



What's in the Pockets?

The Importance of Chain of Title
in Real Property Disputes

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This article discusses the basis of some of the recent work of the Colorado Real Estate Title Standards Committee with regard to examining chain of title in Colorado.

Lifelong Denver real estate attorney Aldo Notarianni was fond of saying, “Buying property is like buying pants, you get what’s in the pockets.” But how do you know what’s in the pockets? Title to real estate is “born” when a patent is issued, it lives and changes over time, and, not unlike humanity, its history is and remains part of its existence. It is an ever-growing compilation of the history of property ownership.

Like ever-growing real estate titles, real estate law has evolved over the centuries to better serve private property owners and society in general. Under Old English law, a buyer obtained title to property through action instead of a written document like a deed. The buyer and seller would engage in a ceremony consisting of a symbolic delivery of some part of the land—such as a twig or handful of dirt—to the buyer.¹ Another process, referred to as perambulation or circumambulation, involved a group walking the property to determine the boundary and beating children when they reached a boundary or monument so that the children would “take pains” to help remember the townspeople’s property rights.² For example, if the boundary was a stream, one of the boys would be thrown into it, or if they came upon a bush or tree they would remove a branch and beat them with it.³ We’re more civilized now and no longer promote child abuse to record property ownership. In modern times, property is conveyed in writing by using deeds. Now determining property ownership and interests focuses, for the most part, on written documents.

Those written documents often take the form of deeds recorded in the county’s land records. However, deeds and other instruments are not required to identify and describe every ownership interest in the particular parcel of property. Every real estate interest that may be created over time, such as a previously granted

easement appurtenant or reserved fractional mineral interest, is rarely, if ever, identified in subsequent recorded deeds. Therefore, to really know what’s “in the pockets,” the reader of the deed in question must review and analyze all of the recorded instruments affecting title to that property.⁴ However, when Colorado courts read a particular deed in a chain of title, they sometimes refuse to review anything except the deed that is the subject of the lawsuit. According to those courts, the “four corners” test does not permit them to review anything else in the chain of title. However, a strict application of the four corners test in the context of real estate is contrary to long-established Colorado law and public policy. Applying the four corners test can lead to less secure and marketable titles to real estate in Colorado. This article discusses the importance of examining the chain of title in real property disputes and reviews Colorado’s Recording Act, the CBA’s publication of Colorado Real Estate Title Standard 8.4, and relevant statutes and case law.

Colorado’s Recording Act

Anyone who wants to obtain an interest in real property in Colorado can determine the status of title by examining the real property records maintained by the county clerk and recorder’s offices. Indeed, failure to search and examine record title to a parcel of land renders the person ignorant of the published rights of others in and to that land, but subject to those rights nonetheless. Searching property title involves following a specific set of procedures set forth in Colorado’s Recording Act.⁵ Under the Recording Act, county clerks and recorders are tasked with maintaining grantor-grantee indices of every document filed or recorded in that county concerning or affecting real estate.⁶ The documents are maintained in chronological order and indexed by the grantors’

and grantees' names. To enjoy the protections of the Recording Act, prospective bona fide purchasers, bona fide mortgagees, and title examiners are charged with searching the grantor-grantee indices in a specific fashion and then examining those documents. Later deeds in a chain of title typically do not recite the effect of all prior conveyances in the chain. Nevertheless, title at any given point in time is the then-total accumulation of that title from its inception. Therefore, to understand the state of title for a parcel of property, the entire chain of title must be constructed and examined.

The Recording Act "is the linchpin of Colorado Real Estate Law."⁷ "Its purpose is to enable a buyer or mortgagee, by analysis of the chain of title, to determine exactly what it is acquiring."⁸ This protects Colorado's "essential state interest" in "the security and marketability of real estate titles."⁹ "This interest is best served by a bright line rule that enables potential buyers to determine the validity of a title and its potential encumbrances."¹⁰ Therefore, courts should "give full effect to the recording act absent the clearest expression of contrary legislative intent."¹¹

The Recording Act works hand in glove with CRS § 38-34-101, which sets forth Colorado's policy for construing its real estate laws and documents affecting real estate. Together, the purpose of these laws is "to render titles to real property and every interest therein more secure and marketable . . ." According to CRS § 38-34-101, it is Colorado public policy that all the real estate statutes

and all recorded instruments, decrees, and orders of courts of record . . . shall be liberally construed . . . [to render] such titles absolute and free from technical defects so that subsequent purchasers and encumbrancers by way of mortgage, judgment, or otherwise may rely on the record title and so that the record title of the party in possession is sustained and not defeated by technical or strict constructions.¹²

