause ademption under our ‘modified intention theory’ where the testator is not aware that the specific action has taken place.”³⁸

c. *In order for a foreign will to serve as a muniment of title in Iowa, it must be admitted to probate in Iowa pursuant to Iowa Code. Goldsmith v. Petersen, 141 N.W. 60, 62 (Iowa 1913).*

d. *Title to real estate vests in the heirs at law immediately upon the death of the decedent and any liens attach to the interests of the heirs. In re Duffy's Estate, 292 N.W. 165, 176 (Iowa 1940).* In this case, the Court considered whether creditors of an insolvent heir at law have standing to contest a will which disinherits or diminishes the interest of the heir. In the course of this analysis, the Court provided this explanation of the effect of probating a will where judgments attached to an intestate interest in real estate:

The soundness of such a rule may readily be demonstrated; title to real estate vests in the heir at law immediately upon the death of the ancestor, and at the same instant the lien of a judgment against such heir attaches to his interest in the land. If, subsequently, a valid will is probated, title may go in another direction and the apparent lien of the judgment be defeated; and although it is true that the will relates back and takes effect as of the date of death, yet it must be

³⁶ *DeLong v. Scott, 217 N.W.2d 635, 637 (Iowa 1974) (citations omitted).*

³⁷ “Ademption generally means ‘a taking away,’ and, in the context of the law of wills, refers to the removal or elimination of a specific bequest prior to the time of death.” *In re Estate of Anton, 731 N.W.2d 19, 23 (Iowa 2007).*

³⁸ *Id.* at 27 (citations omitted).

remembered that it is necessary to probate that will in order to divest the apparent lien of the judgment. Obviously, it cannot be said that the judgment creditor would not be injured by the probate of such a will.³⁹

Thus, where a will serves as a muniment of title, there is a gap of time where title may vest temporarily in the heirs at law prior to the will conveying the real estate.

Practice pointer: use a court officer deed even where a will serves as a muniment of title.

Although the will may serve as a muniment of title, consider using a court officer deed as the instrument of conveyance. There is no transfer tax assessed and the deed makes the chain of title easier for future examining attorneys to follow. The same would apply where the real estate passes by intestate distribution.

³⁹ *In re Duffy's Estate*, 292 N.W. 165, 176 (Iowa 1940).

III. Conveying real estate by decree of dissolution of marriage

A. Statutory framework

1. 598.21 Dissolution of Marriage and Domestic Relations – Orders for Disposition of Property

Iowa Code § 598.21(1) provides:

1. General principles. Upon every judgment of annulment, dissolution, or separate maintenance, the court shall divide the property of the parties and transfer the title of the property accordingly, including ordering the parties to execute a quitclaim deed or ordering a change of title for tax purposes and delivery of the deed or change of title to the county recorder of the county in which each parcel of real estate is located.

2. Iowa Code § 557.15 Common forms of co-ownership of real property.

1. A conveyance of real property to two or more grantees each in their own right creates a tenancy in common, unless a contrary intent is expressed in the conveyance instrument or as provided in subsection 2.

2. A conveyance of real property to two or more grantees in a conveyance instrument in any of the following circumstances creates a presumption of joint tenancy with rights of survivorship unless a contrary intent is expressed in the instrument and subject to subsection 3:

a. The instrument identifies two grantees as married to each other at the time the instrument is executed.⁴⁰

b. The instrument describes the conveyance to the grantees with the phrase “joint tenants”, “joint tenancy”, or words of similar import.

c. The instrument describes the conveyance to the grantees with the phrase “or their survivor” with reference to the grantees, or words of similar import.

3. An order of annulment, dissolution, or separate maintenance entered pursuant to section 598.21 is a muniment of title to the real property described, and severs a joint tenancy with rights of survivorship and creates a tenancy in common in equal shares, unless otherwise provided in the order.

⁴⁰ This section applies to instruments executed on or after January 1, 2015.

B. Conveying real estate before the decree is entered. When a couple is going through a dissolution of marriage, a deed must recite that the grantors are a married couple until the dissolution decree is entered. It is prudent to provide two notary sections in such a situation to facilitate different occasions for signing.

