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What are our options in Montana?

- **Contract for Deed**
 - Title typically does not transfer until contract is paid in full.
- **Promissory Note /Deed of Trust – Trust Indenture**
 - Title is transferred at time of closing. Similar situation to that of a lender loan.
- **Mortgage**
 - Title transfers at time of closing
- **Asset Purchase and Sale Agreement**
 - Sometimes a combination between contract for deed and note/trust indenture

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An issue frequently encountered before we get to the documents.

- **Agreements to agree.** The buy sell agreement states that the transaction is to be via a contract for deed, X amount down, term, interest rate, frequency of payments and stops there.
 - The essential elements of a contract are "(1) identifiable parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration." MCA § 28-2-102.
 - The Montana Supreme Court has held that "[a]n agreement that requires the parties to agree to material terms in the future is not an enforceable agreement." *Hurly v. Lake Cabin Development, LLC*, 2012 MT 77, ¶ 18, 364 Mont. 425, 276 P.3d 854.
 - An agreement with terms insufficiently certain to make the act "clearly ascertainable" cannot be specifically enforced. MCA § 27-1-412(5); *GRB Farm v. Christman Ranch, LLC*, 2005 MT 59, 326 Mont. 236, 108 P.3d 507
 - Only an agreement containing all essential material terms will constitute a binding and enforceable contract.

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Contract for Deed


- What documents should you expect to see?
 - Contract. Issues frequently addressed in Contract for Deeds:
 - Parties
 - Property description (real and personal property. Leased equipment)
 - Purchase price
 - Downpayment (does this include the Earnest Money Deposit?)
 - Balance,
 - Interest rate. Commences to accrue when? 365 or ?
 - Schedule of payments i.e., monthly, quarterly, etc. balloon at ?
 - Late fees – grace period.
 - Assignability by Buyer



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Contract for Deed


- What documents should you expect to see?
 - Contract
 - Further subdivision of property – deed release - additional payments
 - Timber, minerals or other restrictions (waste)
 - Seller’s representations as to environmental issues and commitment by Buyer as to same.
 - Water rights
 - Default
 - 30 days or ?
 - Seller’s options – take property back and keep the monies paid or sue Buyer for remaining sums due.



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Contract for Deed

- What documents should you expect to see?
 - Contract
 - Long term escrow agent – who pays opening fee, who pays remaining fees.
 - What documents are to be held and in the event of pay off or default, what is to happen?
 - Attorney’s fees (for default, court action and or bankruptcy?)
 - Jurisdiction for any disputes
 - Signatures for parties (notarized?)
 - Notice of Purchaser’s Interest a/k/a Abstract of Contract for Deed.
 - To be recorded at closing.
 - Montana statute requiring statement as to who will provide copy of agreement upon request.



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Contract for Deed

- What documents should you expect to see?
 - **Notice of Purchaser's Interest a/k/a Abstract of Contract for Deed.**
 - To be recorded at closing.
 - Montana statute requiring statement as to who will provide copy of agreement upon request.
 - **70-21-101. Instrument defined -- abstract.** contains:
 - (1) the names and addresses of the parties to the instrument;
 - (2) a description of the real property affected;
 - (3) a statement that this is an abstract of another document;
 - (4) a short statement of the effect of the document abstracted;
 - (5) **the name and address of the person who will provide a full and complete copy of the document abstracted, without cost, upon request of any person.**

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Contract for Deed

What documents should you expect to see?

- **Deed from Seller(s):**
 - Warranty Deed, Quit Claim Deed, Special Warranty Deed, Statutory Form Of Warranty Deed.
 - Trustee's deed
 - Sheriff's deed
 - Bill of Sale - personal property (is the bill of sale to be released to the buyer at closing?)
 - Assignments of leases
 - Realty Transfer Certificate?
- **Deed from Buyer(s):**
 - Quit Claim, Special Warranty Deed
 - (if the bill of sale was released to the buyer at closing. Does seller understand the property is gone?
 - Not realistic to have a reverse bill of sale held in escrow.
 - Realty Transfer Certificate?
 - Title Industries' concerns with age of quit claim deed in the event of buyer's default.

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Contract for Deed

Some issues you might see.....

- Contract for Deed where deed from Seller to Buyer is recorded at time of closing.
 - Subsequent liens against buyer?
 - Seller holding buyer's quit claim deed. Parties have a dispute- seller mad....
- Using Contract for Deed with sale of convenience stores, business entities, etc.
- Parties are good friends, related, etc. and do not wish to use a long-term escrow agent:
 - IRS reporting
 - Seller passes away prior to pay off of contract
 - Dispute over when payments were made, amount of payments, etc.
 - Tax and Insurance reserves.

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Note, Trust Indenture/Deed of Trust
Documents you would expect to see.

- Deed from Seller to Buyer:
 - Type of deed may vary from transaction to transaction.
 - Realty transfer certificate
 - Water rights?
 - Bills of sale for personal property (note: is the personal property being convey free from any security for remaining balance due? If not Uniform Commercial Code filings and security agreement. If personal property is secured as part of buyer's obligation, need to be sure there are releases of UCC filings in long term escrow.)
- Licenses, assignments of leases, franchises, etc. if a business is involved. Will a foreclosure of the Trust Indenture return the seller to their prior position?
- Promissory Note:
 - Amount remaining due, interest rate, amortization term, grace period for payments, late fee, payments to be made to long term escrow.

