

CHOOSING YOUR “TITLE”

Life doesn't always afford you the opportunity to choose your title, except in the case of purchasing real estate. The choice is always yours and can have significant implications and consequences if the wrong choice is made! In those cases where more than one person intends to acquire real estate, whether by gift, purchase or otherwise, there are three common, yet distinctive, methods to “take title”.

The first method of taking title is reserved to those individuals who are married and is referred to as “Tenants by the Entireties”. A conveyance to husband and wife is presumed to create a tenancy by the entireties, which presumption can only be overcome using clear and convincing evidence of a contrary intent. Again, only a husband and wife can be tenants by the entireties, so a deed purporting to create tenancy by the entireties in unmarried persons will create either joint tenancy or tenancy in common, depending on the intent of the parties. If a man and woman acquire property as tenants in common and subsequently marry each other, they remain tenants in common unless they deed the property to themselves again after marriage. The husband and wife are considered a single entity which owns 100% of the property. Neither spouse, acting independently, can sever a tenancy by the entireties. Furthermore, the only ways to sever a tenancy by the entireties are by joint acts of the married couple, such as divorce, joint conveyance and mutual agreement. The entry of a divorce decree creates a tenancy in common subject to rights of equitable distribution.

The second method is called “Joint Tenancy” and creates an equal interest in the joint tenants holding title. Each joint tenant is considered to own an undivided share of the entire property. A conveyance by deed to two or more persons who are not husband and wife is presumed to create tenancy in common and not joint tenancy, unless clear intent to the contrary is shown. Consequently, in order to create a joint tenancy the deed should clearly state that title is being conveyed to the grantee as “joint tenants with the right of survivorship” and not as tenants in common. The differentiation is extremely important. Right of survivorship means that the interest of a deceased joint tenant passes by operation of law to the surviving joint tenant, immediately upon death. This means that the deceased joint tenant's interest does not pass through his or her estate. Because the interest passes by operation of law, the right of survivorship cannot be defeated by a will or by laws of intestacy.

The third method is referred to as “Tenancy in Common” and creates a fractional share of an undivided interest in the entire property for each joint owner. This type of tenancy is presumed when a conveyance of real property is to two or more unmarried persons. In this instance, each co-tenant's share can pass by will, devise or intestate succession and the share can be freely transferred and encumbered, there being no right of survivorship in this case.

In summary, the choice of how to take title is important from many perspectives; estate planning, tax planning, preservation of assets from judgment creditors, etc. Always choose your title carefully!

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