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FAQs | Holding Title to your San Francisco Home

4/1/16 Edition by David R. Gellman

The question of how to take or hold title to a home is one that San Francisco real property buyers and owners ask their real estate, escrow and title professionals every day. Though these professionals may identify the many ways of owning property, they cannot recommend a specific form of ownership, as doing so would constitute practicing law. This article is provided as a resource for understanding how the choice of holding title to real property affects matters such as taxes, transferability of title, exposure to creditor's claims, and Probate implications upon death. Updated versions of this article may appear on the firm's website at www.g3mh.com.

Breaking News California has introduced a new form of holding title to real property, called a "Revocable Transfer on Death Deed." This new type of deed allows homeowners to name a death beneficiary for their property and avoid Probate without making an immediate transfer of ownership. This new form of taking title offers a simple and economical estate planning tool, with some limitations (more within).

What does Holding Title as "Fee Simple" Mean?

"Fee Simple" (or "Fee Simple Absolute") refers to a ***single*** owner of real property. Considered under Common Law as the greatest possible estate in land, a Fee Simple owner has the exclusive right of use, possession and disposition of real property. Holding such absolute ownership, the owner may do whatever he or she chooses with the land and its improvements. A Fee Simple owner can leave her or his land to heirs via a Will, and if he or she dies without a Will ("intestate"), the land will pass to the decedent's legal heirs as determined under California law. In either case, ***Probate administration will be required to transfer ownership to the heir(s)***.

What does Holding Title as "Fee Simple" Mean?

"Tenancy in Common" is a widely used type of ***group*** ownership of property; there is no limit as to the number of individuals ("cotenants") who can share such ownership in undivided fractional interests. Ownership fractions are usually specified in the property deed; when they are not, it is presumed that all cotenants own equal shares. Even when cotenants hold ***unequal*** ownership shares, they nevertheless ***equally share*** all rights of use, possession and disposition of real property; each cotenant is entitled to her or his fraction of the income from the property and must bear an equivalent share of expenses. However, all of those rights can be, and frequently are, limited and modified by contract, under what is commonly called a "TIC Agreement." Upon the death of a cotenant, her or his interest passes to the cotenant's heirs, not to the other cotenants. In San Francisco, Tenancies in Common are frequently used among co-owners of multi-unit properties when condominium ownership isn't feasible, allowing the cotenants each to have exclusive usage rights to a particular area of the property. Tenancy in Common therefore allows each cotenant to choose who will inherit his or her interest, but ***Probate administration will be required to transfer ownership to the heir(s)***.

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What does Holding Title as "Joint Tenants" Mean?

"Joint Tenancy" (short for "Joint Tenancy with Right of Survivorship") is a special kind of multiple ownership which allows for the transfer of title following death of a co-owner to the surviving co-owner(s) ***without Probate administration***. To create a Joint Tenancy, four different "unities of ownership" are required:

- **Time.** Each joint tenant must receive title at the ***same time***.
- **Title.** Each joint tenant must receive title via the ***same deed or instrument***.
- **Interest.** Each joint tenant must receive the ***same proportionate and equal share*** of ownership (this is why Joint Tenancy Deeds never show any ownership percentages – they are always equal).
- **Possession.** Each joint tenant must have the ***identical right of possession***.

In practice, this means that title to the property must have been acquired at the same time by the same deed, and the deed must expressly declare the intention to create a Joint Tenancy estate. If a Joint Tenant sells or conveys his or her interest in the real property, then the Joint Tenancy is ***broken***, and a Tenancy In Common is deemed to exist ***with no rights of survivorship***.

Can a Joint Tenancy be Broken Unilaterally?

Yes. A Joint Tenant can undo the Joint Tenancy without the consent – or even the knowledge – of the other Joint Tenant(s), converting the ownership to a Tenancy in Common. The parties will still own the property in equal shares, but with ***no survivorship rights***. This tactic is often employed by one co-owner in the immediate aftermath of a breakup.