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Note, Trust Indenture/Deed of Trust
Documents you would expect to see.

- Trust Indenture/Deed of Trust
- Note: cannot be used on property more than 40 acres in size. However, multiple parcels can have multiple Trust Indentures securing one promissory note.
 - FHA and various forms.
- Long term escrow agreement.
- Request for Reconveyance.

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Note & Mortgage
Documents you would expect to see...

- Deed from Seller to Buyer:
 - Type of deed may vary from transaction to transaction.
 - Realty transfer certificate
 - Water rights?
 - Bills of sale for personal property (note: is the personal property being convey free from any security for remaining balance due? If not Uniform Commercial Code filings and security agreement. If personal property is secured as part of buyer's obligation, need to be sure there are releases of UCC filings in long term escrow.)
- Licenses, assignments of leases, franchises, etc. if a business is involved. Will a foreclosure of the Mortgage return the seller to their prior position?

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Note & Mortgage
Documents you would expect to see...

- **Promissory Note:**
 - Amount remaining due, interest rate, amortization term, grace period for payments, late fee, payments to be made to long term escrow.
- **Mortgage:**
 - Can be used on property of any size.
 - Most anticipate a judicial foreclosure but may also include a power of sale similar to a trust indenture/deed of trust procedure.
- **Long Term Escrow:**
- **Satisfaction of Mortgage.**

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Asset Sale & Purchase Agreement
Documents you would expect to see...

- **Typically, multiple documents:**
 - As to land, frequently a promissory note and trust indenture/deed of trust or mortgage depending on size of property.
 - As to business assets. Promissory note (may be same as for land), Uniform Commercial Code filings (county – fixtures; state - non-fixtures).
 - Liquor licenses, convenience store licenses i.e., gas pumps, underground tanks, agreement with gas/fuel provider.
 - Bills of sale (in escrow or delivered to buyer).
- Can a contract for deed format be used for an asset sale?
- **Long Term Escrow:**

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HOW THEY FUNCTION AFTER CLOSING
Pro's and Con's

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Contract for Deed

- Pro's:
 - Seller's perspective
 - Many options for variable terms as opposed to mortgages and trust indentures/deeds of trust which tend to use form documents.
 - Typically, short default time – 30 days.
 - Windfall to Seller if default not corrected
 - Seller retains monies paid and gets the property back.
 - Seller retains title until contract paid off.
 - Buyer's perspective
 - Frequently sellers are more willing to do seller financing via a contract for deed.
 - Seller more comfortable with smaller downpayment as they still hold title and short default term.

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Contract for Deed

- Con's:
 - Seller's perspective
 - **Quigley v. Acker**: 1998 MT 72 *; 288 Mont. 190 **; 955 P.2d 1377 ***; 1998 Mont. LEXIS 46 ****; 55 Mont. St. Rep. 295;
 - \$706,932. Purchase price. Monthly payments. Balance paid down by \$657,204. Owed \$49,728. Missed September and October payments. Supreme Court: Buyers did not voluntarily default. Issues with notice of default.
 - Buyer's perspective
 - No option for foreclosure sale where Buyer may receive some money.
 - Short default time.

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Note – Trust Indenture/Deed of Trust

- Pro's:
 - Seller's perspective
 - Don't run into the **Quigley v. Acker** issues.
 - Foreclosure process set by state law.
 - Potential of bidding in at sale and recovering property or be paid off if there is a third parties who bids more.
 - If buyer files bankruptcy, pretty standard process and procedures for addressing default.
 - Buyer's perspective
 - Foreclosure sale may result in buyer receiving some of the money invested back.
 - No deficiency judgment on residential property vs commercial if foreclosure done via judicial proceedings.
 - Minimum 120 day time for foreclosure and buyer able to cure at anytime up to date of sale.
 - Documents are typically standards forms parties are familiar with.

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Note – Trust Indenture/Deed of Trust

- Con’s:
 - Seller’s perspective
 - Length of time to complete foreclosure
 - No windfall as with Contract for Deed.
 - Buyer’s perspective
 - Black mark on Buyer’s credit.
 - Potential of Deed in Lieu of Foreclosure.

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Note – Mortgage

- Pro’s:
 - Seller’s perspective
 - Mortgage is an option when dealing with properties in excess of 40 acres.
 - Potential of being paid off via sheriff’s sale or via power of sale.
 - Buyer’s perspective
 - Potentially longer foreclosure time than Contract for Deed
 - Possible recovery of some of monies paid if third party bids at sale.
 - One year redemption time.

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Note – Mortgage

- Con’s:
 - Seller’s perspective
 - Typically foreclosed via court proceeding – sheriff’s sale
 - Potential of matter being tied up in litigation for extended time.
 - If buyer occupies the property, the one year right of redemption creates risk of loss via hazards, requires payment of taxes and buyer unlikely to maintain property
 - Buyer’s perspective
 - Involvement in court proceedings if judicial foreclosure is used.

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Any additional items?

- Subject to clauses in warranty deeds.