C. Dissolution decrees as muniments of title

A dissolution decree may serve as a muniment of title. However, dissolution decrees vary as to whether the decree itself serves as a muniment of title or whether it requires a quit claim deed. This raises the question for title examiners of whether to require the prescribed quit claim deed or rely on the dissolution decree as a muniment of title where the quit claim deed has not been filed. A safer approach is to require the quit claim deed if there is any ambiguity because the decree contemplates an additional step. Note that the description of the marital property used in the dissolution decree should be the legal description rather than the street address of the property. If the dissolution decree inadvertently uses the street address, an order *nunc pro tunc* will resolve this. See Exhibit 12.

1. Important case.

a. *A dissolution decree may constitute a muniment of title.* *Martin v. Martin*, 720 N.W.2d 732, 737 (Iowa 2006). When this case was initially issued on August 18, 2006, the opinion originally provided “A dissolution decree or a stipulation by the parties in a dissolution of marriage is *not* an instrument of conveyance or encumbrance.”⁴¹ However, a Correction Order was filed September 21, 2006 which corrected this to read: “Although a decree for dissolution of marriage may constitute a muniment of title, a dissolution decree, or a stipulation, cannot be viewed as a conveyance of land to a nonparty to the dissolution of marriage.”⁴²

D. Sample language for a dissolution decree as a muniment of title. The following is standard language for a dissolution decree where the decree serves as a muniment of title:

⁴¹ *Id.* (emphasis added).

⁴² *Id.*

That pursuant to Section 598.21(11), Code of Iowa, the Court hereby orders a transfer of title in favor of <>, the Petitioner<>Respondent<>, to the following described real property located in <> County, Iowa:

<legal description>

The Clerk of Court shall issue a title certificate under Chapter 558 relative to said real estate and deliver the same for recording to the County Recorder of <> County. The County Recorder shall deliver the certificate to the County Auditor as provided in Section 558.58(1), Code of Iowa. See Iowa Code § 598.21(11), Code of Iowa.

E. Dissolution decrees which require a conveyance

1. No transfer tax due. When the decree requires that a quit claim deed be used to convey the real estate, include the following recital in the body of the deed: This deed is given pursuant to a dissolution of marriage and is therefore exempt under §428A.2(16).

2. The effect of a quit claim deed for a judgment holder. A quit claim deed given by a judgment holder for spousal support, child support, or property settlement can create a question of whether the deed extinguishes the lien since it conveys all of the grantor's interest in the real estate. For example, a decree requires Jane Doe to convey her interest by quit claim deed to John Doe; John Doe owes her a monthly child support obligation. Although every unpaid monthly payment creates a new judgment lien, the quit claim deed from Jane Doe should specifically recite that the conveyance is subject to the lien created by the decree. The recital in the body of such a quit claim deed should use the following language:

This deed is given subject to that certain spousal support / child support / property settlement <> lien created in <> County Case No. <> by an Order dated <> and any amendments thereto.

If the quit claim deed is silent on the status of a judgment lien, I still recommend obtaining a release from the judgment holder.

Exhibits

1. Warranty deed
2. Quit claim deed
3. Court officer deed
4. Trustee warranty deed
5. Special warranty deed

6. Affidavit to show grantor's marital status
7. Trustee's § 614.14 affidavit
8. Grantee's § 614.14 affidavit
9. Affidavit for showing authority to convey real estate from a religious organization
10. Affidavit of no interest in real estate (stray deed)

11. Scrivener's error affidavit
12. Order *nunc pro tunc* to establish equivalence between street address and legal description in a dissolution of marriage decree

Exhibit 1

Prepared By: Attorney's Name, Att'y at Law, Attorney's address and phone number
Sent Tax Statement To:
Return Document To:

Warranty Deed

KNOW ALL PERSONS THAT BY THIS INSTRUMENT:

<>, <>, a married couple<> a single person<>, for valuable consideration, CONVEY(S) to: <>, a married couple<>, as JOINT TENANTS WITH RIGHT OF SURVIVORSHIP AND NOT AS TENANTS IN COMMON, the following described real estate in <> County, Iowa:

<legal description>

Consummation of contract

This deed is given in consummation of a certain real estate contract recorded on <>, in Book <>, Page <>, of the <> County Records.<>

Exemption from transfer tax

This deed is <SUMMARIZE THE EXEMPTION<> and is therefore exempt under §428A.2(<>).