Does Naming Someone a Joint Tenant Transfer Immediate Ownership?

Yes, and this is often poorly understood by people who use Joint Tenancy as a simple estate planning tool. "Putting someone on title" by deeding the property to yourself and someone else as Joint Tenants immediately makes the person who you have named a Joint Tenant a full and equal co-owner of the property. From that day on, you can't sell or refinance the property without your co-owner's willing participation, your co-owner's right to use the property will be equal to yours, and your co-owner will be entitled to an equal share of any sale proceeds or rental income from the property. Such problems can be avoided by using instead the new TOD Deed, described below.

Does Holding Title in Joint Tenancy Postpone a Property Tax Reassessment?

It can, but the particulars of how and when are beyond the scope of this article. To be fully exempt from any Prop 13 Property Tax reassessments, the Joint Tenants must be "Original Transferees" as defined by the California Board of Equalization (see below). Please contact one of our attorneys for guidance on this subject.

Does Holding Title in Joint Tenancy Avoid Estate Taxes?

No. Even though holding property as Joint Tenants may avoid Probate administration, the value of the decedent's share of the property ***remains part of his or her gross estate*** for Federal Estate Tax purposes. Creating a Joint Tenancy during life with children or other beneficiaries won't eliminate these taxes; moreover, it will be treated by the IRS as a ***lifetime gift***, triggering Federal Gift Taxes.

Does a Will or Trust have any Control over Property Held in Joint Tenancy?

Not until the death of the last surviving Joint Tenant. When property is owned in Joint Tenancy, the surviving Joint Tenant(s) will own the deceased Joint Tenant's interest in the property, ***regardless*** of how the deceased's Will or Trust ***attempts*** to bequeath the property. For the last surviving Joint Tenant, the Joint Tenancy has ended; the survivor becomes a Fee

Simple owner, and his or her Will controls the disposition of the property upon his or her death. Also, when *both* Joint Tenants die simultaneously, their individual Wills distribute their equal interests in the property; without a Will, State intestacy rules apply.

What is the Main Advantage of Joint Tenancy?

Holding title in Joint Tenancy is often used as a simple estate planning tool, because it allows for transfer of the property at death ***without*** Probate administration. Title to real property can be cleared after a Joint Tenant's death by recording a sworn Affidavit of Death of Joint Tenant with a certified copy of the death certificate attached; the surviving Joint Tenants then own the property. If there is only one survivor, he/she owns the property in Fee Simple; if more than one, the survivors continue to hold title as Joint Tenants with each other.

What are the *Dis*advantages of Joint Tenancy

Because creation of a Joint Tenancy involves an ***immediate transfer*** of ownership, the transfer may be subject to Federal Gift Tax. Also, assets held in Joint Tenancy will be exposed to liens and creditor's claims from ***all*** of the Joint Tenants (consider instead using the new TOD Deed, described below). If the parties are relying on holding title as Joint Tenants as their exclusive means of transferring title at death, their estate planning goals may not be fully achieved; Probate administration ***will*** be required following the death of the last surviving Joint Tenant, or if the Joint Tenants die simultaneously. Also, ***married couples*** who hold title to appreciated property as Joint Tenants rather than as Community Property, in or out of a Trust, forfeit tax planning advantages (see below).

What does Holding Title as "Community Property" Mean?

Married spouses or Registered Domestic Partners may take or hold title to their property as their Community Property. In California, real property acquired by a married person, or a registered domestic partner, is ***presumed*** to be Community Property, with certain exceptions, such as property received by inheritance or as a gift. There are often Federal tax benefits to holding title Community Property. Community Property is distinguished from Separate Property, which is property acquired ***before*** the couple's legal union; by separate gift or bequest; ***after*** legal separation; or which is ***agreed in writing*** to be owned by ***only one*** spouse or registered domestic partner. Community Property is always owned ***equally***, and both owners must sign all agreements and documents transferring the property or using it as security for a loan. At death, each owner has the right to dispose only of her or his half of the Community Property by Will or Trust; there is no automatic transfer at death, and Probate administration ***will*** be required.

