

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 121

DEEDS - Use by grantor of quitclaim deed to transfer property not owned by grantor;  
PROPERTY, REAL - Conditions requiring survey of property under section 76-3-401, MCA;  
PROPERTY, REAL - Use by grantor of quitclaim deed to transfer property not owned by grantor;  
SURVEYORS - Conditions requiring survey of property under section 76-3-401, MCA;  
MONTANA CODE ANNOTATED - Sections 76-3-103(3), 76-3-401.

HELD: Section 76-3-401, MCA, requires a survey only when the transfer of title involves division of a tract of property. Further, a grantor is not barred from using a quitclaim deed to transfer property whose title he does not own, but such action is inadvisable and subject to potential liability.

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4 November 1988

David G. Rice  
Hill County Attorney  
Hill County Courthouse  
Havre MT 59501

Dear Mr. Rice:

Thank you for your letter requesting my opinion on two issues which I have rephrased as follows:

1. Is a survey required under section 76-3-401, MCA, for a transfer of a parcel of land which includes, within its boundaries, two smaller parcels of property not owned by the grantor, but which have been surveyed and recorded as a result of earlier transfers?
2. Can a grantor transfer by quitclaim deed a parcel of land which includes, within its boundaries, two smaller parcels of property which the grantor does not own?

It is my understanding that you are presented with a situation where the grantor owns a quarter-section block of property (160 acres) which has within its boundaries two smaller parcels (10 and 15 acres in size) that the grantor does not own. You explain that the grantor intends to transfer, by quitclaim deed, the entire 160-acre tract, making no attempt to specifically exclude the two smaller tracts because he believes that a survey would be required if he were to do so.

A survey is not required under the described circumstances. Roughly paraphrased, section 76-3-401, MCA, requires that all "divisions of land for sale" into parcels smaller than 20 acres be surveyed. While the two parcels at issue here are smaller than 20 acres, the transaction, as it affects them, is not a "division of land." A "division of land" is defined in section 76-3-103(3), MCA, as

the segregation of one or more parcels of land from a larger tract held in single or undivided ownership by transferring or contracting to transfer title to or possession of a portion of the tract or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to this chapter.

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The two smaller parcels of property not owned by the grantor which are within the grantor's property lines were segregated from the larger tract before the transaction at issue here, as evidenced by the certificate of survey filed for the one parcel and the recording date for the second. Hence, the two smaller tracts were already created and, as such, are not a "division of land" requiring a survey under section 76-3-401, MCA. In other words, a survey is only required when a single tract of land is divided, creating several tracts. No division occurs as a result of the transaction contemplated in your request, therefore no survey is required.

Your second question is whether the grantor may transfer by quitclaim deed the entire parcel of property, even though it includes two smaller parcels within its boundaries which the grantor does not own. A quitclaim deed passes to the buyer all those rights or as much of a title as the seller actually has. A quitclaim deed does not warrant that the seller actually has full title of the land to pass on. See 23 Am. Jur. 2d § 338. In sum, the distinguishing characteristic of a quitclaim deed is that it conveys the interest or title of the grantor in and to the property described, rather than the property itself. See 23 Am. Jur. 2d § 259.

While the grantor in this case is not precluded from using a quitclaim deed to transfer his block of property, expansively including the two tracts he does not own in his description of the property, such action would be inadvisable and subject to potential liability. Obviously, rather than create unnecessary difficulties for the buyers of his tract and the owners of the two smaller parcels, the grantor should merely describe the property in a manner which excludes the two smaller parcels from his deed.

THEREFORE, IT IS MY OPINION:

Section 76-3-401, MCA, requires a survey only when the transfer of title involves division of a tract of property. Further, a grantor is not barred from using a quitclaim deed to transfer property whose title he does not own, but such action is inadvisable and subject to potential liability.

Very truly yours,

MIKE GREELEY  
Attorney General