Colorado developed its Recording Act because, without it, determining who owned real estate or who had an interest in a specific property was chaotic.¹³ Even before statehood, Colorado's territorial government established a system by which it could adjudicate real estate

claims and establish a common repository for preserving written claims to land.¹⁴ The importance of this matter resulted in Colorado's Recording Act and in 1946 also caused the CBA to adopt and promulgate statewide title standards. The Colorado Real Estate Title Standards are updated on an as-needed basis and usually consider the effect of a precise state of facts on the marketability of title based on law. For example, Title Standard 1.1.3 identifies the appropriate scope of a search of the county clerk and recorder's records to determine the status of title to a specific parcel of property.¹⁵ That standard lays a vital foundation by requiring a complete examination of the entire chain of title.

Court Decisions Determining Property Interests

For the Recording Act to remain the linchpin of Colorado real estate law, all title examiners, including courts, must follow the same rules. That has not always happened. For example, in *Brown v. Kirk* and *O'Brien v. Village Land Co.*, the Colorado Supreme Court was tasked with interpreting mineral interest reservation language in unrelated deeds.¹⁶ The Court never mentioned the Recording Act in either case. Instead, the Court focused on the legal concept that when a deed is unambiguous, the intention of the parties is determined "entirely by the deed and its terms."¹⁷ The Court has performed the same analysis in cases involving the determination of easement interests. In *Lazy Dog Ranch v. Telluray Ranch Corp.* and *Lobato v. Taylor*, the Court discussed the scope of use of an expressly created easement.¹⁸ In *Lazy Dog Ranch*, the Court reaffirmed the *O'Brien* approach but explained that it was more flexible than the four corners test. In *Lobato*, the Court reaffirmed the *Lazy Dog Ranch* approach. However, even the more flexible approach from *O'Brien*, *Lazy Dog*, and *Lobato* relies on a court considering extrinsic evidence as part of an analysis to determine whether a deed is ambiguous. In other words, under these cases, courts must disregard extrinsic evidence if they find a deed's terms to be unambiguous. The Court in these cases focused on the concept that a deed is like a contract instead of determining how the relevant deed fits within its chain of title. Treating a deed like

a contract gained favor beginning in the 19th century because the law at that time shifted from the public policy favoring use and occupation of land to favoring private needs.¹⁹ The 20th century brought with it a renewed recognition of the former public policy while also focusing on the intent of the parties.²⁰ Nevertheless, the longstanding Recording Act continues to require the examination of a full chain of title when adjudicating real property interests.

Some Colorado courts, however, have analyzed the relevant chain of title in resolving title disputes. For example, in *Collins v. Scott*, the Colorado Court of Appeals was presented with determining the effect of a specific personal representative's deed.²¹ The court's analysis began with discussion of Colorado's Recording Act. The court never discussed the concept of ambiguity, yet it relied on analysis of documents in the chain of title to resolve the dispute.²² Applying all of these tools together is what Colorado law requires and will lead to more consistent and predictable results.

Deed Construction

Colorado law regarding the interpretation of deeds is well-established. Construction of a deed is a matter of law.²³ In construing a deed, the purpose of the court is to give effect to the instrument.²⁴ Words used in a document are to be given their plain meaning.²⁵ The obvious meaning of plain words is the meaning to be applied, rather than a different meaning that requires adding unused words to modify the import of the plain words.²⁶ The paramount purpose in construing a deed is to ascertain the parties' intent.²⁷

According to the *Brown*, *O'Brien*, *Lazy Dog Ranch*, and *Lobato* courts, a deed is to be construed according to the intent of the parties as determined, if possible, within the four corners of the document.²⁸ It is only when an instrument is ambiguous that the parties' intent becomes open to interpretation.²⁹ Whether an ambiguity exists is a question of law.³⁰ In determining whether a deed is ambiguous, a trial court may conditionally admit extrinsic evidence that issue, but if it is ultimately determined that the document is unambiguous, the conditionally admitted evidence must be stricken.³¹

Though based on well-established principles, this jurisprudence can cause problems for two reasons. The first and most fundamental is that, more often than not, the court's job is to determine the respective title interests of the parties who are before the court. That requires title examination, not the review of an isolated document in the chain of title. The second problem is treating a title document like a contract. As explained above, several or even many documents in a chain of title can affect the ownership interests of parties who come to court asking that the court sort out their interests, which is why examining a single document so often falls short. Again, title to real property changes over time; a deed should not be read in isolation as the entirety of the title it represents.