What is the Main Advantage of Community Property?

Unlike Joint Tenancy, which upon the death of a Joint Tenant provides a stepped-up cost basis for the ***decedent's interest only***, Community Property receives a stepped-up cost basis as to the ***entire property***. This means that if a surviving spouse subsequently sells the property, he or she will pay capital gain taxes ***only on any post-death appreciation***. A full analysis of the tax advantages of holding title as Community Property is beyond the scope of this article; please contact one of our attorneys for guidance on this subject.

Can Community Property be Broken Unilaterally?

No. Because the legal basis for Community Property lies not with the wording on the deed, but on the ***legal union*** of the couple, merely changing the wording on the deed or subsequently re-deeding the property will not necessarily alter its Community Property status.

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What is "Community Property with Right of Survivorship"?

Adding the words "With Right of Survivorship" on a deed conveying Community Property combines the benefits of holding title as Community Property with the automatic survivorship feature of Joint Tenancy, because it allows for the immediate death transfer of the property to the survivor ***without*** Probate administration. On death, one spouse's ownership ceases, and the surviving spouse owns the entire property in Fee Simple. Of course, the automatic survivorship feature doesn't work if ***both*** spouses die simultaneously, or upon the death of the ***second*** spouse – in such cases, Probate administration ***will*** be required to transfer title to the heirs.

What is a "Life Estate"?

A "Life Estate" exists when a person is granted (or retains) a legal right to use real property during their lifetime, but does not own the property outright. That person is called the "Life Tenant." After the death of the Life Tenant, the property passes to the named beneficiaries, called "remaindermen." Probate administration is not required (unless a remainderman dies before the Life Tenant). Life Estates have faded from popularity in favor of Trusts, which offer greater flexibility.

What does Holding Title "in Trust" Mean?

A Trust is an arrangement whereby legal title to property is transferred by a grantor to a person called a trustee, to be held and managed by that person for the benefit of the people specified in the Trust agreement, called the beneficiaries. In the most common type of Trust used for home ownership, the Revocable (or "Living") Trust, the grantor, the trustee and the beneficiary often are, at least initially, the same person. A Trust typically does not hold title in its own name. Instead title is vested in the trustee of the Trust. Revocable Trusts are used to protect one's assets from the delay, publicity, court supervision, and expense associated with Probate administration.

Can a Trust be a Joint Tenant?

No. Trust ownership is incompatible with Joint Tenancy ownership – two Trusts cannot hold title as Joint Tenants with each other, nor can an individual be a Joint Tenant with a Trust.

What is Indirect Ownership?

In some cases, owners will choose ***indirect ownership*** – where an individual does not actually hold title to property itself, but instead owns an interest in a ***legal entity*** that holds title to the property. While often misguidedly believed to be helpful in lessening liability for injuries occurring on the property, entity ownership can be exceptionally useful in multi-party situations, where one of the following entities may be employed:

- **Corporation** – A legal entity, created under state law, consisting of one or more shareholders but granted an existence and personality separate from its shareholders.
- **Partnership** – an association of two or more persons who can carry on ***business for profit as co-owners***. Forming a Partnership doesn't require any specific act or written agreement, but regardless, all Partnerships are governed under the California Revised Uniform Partnership Act (RUPA). A Partnership may hold title to real property in the names of the individual partners, or in the Partnership's name.
- ***Limited Liability Company (LLC)*** – a legal entity similar to both the corporation and the partnership. An LLC Operating Agreement will determine how the LLC functions and how it is taxed. Like the corporation, its existence is separate from its owners.

Can How I Hold Title Affect my Property Taxes?

