Forms of Real Estate Ownership

LEARNING OBJECTIVES

Upon completion of this section, the student should be able to:

- Explain why the form of real estate ownership is important when the property is being transferred.
- Define ownership in severalty, tenancy in common, joint tenancy, tenancy by the entirety, and community property.
- Explain how co-ownership can be created and terminated.
- List the ways business organizations can own real estate.
- Describe the differences between a cooperative and a condominium.
- Outline the creation and operation of a condominium.

OWNERSHIP INTERESTS IN REAL PROPERTY

When buyers purchase property, they decide how they will take ownership. A title or escrow company usually assists buyers in determining the best choice for them. Factors that are considered include:

- How many owners are purchasing?
- Do the owners want their heirs to inherit the property upon their death?
- Are the owners investing equal amounts?
- Are all of the owners taking ownership at the same time?
- Do the owners want the remaining owners to take possession of an owner’s share upon their death?
Major types of ownership interest

One Owner

If only 1 person is purchasing a property, the choice is easy. He/she takes ownership in **severalty**, separate from any other owners. The individual owner has the sole rights to the ownership and sole discretion over the transfer of the ownership. The ownership gives the buyer a sole custody or sole proprietorship of the property.

**Severalty**
- Ownership is not shared when any other owners.
- The owner has sole rights to the ownership and sole discretion over the transfer of the ownership
- Individual ownership.
- owner is ‘severed’ or ‘cut off’ from all other owners
- the owner has sole rights to the ownership and sole discretion over the transfer of the ownership
- only one owner

Multiple Owners aka concurrent ownership

If multiple owners are purchasing a property, there are three major choices of co-ownership. They may take ownership as joint tenants, tenancy in partnership, or tenants in common. Tenancy by the entireties is also a type of ownership that may be used instead of joint tenancy; with marriage as a prerequisite. It is not recognized in many states including Nevada. The choice dictates the future of the property ownership when an owner dies, whether the owners can own the property with an equal or non-equal percentage, and the timing of their ownership.
Joint Tenancy

Joint tenancy means equal ownership. Even though multiple owners can acquire a property as joint tenants, most residential property has two joint owners because many married couples usually prefer to acquire property as joint tenants. This is the most popular choice for married couples because it enables a surviving spouse to automatically inherit ownership of 100% of real property upon one spouse’s death.

This is the unity of ownership called right of survivorship. This type of co-ownership requires 5 unities of ownership remembered with the acronym PITTS. They are:

1) Unity of Possession,
2) Interest,
3) Time,
4) Title, and
5) Right of Survivorship.

1) Unity of possession

Unity of possession means that both or all parties must be entitled to possession of the whole property. The property cannot be split into pieces with one owner owning the kitchen, one owner owning the bathroom and one owner owning one of the bedrooms. All owners must have equal, undivided interest to the whole property.

2) Interest

The unity of interest means that “all joint tenants’ interests must be identical in nature, extent, and duration.” In other words, they all must have acquired an equal percentage of ownership. If two co-owners own a piece of real property, they each own 50% of the whole. If four co-owners own a piece of real property, they each own 25% of the whole. All co-owners own equal parts of the whole.

---

3) **Time**

The unit of time means that all parties acquired interest in the property at the same time. If the purchase was made on February 14, 2008, all parties acquired their interest on February 14, 2008. If one of the co-owners choose to sell their portion while they are alive (i.e. they cannot will property because of the unity of survivorship, only sell it while they are alive), the new owner will acquire ownership in a different manner; not by joint tenancy. If there are two joint tenants and one of them sells their interest, joint tenancy will fall and they will take ownership by another method. When there is only one owner left, they will own the property in severalty. If there are three or more tenants and one of the tenants sells their interest, the remaining tenants may remain joint tenants, and the new tenant will take ownership by *tenants in common* (discussed later).

4) **Title**

The unity of title means that all parties must acquire ownership by the same method. If the property was willed, all co-owners acquired the property through the will. If the property was sold, all co-owners acquired the property through transfer of a deed.

5) **Right of Survivorship**

The right of survivorship is “a joint tenant’s right to succeed to the whole estate upon the death of the other joint tenant.”[^7] This right is protected by state law. If one tenant dies, the remaining tenants obtain an equal percentage of ownership. The percentage of ownership that is owned by the deceased tenant may not be willed. It is equally absorbed by the remaining tenants.

**Example:**

Jessie Wettergren was co-owners with his two other siblings on their deceased parent’s time-share. He owned 33 1/3% of the time-share before the recent death of his sister. Now there are only two owners, and they each own 50% of the time-share. Upon his death, his remaining sister will be the sole owner and will own the property in severalty.