Power of attorney

The undersigned Attorney-in-Fact warrants that the principals are alive on the date the deed is delivered. If the power of attorney is triggered upon disability, the principal(s) is/are disabled.

AND the Grantor(s) do HEREBY COVENANT with the Grantee(s), and successors in interest, that Grantor(s) hold this real estate by TITLE IN FEE SIMPLE; that they have good and lawful AUTHORITY TO SELL AND CONVEY the same; that this real estate is FREE AND CLEAR OF ALL LIENS AND ENCUMBRANCES WHATSOEVER, except as may be stated above; and Grantor(s) covenant to WARRANT AND DEFEND the real estate against the lawful claims of all persons whomsoever except as may be stated above. If a spouse who is not a titleholder executes this deed, that spouse does not join in the warranties stated above, but executes solely for purposes of releasing rights of dower, homestead and distributive share.

Each of the undersigned releases all rights of dower, homestead and distributive share in and to the real estate described above. Words and phrases herein, including the acknowledgment, shall be construed as in the singular or plural number and as masculine, feminine or neuter gender, according to the context.

Individual capacity

Signed _____, 20__

Print name:

Print name:

State of Iowa, <> County) SS.

This record was acknowledged before me on _____,
20____, by <>.

Print name here:
Notary Public in and for said State and County

Representative capacity

<Grantor>

by _____
Print name: _____
Print office: _____

Date

State of Iowa, <> County) SS.

This record was acknowledged before me on _____,
20____, by <> as <> of <>.

Print name here:
Notary Public in and for said State and County

Exhibit 2

Prepared By: Attorney's Name, Att'y at Law, Attorney's address and phone number
Sent Tax Statement To:
Return Document To:

Quit Claim Deed

KNOW ALL PERSONS BY THIS INSTRUMENT: That <>, <>, a married couple<> a single person<>, for valuable consideration, do<> hereby QUIT CLAIM unto <>, a married couple, as JOINT TENANTS WITH RIGHT OF SURVIVORSHIP AND NOT AS TENANTS IN COMMON, all of his/her/their right, title, interest, estate, claim, and demand in and to the following described real estate situated in <> County, Iowa:

<legal description>

This deed is given subject to that certain mortgage given to <>, and recorded on <>, in Book <>, Page <>, of the <> County Records, which mortgage Grantee(s) agree to assume and to hold Grantor(s) harmless thereon.<>

This deed is given in consummation of a certain real estate contract recorded on <>, in Book <>, Page <>, of the <> County Records.<>

This deed is <SUMMARIZE THE EXEMPTION> and is therefore exempt under §428A.2(<>).

This deed is between husband and wife, without consideration, and is therefore exempt under §428A.2(11).

This deed is given pursuant to a dissolution of marriage (<> County Case No. <>) and is therefore exempt under §428A.2(16).

Each of the undersigned releases all rights of dower, homestead and distributive share in and to the real estate described above.

Individual capacity

Signed _____, 20____

Print name:

Print name:

State of Iowa, <> County) SS.

This record was acknowledged before me on _____,
20____, by <>.

Print name here: _____
Notary Public in and for said State and County

Representative capacity

<Grantor>

by _____
Print name: _____ Date _____
Print office: _____

State of Iowa, <> County) SS.

This record was acknowledged before me on _____,
20____, by <> as <> of <>.

Print name here: _____
Notary Public in and for said State and County

Exhibit 4

Prepared By: Attorney's Name, Att'y at Law, Attorney's address and phone number
Sent Tax Statement To:
Return Document To:

**Trustee Warranty Deed
(Inter Vivos Trust)**

KNOW ALL PERSONS THAT BY THIS INSTRUMENT:

<>, Trustee(s) of the <>, for valuable consideration, CONVEY(S) to: <>, a married couple<>, as JOINT TENANTS WITH RIGHT OF SURVIVORSHIP AND NOT AS TENANTS IN COMMON, the following described real estate in <> County, Iowa:

<legal description>

The grantor hereby covenants with the grantees, and successors in interest, that grantor hold this real estate by title in fee simple; that grantor has good and lawful authority to sell and convey the real estate; that the real estate is free and clear of all liens and encumbrances, except as may be above stated; and grantor covenants to warrant and defend the real estate against the lawful claims of all persons, except as may be above stated.