The four corners test that some courts have used in attempting to determine the property interests of all parties before the court was borrowed from contract law. But this method of interpretation overlooks the fundamental differences between contracts and title documents. First, recorded documents are permanent and remain in the chain of title forever. Once a document is recorded, it remains in the clerk and recorder's office and can potentially affect title generations later.³² Contracts, in general, are almost always for shorter terms. Second, contracts typically bind only those who are parties to that document or their immediate assignees. Real estate documents, by contrast, can bind parties for decades or even a century or more after their execution and recordation. Third, breach of contract cases most often involve the actual parties to the contract in question. Real estate disputes, however, often implicate documents that were drafted, signed, and recorded before anyone currently alive was even born. Finally, the goal behind the four corners test is to encourage contracting parties to mean what they say and say what they mean when drafting their contract. In other words, all relevant issues should be addressed in the contract so that a court can understand and enforce the contract based solely on what it says. Real estate simply does not work that way—it never has, and Colorado's statutes and much of its case law acknowledge this reality.

If the four corners test evaluation of one document were the end-all for evaluating title to real property, then proper drafting of that one instrument would require that all interests in the land in question gleaned from a proper search and examination of the title be included in that single instrument. Deeds are not drafted that way, if they ever were. Who would (or could) certify that such a deed is in fact an accurate reproduction of all of these recorded real property interests? Moreover, this concept presumes the existence of the real property records in the first instance. It is still the case that the entirety of the real property records form "title" as we know it. Real property jurisprudence in Colorado assumes that whoever has legal title to land owns whatever title that was born and grew over time.

Colorado once had a system of documenting real estate title similar to that described in the preceding paragraph. It was known as the Torrens Title Registration Act,³³ and the goal was to put all interests in a piece of real property into a single certificate. To do so required what amounted to a quiet title lawsuit to establish all interests. Not surprisingly, this Act was never very popular, and in 2018, the Colorado legislature essentially repealed it.³⁴

Documents in a chain of title should not be extrinsic evidence that Colorado courts refuse to review and analyze unless they find an ambiguity in the document they are reviewing. This is because, under Colorado's Recording Act, anyone interested in obtaining an interest in real estate is charged with constructive notice of everything in the recorded chain of title.³⁵ The law requires that a prospective purchaser search the chain of title to discover all claimed interests in that parcel of property.³⁶ This provides certainty and predictability for anyone who wants to buy property in Colorado or lend money secured by property in Colorado. When Colorado courts apply the four corners test and find that the subject deed is unambiguous, they are ignoring that the grantee acquired a title that has changed over time. Every owner is legally assumed to know everything in the chain of title before the deed was executed and recorded. Thus, when courts embark on their mission to divine the "intent of the parties,"

the four corners test could prevent them from knowing and understanding all the facts and circumstances known to those very parties who entered into the document under scrutiny.

In analyzing deeds to determine the intent of the parties, Colorado courts have held that the deed's language should be "interpreted in light of all the circumstances."³⁷ These circumstances typically are considered to be physical. For example, the circumstances may include the location and character of the property, the use of the property made before and after the conveyance, and the character of the surrounding area.³⁸ Courts often include diagrams or other depictions of the real estate relevant to the dispute to aid readers in understanding the result of those opinions.³⁹ When competing claims to title are in play, the "all circumstances" interpretation necessarily should include record "title" itself and is more likely to lead to more predictable results in lawsuits. The two cases discussed below were catalysts for formal action by the CBA and the Colorado legislature intended to encourage analysis of all documents in a chain of title and a liberal construction of those documents.

Moeller v. Ferrari and Title Standard 8.4

The CBA published Title Standard 8.4 in 2021 in response to cases like those described above wherein courts limited their analyses to the contents of the deeds in question and considered extrinsic evidence only if analyzing the relevant deed resulted in a finding of ambiguity. Another significant case prompting Title Standard 8.4 was *Moeller v. Ferrari Energy, LLC*, which highlighted the problems with this type of analysis, particularly with regard to mineral rights. In *Moeller*, both parties asserted that they owned the minerals under property in Weld County.⁴⁰ The court of appeals assumed that its role was to construe a single deed in the chain of the property's title.⁴¹ In fact, the court was engaged in title examination, which required review of all the documents in the chain of title regardless of whether a single deed was ambiguous or unambiguous. The *Moeller* dispute arose because a deed reserved a "1/2 interest" in the minerals to the grantors, and a

prior deed in the chain of title also reserved a 1/2 interest in the minerals.⁴² The court relied on the four corners test and would not consider the prior reservation until it concluded that the deed was ambiguous.⁴³

Looking at extrinsic evidence only if a deed is ambiguous could lead to a result contrary to the parties' intent and an improper award of title. Recognizing that this method could lead to an unjust result, the CBA promulgated Title Standard 8.4 to formalize its guidance to always review and analyze the chain of title when litigants seek a determination of ownership rights in real estate. This will lead to more secure and marketable titles to real estate in Colorado because all prospective property purchasers, lenders, and courts will be operating under the same rules. Ironically, under the four corners test, a well-drafted deed with no ambiguities would not trigger a court's ability to look beyond that document and increases the likelihood that a court will conduct a flawed title examination.