---

* joint tenancy continues until only one of the owners remain - who would re-take title in severalty
* right of survivorship
* title is acquired by one deed
* the deed is executed and delivered at one time
* the deed conveys equal interest to all of the parties
* If any unity is broken, the joint tenancy falls to a tenancy in common
* the parties own undivided possession of the property as joint tenants
* Title is held as if all owners are one owner.
* all five unities of ownership and survivorship must be present (PITTS)
  * Unity of Possession
    * equal right of possession
  * Interest
    * All have equal ownership interests
  * Time
    * All acquired interest at the same time
  * Title
    * All have acquired the same interest by the same document (deed or will)
  * Right of Survivorship
* Terminating Joint Tenancy:
  * destroyed when unities no longer exist
  * rights of the other tenants are unaffected if one tenant sells property

---

**Community Property Laws**

**Community Property Defined**

As with most states, Nevada is a state that recognizes community property laws. Any property acquired by one or both spouses, during a marriage is community property and split 50%/50% if the marriage ends. Community property laws are not a type of ownership interest, rather a legal treatment of marital assets. All property acquired after the written agreement of marriage is community property unless there is a prenuptial agreement in place, ordered so by a judge, or falls under the definition of separate property. Transfer of property requires both signatures.
Separate Property Example:

Robert Jess inherited a lodge from his parents when he turned 18 years old. On his 65th birthday, he married Jennifer and on his 66th birthday, he divorced Jennifer. Jennifer was Robert’s first wife. He did not have a prenuptial agreement in place. Even though Robert’s parents money was used to purchase the lodge, Robert did not keep money legally separate from the marriage to pay all of the bills generated by the lodge. Since Jennifer’s salary was used to pay the electric bill at the lodge, Jennifer’s attorney told Jennifer that 50% of the equity (difference between market value and mortgage) in the lodge now belonged to Jennifer. Robert will have to either sell the lodge and pay Jennifer the cash or work out another equitable arrangement. If Robert had used money earned from the lodge to pay the electric bill, and had involved an attorney to make sure that this remained separate property, Jennifer wouldn’t have been entitled to any of the equity from the lodge.

Community Property State Review

* Nevada is a community property state
* husband and wife are equal partners in the marriage
* any property acquired during the marriage is a mutual effort
* constitutes immediate 50%-50% ownership upon acquisition of the property regardless of the names or vesting appearing on the deed
* Separate property
* owned by either spouse before the marriage
* includes property received by a gift or an inheritance to just one spouse during marriage.
* also includes property purchased and maintained by separate funds during the marriage
* any income earned by separate property remains separate property
* Community property
* consists of all other property acquired by either spouse during the marriage
* property cannot be conveyed (sold, leased) without both signatures
Tenancy in Partnership

Tenancy in partnership exists if two or more persons, as partners, own property for partnership purposes. Under the Uniform Partnership Act, the incidents of tenancy in partnership are such that:

1. A partner has an equal right with all other partners to possession of specific partnership property for partnership purposes. Unless the other partners agree, however, no partner has a right to possession for any other purpose.
2. A partner’s right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.
3. A partner’s right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership.
4. On death, a partner’s right in specific partnership property vests in the surviving partner (or partners). The rights in the property of the last surviving partner would vest in the decedent’s legal representative. In either case, the vesting creates a right to possess the partnership property only for partnership purposes.
5. A partner’s right in specific partnership property is not subject to dower (the portion to which a surviving wife is entitled) or curtesy (the portion to which a surviving husband is entitled) rights; nor allowance to widows, heirs, or next of kin. Even when married, a partner’s right is not community property. On the other hand, a partner’s interest in the partnership as such (that is, a partner’s share of profits and of surplus) is governed by community property rules for some purposes.

This make sense because two or more persons are attempting to carry on a business for profit. Without these rules, efficient operation would be difficult.

Partners are not, however, prevented from owning different fractional parts of the business. Thus, although each partner has unlimited liability to third parties for firm debts, each partner’s interest in profits and losses may be any percentage agreed upon. Partners may also structure the business relationship as a partnership in many different ways. By agreement, one partner may have greater authority than the other partners.8

Tenancy in Common

(Can be unequal ownership)

Tenancy in common is the last type of co-ownership. It is used when buyers acquire property at different times, by different documents, with no right of survivorship, in various percentages and want to be able to will property to their heirs. All co-owners are still entitled to unity of possession, an equal, undivided interest to the whole property.

If owners acquire interest as joint tenants, and a joint tenant sells his share; the new owner may acquire ownership as a tenant in common while the remaining owners keep their joint tenancy ownership with a right of survivorship interest with each other.