The grantor further warrants to the grantee all of the following: That the trust pursuant to which the transfer is made is duly executed and in existence; that to the knowledge of the grantor the person creating the trust was under no disability or infirmity at the time the trust was created; that the transfer to the grantees is effective and rightful; and that the trustee knows of no facts or legal claims which might impair the validity of the trust or the validity of the transfer.

Words and phrases herein, including the acknowledgment, shall be construed as in the singular or plural number and as masculine, feminine or neuter gender, according to the context.

The <> Revocable Trust dated <>

by _____ Date _____
<>, Trustee

State of Iowa, <> County) SS.

This record was acknowledged before me on _____,
20____, by <> as Trustee(s) of the <> Revocable Trust dated <>.

Print name here: _____
Notary Public in and for said State and County

Exhibit 5

Prepared By: Attorney's Name, Att'y at Law, Attorney's address and phone number
Sent Tax Statement To:
Return Document To:

Special Warranty Deed

KNOW ALL PERSONS THAT BY THIS INSTRUMENT:

<>, in consideration of the sum of One dollar and other valuable consideration in hand paid do<> hereby CONVEY unto: <>, the following described real estate, situated in <> County, Iowa:

<legal description>

AND Grantors do HEREBY COVENANT with the said Grantees and successors in interest to Warrant and Defend the said premises against the lawful claims of all persons claiming by, through, or under Grantors, except as may be above stated and except as to any liens or encumbrances created or suffered to be created by the acts or defaults of the Grantee.

Each of the undersigned releases all rights of dower, homestead and distributive share in and to the real estate described above.

<Grantor>

by _____
Print name: _____ Date _____
Print office: _____

State of Iowa, <> County) SS.

This record was acknowledged before me on _____,
20____, by <> as <> of <>.

Print name here: _____
Notary Public in and for said State and County

Exhibit 6

Space above for recording data

By: Attorney's Name, Att'y at Law, Attorney's address and phone number
Return Document To:

**Affidavit Regarding Martial Status in re
Real Estate Located in <> County, Iowa
Described as follows:**

<legal description>

State of Iowa, <> County) SS.

I, <>, being first duly sworn or affirmed, do hereby depose and state of my personal knowledge that:

1. A warranty deed was given by <> which conveyed the above-described real estate. The warranty deed was dated <> and recorded <> in Book <>, Page <> or Inst. No. <> of the county records. The deed did not recite the marital status of the grantor(s).

2. At the time of the execution and delivery of said warranty deed, <> was a single person or <> and <> were a married couple.

_____ print name: _____ Date _____

Subscribed and sworn or affirmed before me by <>, this _____ day of _____, 20____.

Print name here: _____
Notary Public in and for said State and County

Exhibit 7

Space above for recording data

Prepared By: Attorney's Name, Att'y at Law, Attorney's address and phone number
Return Document To:

**Affidavit in re
Real Estate Located in <> County, Iowa
Described as follows:**

<legal description>

State of Iowa, <> County) SS.

I/We, <>, being first duly sworn or affirmed do hereby depose and state of our personal knowledge that:

1. I/We am/are the trustees under the trust dated <>, to which the above described real estate was conveyed to the trustees by <>, pursuant to an instrument recorded on <>, in the office of the <> County Recorder in Book <>, Page <> or as Inst. No. <>.
2. I/We am/are the presently existing trustees under the trust and are authorized to convey the above-described real estate, without any limitation or qualification whatsoever.
3. The trust is in existence and I/we as trustees am/are authorized to transfer the interests in the real estate as described in paragraph 2, free and clear of any adverse claims.
4. The grantor(s) of the Trust is/are alive.
5. The Trust is revocable or, if the trust is irrevocable, none of the beneficiaries of the trust are deceased.
6. This affidavit is given pursuant to § 614.14, Code of Iowa.

_____ print name:

_____ Date

Subscribed and sworn or affirmed before me by <>, this _____ day of _____, 20____.