Sender v. Cygan and Legislative Changes


In *Sender v. Cygan (In re Rivera)*, the Colorado Supreme Court considered whether a deed of trust that, on its face, did not accurately describe a condominium, was a valid encumbrance.⁴⁴ The deed of trust was recorded in the appropriate clerk and recorder's records.⁴⁵ While it contained a complete and accurate street address of the encumbered property, it referenced an Exhibit A that included the property's legal description.⁴⁶ Alas, there was no Exhibit A attached to the deed of trust when it was recorded.⁴⁷ The Court held that a recorded deed of trust that omits the property's legal description is "defectively" recorded and cannot provide constructive notice to a subsequent purchaser of its contents.⁴⁸ This was a surprise to Colorado's real estate community. The Court did not follow Colorado's public policy to liberally construe Colorado's real estate laws and recorded documents in this property's chain of title. Instead, it found that a technical defect in a recorded document made it so that the document, essentially, never was recorded.⁴⁹ Moreover, prior Colorado case law holds that a deed of trust provided sufficient

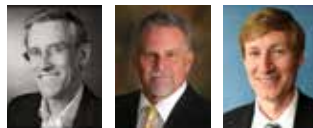
notice so long as it described the property with reasonable certainty.⁵⁰ Indeed, in *Hill v. Taylor*, the court held that a properly recorded deed of trust with a correct street address, but an incorrect legal description, placed a bankruptcy trustee on inquiry notice of the encumbrance.⁵¹

In response to *In re Rivera*, the Colorado legislature amended CRS § 38-35-122 by adding subsections clarifying that, notwithstanding *In re Rivera*, failure to include a legal description on a deed does not, by itself, render the document defective or invalid when it was recorded.⁵² All of this may have been avoided had the Court focused on the chain of title instead of the deed of trust in isolation. Under Colorado's Recording Act, a title examiner would have found the deed of trust in the grantor-grantee index and noticed that its Exhibit A had been omitted, but still would have been on inquiry notice of its contents. Indeed, the title examiner would have reviewed the chain of title and found that the deed of trust was recorded immediately after the deed conveying title to the grantor of the deed of trust. The deed conveying title to the owner would almost certainly have shown the same street address as shown on the deed of trust. Therefore, the title examiner would have understood that the deed of trust was part of

the same transaction that encumbered the real estate involved in that transaction.⁵³

Conclusion

As long as Colorado recognizes private property ownership, Colorado's real estate records will be an integral component of that private ownership. Over time, chains of title will only become longer and contain more information, making title examination more difficult. This highlights the importance for all title examiners, including Colorado's courts, to insist upon analysis of an entire chain of title in every case where deed interpretation is at issue. When all title examiners follow the same rules and ensure that Colorado's real estate laws and recorded documents are liberally construed, Colorado real estate titles will be more secure and marketable. When a title examiner fails to analyze the entire chain of title it is like the parable of the blind men and an elephant.⁵⁴ The moral of that story is that people tend to claim absolute truth of an erroneous conclusion based on incomplete facts. Courts must provide finality to disputes, and the finality should be based on complete facts, of which there is a permanent repository established specifically to memorialize those facts for future use. 



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NOTES

1. Palomar and Patton, *Patton and Palomar on Land Titles* § 3 (3d ed. Thomson West 2002).
2. *Town of Greenville v. Town of Mason*, 57 N.H. 385, 393 (1876).
3. *Id.*
4. CRS § 38-35-109(1).
5. *Id.*
6. CRS § 30-10-408(1)(a).
7. *Joondeph v. Hicks*, 235 P.3d 303, 306 (Colo. 2010) (citing *Premier Bank v. Bd. of Cnty. Comm'rs of Bent*, 214 P.3d 574, 579 (Colo.App. 2009)).
8. *Premier Bank*, 214 P.3d at 579 (citing *Lobato v. Taylor*, 71 P.3d 938, 964-65 (Colo. 2002)).
9. *Strekal v. Espe*, 114 P.3d 67, 73 (Colo.App. 2004) (citing *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544 (1994)).
10. *Id.* (citing *Lobato*, 71 P.3d at 964).
11. *Id.*