Tenancy in common
* owned by two-or-more people
* each tenant owns an undivided, fractional interest in the property
* specific property is not physically divided to match fractional interest
* all co-owners are entitled to unity possession of the whole property
* Their interests may be equal or unequal (50%-50% or 60%-40%)
* the ownership interest, not the property is divided
* tenants own their ownership interest in severalty
* Their interests may have been acquired at different times and by different documents; by deed or will.
* Each owner's interest can be separately mortgaged, sold, leased or inherited without the consent of the other co-owners.
* no individual tenant may transfer the interest of the whole property
* when a tenant dies, their will dictates inheritance of their share
Tenancy by the entireties

(must be husband and wife - not used in Nevada)

Tenancy by the entireties is a joint possession of real property by a husband and wife who are viewed as one entity under the law. Neither husband nor wife can convey the property without the consent of the other, and the surviving spouse takes control of the entire estate.

- not used in Nevada
- Must be husband and wife to use.
- entirety means that the owners are considered one, indivisible unit
- stems from common law that looked at married couples as one person
- some states assume this type of ownership if husband and wife
- not right to partition or divide
- upon the death of a spouse, the surviving spouse becomes sole owner
- all four unities of joint tenancy must be present
- right of survivorship
- owners must be husband and wife
- no right to partition the property
- must have both signatures to convey (sell, lease)
- does not require probate action to obtain property if one spouse dies
- one party cannot sell, mortgage or lease without the consent of the other

Real Estate Investment Trust (REIT)

A Real Estate Investment Trust (REIT) is a corporation or trust that uses the pooled capital of many investors to purchase and manage income property and/or mortgage loans. REITs are traded on major exchanges just like stocks. They are also granted special tax considerations. REITs offer several benefits over actually owning properties. First, they are highly liquid, unlike traditional real estate. Second, REITs enable sharing in non-residential properties as well, such as hotels, malls, and other commercial or industrial properties. Third, there’s no minimum investment with REITs. REITs do not necessarily increase and decrease in value along with the broader market. However, they pay yields in the form of dividends no matter how the shares perform. REITs can be valued based upon fundamental measures, similar to the valuation of stocks, but different numbers tend to be important for REITs than for stocks.9

Ownerships by Business Organizations

Businesses can also purchase property. There are three major types of business formations; sole proprietorship, partnership and corporations. A sole proprietorship or DBA (doing business as) has one individual owner. If there are co-owners, businesses form as a partnership or corporation. A partnership may be a general partnership or a limited partnership, depending on whether or not all partners have complete authority. A corporation may be formed as a C corporation (income is taxed through it rather than through the tax returns of its shareholders); or an S corporation (IRS taxes income through the tax returns of its shareholders).

1 Sole Proprietorship

A sole proprietorship is a type of business entity which is owned and run by one individual and where there is no legal distinction between the owner and the business. The owner is ‘doing business as’ or dba.

All profits and all losses accrue to the owner (subject to taxation). All assets of the business are owned by the proprietor and all debts of the business are their debts and they must pay them from his/her personal resources. This means that the owner has unlimited liability. It is a "sole" proprietorship in the sense that the owner has no partners (partnership).

A sole proprietor may do business with a trade name other than his or her legal name. This also allows the proprietor to open a business account with banking institutions.

Advantages

The main advantages of a sole proprietorship are that they are easy to start up, they are subject to fewer regulations relative to other types of businesses, the owner has full autonomy with regard to business decisions, and they are easy to discontinue. Another advantage is that one takes all the profits of the business. This is the main reason that most businesses are of this type. A sole proprietorship is not a corporation; it does not pay corporate taxes, but rather the person who organized the business pays self employment taxes on the profits made, making tax filing much simpler. A sole proprietorship also does not have to be concerned with double taxation, as a corporate entity would. A sole proprietor usually has a quick decision process and doesn't have any opposition when making a decision as he or she has total control of his or her business. All profits and losses accrue to the owner. The owner does not have the tension regarding conflicts among the partners as there are no partners. Also it's easy to set up, with having little paper work to fill in and little money spent on setting up, this is one of the easiest types of business to start.
Disadvantages
A business organized as a sole trader will likely have a hard time raising capital since it has to make up for all the business's funds. The owner of the business has unlimited liability as he is responsible for the business's debts because he has control over the business. A disadvantage of a sole proprietorship is that as a business becomes successful, the risks accompanying the business tend to grow. To minimize those risks, a sole proprietor has the option of forming a corporation, or, more recently in America, a limited liability company.  