Print name here: _____
Notary Public in and for said State and County

Exhibit 8

Space above for recording data

Prepared By: Attorney's Name, Att'y at Law, Attorney's address and phone number
Return Document To:

**Affidavit in re
Real Estate Located in <> County, Iowa
Described as follows:**

<legal description>

State of Iowa, <> County) SS.

I/We, <grantee>, being first duly sworn or affirmed do hereby depose and state of my/our personal knowledge that:

1. I/We am/are the grantee(s)<>vendee(s) of the deed<>contract dated <>, by which the above described real estate was conveyed to me by <>, pursuant to an instrument to be recorded in the office of the <> County Recorder.
2. In connection with the delivery of this deed to me, the Trustee(s) executing the deed<>contract<> provided me with an Affidavit which states the following, or substantially the following:
 - a. I/We am/are the presently existing trustee(s) under the trust and am/are authorized to convey the above-described real estate, without any limitation or qualification whatsoever.
 - b. The trust is in existence and I/we as trustee(s) am/are authorized to transfer the interests in the real estate as described above, free and clear of any adverse claims.
 - c. This affidavit is given pursuant to §614.14, Code of Iowa.
3. I have relied on this Affidavit in accepting this deed<>contract<>.
4. I have no notice or knowledge of any adverse claims which will arise out of the execution and recording of the deed<>contract from the trustee.

_____ print name:

_____ Date

Subscribed and sworn or affirmed before me by <>, this _____ day of _____, 20____.

Print name here: _____
Notary Public in and for said State and County

Exhibit 9

Space above for recording data

Prepared By: Attorney's Name, Att'y at Law, Attorney's address and phone number
Return Document To:

**Affidavit in re
Real Estate Located in <> County, Iowa
Described as follows:**

<legal description>

State of Iowa, <> County) SS.

I, <>, Recording Clerk for <name of church>, being first duly sworn or affirmed do hereby depose and state on behalf of said <name of church>, that:

1. By a special business meeting on _____, <name of church>, duly elected <name>, <name of office>, and <name>, <name of office>, as qualified representatives of said <name of church>, to convey the above-captioned real estate.

<name of church>

By _____
 <>, Recording Clerk Date

Subscribed and sworn or affirmed before me by <> as Recording Clerk of <name of church>, this _____ day of _____, 20__.

Print name here: _____
 Notary Public in and for said State and County

Exhibit 10

Space above for recording data

Prepared By: Attorney's Name, Att'y at Law, Attorney's address and phone number
Return Document To:

**Affidavit of No Interest Regarding Real Estate
 Located in <> County, Iowa,
 Described as Follows:**

<legal description>

State of Iowa, <> County) SS.

I, _____, being first duly sworn or affirmed do hereby depose and state of my personal knowledge that:

1. I am currently <>.
2. The above-described real estate was conveyed by <>. The deed was filed <> as Inst. No. <> / in Book <>, Page <> of the county records.
3. At the time of the execution and delivery of said deed, <> did not own the above-described real estate. As result, said instrument constitutes a stray deed.
4. <> does not currently own the above-described real estate or claim any interest in said real estate, nor did it at the time of the execution and delivery of said deed.
5. This affidavit is provided to clear a title objection.

_____ Date

Subscribed and sworn or affirmed before me by <>, this _____ day of _____, 20____.

Print name here: _____
 Notary Public in and for said State and County

Exhibit 11

Space above for recording data

Prepared By: Attorney's Name, Att'y at Law, Attorney's address and phone number
Return Document To:

**Affidavit Regarding Scrivener's Error in Real Estate
 Located in <> County, Iowa,
 Described as Follows:**

<legal description>

State of Iowa, <> County) SS.

I, <>, Attorney at Law, being first duly sworn or affirmed do hereby depose and state of my personal knowledge that:

1. I prepared a warranty deed from <> to <>, filed <> as Inst. No. <> / Book <>, Page <> of the <> County records.

2. The deed used the following legal description:

<>

3. This deed contains a scrivener's error in that "<>" should read "<>" or as described in the caption above.

4. This affidavit is given to clear a title objection.

<>

Date

Subscribed and sworn or affirmed before me by <>, this _____ day of _____, 20____.

Print name here: _____

Notary Public in and for said State and County