Yes, your decisions as to how to take or hold title to real property today can help or hurt you years down the road. The rules of the Board of Equalization, which under Prop 13 determine how real property is taxed in California, are exceedingly complex, but when properly understood, they can be applied to avoid an unnecessary re-assessment of your real property. For example, under BOE rules two people holding title as Joint Tenants can avoid a re-assessment on the death of ***either***, but only if they are ***both*** "Original Transferors" (meaning that they have transferred the property from themselves as Tenants in Common, to themselves as Joint Tenants). The specifics of property taxation are beyond the scope of this article; please contact one of our attorneys for guidance on this topic.

What is a Warranty Deed?

A Warranty Deed transfers ownership and explicitly promises the buyer that the property ***is free of liens or claims of ownership***. The transferor guarantees that he or she will compensate the buyer if that turns out to be wrong. Since most residential property transfers involve issuance of title insurance, with title companies providing a more reliable guaranty than transferors, Warranty Deeds are seldom used in California except when the deed is used to make other promises as well, to address particular problems with the transaction.

What is a Quitclaim Deed?

A Quitclaim Deed conveys a transferor's complete interest in real property, but does not warrant that the transferor's claim of title is actually valid. A Quitclaim Deed only transfers ***whatever ownership interest a transferor has*** in a particular property, but offers ***no guarantee*** as to the extent of the transferor's interest in the property, ***if any***. If the transferor does possess a valid ownership interest, then the Quitclaim Deed will convey that ownership right to the transferee, but the deed itself includes no promises that the transferor actually has a valid ownership interest in the property. This is why title insurance companies may be reluctant to issue title insurance policies when the chain of title includes a transfer using a Quitclaim Deed.

Quitclaim Deeds are often used to certify that the person signing does not have any interest in the property, precluding any future "cloud" in the chain of title. Common instances where Quitclaim Deeds may be appropriate include:

- when a legal heir of a deceased owner gives up any claim to the property;
- when a married person confirms that she or he claims no Community Property interest in real estate owned or acquired by a spouse;
- between divorcing couples, with one spouse signing all of his or her rights in a particular piece of real property over to the other spouse;
- when there is a possibility that a person may have some remaining interest in the property, like a lease by a former tenant, or an option to purchase the property, and the owner or prospective buyer wants that person to disclaim any such interest.

What is a Grant Deed?

Grant Deeds are the predominant instrument used to transfer ownership of real property in California (such as from a seller to a buyer). A Grant Deed includes more guarantees of title than a Quitclaim Deed but fewer guarantees than a Warranty Deed. A Grant Deed is written evidence that the transferor actually ***owns*** property, and implies that the title hasn't already been transferred to someone else or been encumbered, except as set out in the deed. What California calls a Grant Deed is, in fact, similar to what many other states call Warranty Deeds.

A Grant Deed always includes basic transaction information, such as the names of the transferor and transferee, the property address and legal description, the Assessor's Parcel Number

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(A.P.N.) and transfer tax information. The transferor must ***sign and date*** the Grant Deed, ***before a Notary Public***. While ***delivery*** of the Grant Deed by the transferor to the transferee technically completes the transfer, the ***recording*** of the Grant Deed with the County Recorder makes the transfer a matter of public record, and no one may thereafter claim ignorance of the transfer. An unrecorded Grant Deed runs the risk of the transferee losing ownership to a person who, without knowledge of the prior deed, later records a different deed to the property.

What is a Revocable Transfer on Death Deed?

A Revocable Transfer on Death ("TOD") Deed is a newly sanctioned instrument which now offers Californians what they may mistakenly have thought Joint Tenancy ownership provided – a simple, near-automatic transfer upon death with no Probate administration, but ***without any immediate transfer of ownership*** of the property. TOD Deeds can be used only for the following properties:

- Single-family homes;
- Multi-unit properties with no more than 4 residential dwelling units;
- Condominium units;
- Up to 40 acres of agricultural land with a single-family residence.