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12. CRS § 38-34-101.
13. *Lobato*, 71 P.3d at 964–65 (J. Kourlis, dissenting).
14. *Id.*
15. The Title Standards are available at <https://www.cobar.org/Portals/COBAR/Repository/7.24.23/Title%20Standards%202023%20Final.pdf?ver=QDIw5hYDeUbal7D-WZI8VQ%3d%3d>.
16. *Brown v. Kirk*, 257 P.2d 1045 (Colo. 1953); *O'Brien v. Vill. Land Co.*, 794 P.2d 246 (Colo. 1990).
17. *Brown*, 257 P.2d at 1046.
18. *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229 (Colo. 1998); *Lobato*, 71 P.3d 938.
19. *Restatement (Third) of Property: Servitudes* §§ 2.15, cmt. A. (A.L.I. 2000).
20. *Id.*
21. *Collins v. Scott*, 943 P.2d 20 (Colo.App. 1996).
22. *Id.* at 22.
23. This paragraph is from Notarianni (update author), 2 *Colorado Real Property Law* § 19.9.1 (citing *Kanarado Mining & Dev. Co. v. Sutton*, 539 P.2d 1325 (Colo.App. 1975)) (other citations omitted). One of this article's authors served as the update author for this reference.
24. *Michaelson v. Michaelson*, 939 P.2d 835 (Colo. 1987).
25. *Keith v. Kinney*, 140 P.3d 141 (Colo.App. 2005).
26. *Id.*
27. *Percifield v. Rosa*, 220 P.2d 546 (Colo. 1950).
28. *Brown*, 257 P.2d 1045.
29. *Radke v. Union Pac. R.R.*, 334 P.2d 1077 (Colo. 1959).
30. *O'Brien*, 794 P.2d 246.
31. *Id.*; *Lazy Dog Ranch*, 965 P.2d at 1236–37.
32. See *Lazy Dog Ranch*, 965 P.2d at 1237 (explaining that, in interpreting deed language, “it is important to recall the special role of an instrument that conveys an interest in land. The parties to an expressly created servitude generally intend to bind successors to an interest in the land for an indefinite period of time.”) (citing *Restatement (Third) of Property: Servitudes*, *supra* note 19 at § 4.1, cmt. C).
33. CRS §§ 38-36-101 et seq.
34. CRS § 38-36-101.
35. *Franklin Bank, N.A. v. Bowling*, 74 P.3d 308, 313 (Colo. 2003).
36. *Id.*
37. *Lazy Dog Ranch*, 965 P.2d at 1235–36 (citing *Restatement (Third) of Property: Servitudes*, *supra* note 19 at § 4.1, cmt. c). See also *Restatement (First) of Property* § 483 (A.L.I. 1940).
38. *Lazy Dog Ranch*, 965 P.2d at 1237 (citing *Restatement (Third) of Property: Servitudes*, *supra* note 19 at § 4.1, and *Restatement (First) of Property*, *supra* note 37 at § 483).
39. See, e.g., *Lo Viento Blanco, LLC v. Woodbridge Condo. Ass'n*, 2021 CO 56.
40. *Moeller v. Ferrari Energy, LLC*, 2020 COA 113, ¶ 1.
41. *Id.* at ¶ 4.
42. *Id.* at ¶¶ 6–7.
43. *Id.* at ¶ 18.
44. *Sender v. Cygan (In re Rivera)*, 2012 CO 43, ¶ 1, *reh'g granted, withdrawn*, No. 2011SA261, 2013 LEXIS 634 (Colo. Aug. 19, 2013). The Colorado Supreme Court withdrew its opinion after the legislature amended CRS § 38-35-122.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at ¶ 9.
49. *Id.*
50. *Harrison v. Everett*, 308 P.2d 216, 219 (Colo. 1957) (“If the description in a deed identifies, or furnishes the means of identifying, the property conveyed, it performs its function.”).
51. *Hill v. Taylor (In re Taylor)*, 422 B.R. 270 (Bankr.D.Colo. 2009).
52. One of this article's authors, Geoff Anderson, is on the Colorado Real Estate Title Standards Committee and was involved in the CBA's successful efforts in amending a statute in response to *Sender v. Cygan*.
53. See *Bledsoe v. Hill*, 747 P.2d 10 (Colo.App. 1987) (trial court order limiting analysis to four corners test overruled in favor of requiring simultaneously executed recorded instruments between the same parties related to the same subject matter be construed together to determine intent as though entire agreement were contained in one instrument).
54. https://en.wikipedia.org/wiki/Blind_men_and_an_elephant#:~:text=The%20parable%20of%20the%20blind,the%20side%20or%20the%20tusk.

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