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It's the Law: Methods of taking title for property are numerous

By WILLIAM MORRIS, Special to the Eagle
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Q: We are buying some Florida property. Our Realtor asked us how we wanted to take title. Can you explain our options?

A: The manner in which real property is titled determines the rights, liabilities and obligations of each owner and potentially his or her heirs, creditors and others. My answer will discuss some of the more common methods of titling real property.

Tenancy in common is most frequently utilized when two or more people who are not husband and wife own property. In a tenancy in common, each person owns an undivided interest in the property and there is no survivorship right as to the other owners. That means that the interest of an owner passes to the owner's heirs or beneficiaries as an asset of his or her estate.

Each tenant in common may sell or mortgage the ownership interest, but cannot affect the interest of other owners. Similarly, creditors of a tenant in common may obtain a lien and take collection action against the interest of that owner in the property, but cannot reach the interest of other owners. A tenant in common can sell his or her interest in the property, but not the interest of co-owners. And, tenants in common may own different percentages of the property.

Joint tenants with right of survivorship is an alternative method for taking title. Under this type of ownership, when one owner dies, the survivors equally share the decedent's ownership interest. A joint tenancy must be specially created. If language in the deed does not make it clear that the people taking title have taken title as joint tenants with right of survivorship, a tenancy in common is presumed.

A joint tenant cannot sell or mortgage the interest of any other joint tenant. A joint tenant can mortgage his ownership interest. A mortgage does not sever the joint tenancy, but conveyance by the joint tenant to himself or to others severs the joint tenancy and converts it to tenancy in common. A joint tenant's ownership interest is subject to execution and sale by creditors of that joint tenant.

Tenancy by the entireties is a survivorship tenancy for husband and wife. It is basically a joint tenancy with right of survivorship, modified by common-law treatment of husband and wife as one person. Unlike a joint tenancy with right of survivorship, a tenancy by the entireties may not be terminated by either spouse acting alone.

A deed to two people married to each other is presumed to create a tenancy by the entireties. Language in Florida deeds to create such tenancy usually names the grantees, and indicates that they are husband and wife.

Neither spouse has a right to sell, mortgage or otherwise transfer entireties property without consent and joinder of the other spouse. Similarly, creditors of one spouse cannot attach the interest of that spouse in an entireties property. Joint creditors of both spouses can attach such property. If one spouse dies, creditors of the surviving spouse can attach the property unless it is exempt Homestead.

A tenancy in common can be part of a partnership or joint venture. The deed, alone, does not establish the terms of the partnership and rights and obligations of the partners between each other. This makes it important to prepare appropriate partnership and other documents when more than one person will own property as an investment. These

documents should include a buy-sell clause in case of a dispute that cannot be settled amicably.

Title also may be taken in the form of a limited liability entity, such as a limited liability company or corporation. Title in such entities generally evades creditors of the owner of the entity. Creditors of an owner of the entity may be able to attach the owner's interest in the entity. Management and control of the property is determined by the organizational documents for the entity.

Title also may be taken in trust. In a traditional trust, a trustee holds legal title for the benefit of a beneficiary in accordance with a written document outlining how the property is to be administered.

Under modern trust law, the same person can hold title and be a beneficiary under his or her trust for estate-planning purposes. This type of trust is most commonly referred to as a revocable living trust or living trust. Creditors of the trustee acting for the benefit of third parties cannot generally attach the trustee's bare legal title to the property.

In contrast, creditors of the trustee who is also a beneficiary of the trust may pierce through the trust and attach the property.

The decision concerning how to title real property can be complex. Before making your final choice, I urge you to consult with an experienced attorney.

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The information in this column is not intended as legal advice and, of necessity, is generalized. For questions about specific circumstances, the reader should consult a qualified attorney.

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