TOD Deeds must be signed before a Notary Public, and must be ***recorded*** within 60 days from the signature date. However, a TOD Deed doesn't need to be delivered to the beneficiary; the beneficiary need not even know he or she has been named. TOD Deeds may be ***revoked*** by the transferor at any time, and have no effect if the named beneficiary dies first. Signing and recording a new TOD Deed revokes the previous deed. TOD Deed forms can be downloaded from: http://www.sbcounty.gov/arc/_pdf/Revocable_Transfer_on_Death_Deed.pdf. Unless the State Legislature acts otherwise, the new law will expire on January 1, 2021, but that will not invalidate revocable TOD Deeds executed before that date.

How is Title held under a TOD Deed Transferred at Death?

The beneficiary named in the TOD Deed records evidence of the transferor's death, including a death certificate, and files a Change in Ownership Notice to alert the County Assessor that the property is ready for Prop 13 reassessment. If the transferor received Medi-Cal benefits, the beneficiary must also notify the State Department of Health Care Services, so that the state can seek reimbursement for expenses paid by Medi-Cal during the transferor's life (which can render use of TOD Deeds unwise for Medi-Cal planning).

Does Recording a TOD Deed Transfer Immediate Ownership?

No. Recording a TOD Deed is ***not*** a true transfer of ownership; the named beneficiary has no legal right or interest in the property ***until the transferor's death***. Only the death of the person signing the TOD Deed causes a transfer of ownership of the property.

What are the Advantages of TOD Deed?

Because a TOD Deed is not an immediate transfer of ownership, recording a TOD Deed doesn't trigger any Transfer Taxes, nor does it subject the property to an immediate Property Tax reassessment. The beneficiary's debts do ***not*** affect the property while the grantor is alive. Unlike Joint Tenancy, the grantor can revoke a TOD Deed at any time; the grantor remains free to sell or mortgage the property without the involvement of the beneficiary. And when the grantor dies, the transfer is treated as an inheritance, not a gift, and receives a more favorable tax treatment.

What is a Deed of Trust?

A Deed of Trust is not really a deed in the same sense as a Grant Deed, Quitclaim Deed, etc., in that it is not used to transfer ownership of property. Rather, it is the instrument which is recorded to show that real property has been offered as ***security for a loan***, and is thus the California equivalent of a mortgage.

What Sets Goldstein, Gellman, Melbostad, Harris & McSparran, LLP ("G3MH") Apart?

EXPERIENCE:

G3MH has been a respected member of San Francisco's real estate community for nearly thirty-five years. G3MH's transactional attorneys are available to offer guidance in title transfer and vesting, landlord/tenant issues, TICs, condominium conversion, trust and estate matters, encroachments, easements, and property tax issues. G3MH's litigation attorneys field a depth of experience in TIC and condo dispute resolution unmatched by any other firm in San Francisco. In addition to representing individual clients in meditation, arbitration and court, G3MH also offers skilled mediators to help property ownership groups resolve internal disputes.

SERVICE:

Any San Francisco Realtor® can confirm that G3MH is the "go-to" firm for residential property issues. Because timing means everything in real estate, G3MH maintains the staffing and resources to offer unparalleled response times to client needs.

About the Author:

David R. Gellman, managing partner of G3MH, has extensive experience in Tenancy In Common (TIC) formation, condominium conversion, landlord/tenant (rent control), real estate litigation, commercial leasing, like-kind exchanges, multifamily housing finance, construction, and estate planning. Mr. Gellman is an accredited instructor with the California Department of Real Estate, and frequently conducts co-ownership workshops for attorneys, real estate agents, and prospective home buyers. Other G3MH FAQ articles can be found on the firm's website at www.g3mh.com. Mr. Gellman can be contacted via email at DGellman@g3mh.com, or by phone at 415/673-5600 ext.2299.

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