2

Partnerships

Partnerships are legally formed by two or more people engaged in an activity for profit. There are 2 major types: (1) General Partnership, and (2) Limited Partnership.

(1) General partnerships
A general partnership or simply a partnership, refers to an association of persons or an unincorporated company with the following major features:

- Created by agreement.
- Formed by two or more persons

The owners are all personally liable for any legal actions and debts the company may face. It is a partnership in which partners have full liability for losses and obligations. All partners may participate in the operations and management of the partnership. Partnerships are dissolved upon the death of a partner, withdrawal of a partner, bankruptcy of a partner. If a partner dies, the partnership will need to restructure. Any losses or income are put in individual partner’s tax returns.

(2) Limited partnerships.

“A limited partnership is a form of partnership similar to a general partnership, except that in addition to one or more general partners (GPs), there are one or more limited partners (LPs). It is a partnership in which only one partner is required to be a general partner.

The GPs are, in all major respects, in the same legal position as partners in a conventional firm, i.e. they have management control, share the right to use partnership property, share the profits of the firm in predefined proportions, and have joint and several liability for the debts of the partnership.

As in a general partnership, the GPs have actual authority as agents of the firm to bind all the other partners in contracts with third parties that are in the ordinary course of the partnership's business. As with a general partnership, "An act of a general partner which is not apparently for carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership binds the limited partnership only if the act was actually authorized by all the other partners."

Like shareholders in a corporation, LPs have limited liability, meaning they are only liable on debts incurred by the firm to the extent of their registered investment and have no management authority. The GPs pay the LPs a return on their investment (similar to a dividend),

the nature and extent of which is usually defined in the partnership agreement. General Partners thus carry more liability, and in cases of financial misfortune, the GP becomes "the generous partner".

Limited partnerships are distinct from limited liability partnerships, in which all partners have limited liability."^11 In review:
* consists of both general and limited partners
* does not automatically dissolve upon the death or withdrawal of any partners
* general partners
  * runs business
  * participates in operations and decisions
* limited partners
  * not legally permitted to participate
  * liability is limited to their investment.
  * permits investors with small amounts of capital to participate in large real estate investments with low risk
* death does not terminate the partnership

3 Corporations

A corporation is an institution that is granted a charter recognizing it as a separate legal entity having its own privileges, and liabilities distinct from those of its members. There are many different forms of corporations, most of which are used to conduct business.

An important feature of corporation is limited liability. If a corporation fails, shareholders normally only stand to lose their investment, and employees will lose their jobs, but neither will be further liable for debts that remain owing to the corporation's creditors.

Despite not being natural persons, corporations are recognized by the law to have rights and responsibilities like actual people. Corporations can exercise human rights against real individuals and the state, and they may be responsible for human rights violations. Just as they are "born" into existence through its members obtaining a certificate of incorporation, they can "die" when they lose money into insolvency. Corporations can even be convicted of criminal offences, such as fraud and manslaughter.

Although corporate law varies in different jurisdictions, there are five core characteristics of the business corporation:

- Legal personality
- Limited liability
- Transferable shares
- Centralized management under a board structure
- Shared ownership by contributors of capital.\(^12\)

A newly created corporation is initially called a subchapter S corporation for the purposes of tax consequences. If chosen, and paperwork is filled out, a subchapter S corporation can turn into a subchapter C corporation. An S corporation is advantageous for small businesses because it removes ‘double taxation’. A C corporation is independently taxed first and then the employee or independent contractor is taxed. An S corporation’s tax consequences are paid solely on an individuals tax return.

In review:

1. **Sole Proprietorship:**
   * one owner
   * DBA as….

2. **C Corporation**
   * legal entity
   * continues to exist until legally dissolved
   * created according to state laws
   * must obtain Charter from resident state
   * sets powers, and
   * establishes criteria for buying and selling real estate
   * managed and operated by its’ Board of Directors
   * real estate is owned in severalty by the corporation - not joint ownership by the shareholders
   * shareholders own personal property in the form of corporate stock
   * death of an officer or director does not affect assets of a corporation
   * shareholders do not have direct ownership interest in the assets of a corporation
   * shareholders have liability limited to the amount of their investment.
   * corporation must file an individual income-tax return
   * profits are subject to double taxation
   * shareholders profits are taxed and corporations’ income is taxed

3. **S Corporation**
   * IRS classification
   * provides the benefits of having a corporation but eliminates double taxation
   * only shareholders shares are taxed, profits are not taxed
   * setup C Corporation - then change status with IRS (time is of the essence)
   * designed for small corporations
   * subject to strict rules

---