

CONSEQUENCES OF PROPERTY DEEDING

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We are often called upon by clients and potential clients to prepare deeds conveying property without a title search or any other advice regarding the deed. To answer many of the issues surrounding such transfers of title, we created a letter to those requesting the deed. Below is an excerpt from that letter we send prior to starting the work:

You have requested us to prepare a deed for your use in conveying property. The first question we often like to ask is, “Why do you want to transfer the property?”. Depending on your answer, you may not really need a deed at all, and actually having us to prepare a deed will be more harmful to your situation rather than making it better. If you are wanting us to prepare the deed because you are trying to avoid probate, there is specific language that must be included in the deed to truly do this. If you want the deed because you have issues with creditors, then there are other details that we need so that we can determine if it is worthwhile for you to convey the property. If you are merely wanting to gift the property to another party (including a spouse, relative or other party), or if you want to move the property from an entity to yourself for a refinance or other purpose, this will have significant tax consequences that should be discussed in detail prior to having the deed prepared.

In Florida, when you deed the property to someone, even if you are only adding a name to the title, several things happen. First, if the property is homestead and covered under the Save Our Homes amendment to the Florida Constitution, this protection is lost or changed. The property will be reassessed by the tax appraiser at the current market value, leading to an increase in taxes, and you will have to re-apply for homestead status. Secondly, once that person’s name is on the deed, any judgments of record (or subsequently entered) against that person will immediately attach to the property. This could prevent you from selling or refinancing the property later. If the person is not also able to claim the property as their homestead, then the homestead tax exemption and protection will only be partial rather than full.

We also have seen horrific cases where clients have conveyed partial interests to friends and family only to later be sued to have the property partitioned. A partition action is a type of “divorce” for property owners where the court determines the value of the property, often forces its sale at auction (if it can’t be physically partitioned), and then divides the proceeds from the sale to the parties. It is an expensive, emotional and long process for everyone involved.

Conveying property to anyone under the age of 18 is not advised. Once the property is conveyed to a minor, a guardian may need to be appointed by the court to protect the minor's interest before the property will ever be able to be conveyed or refinanced in the future.

Documentary stamp taxes must be paid on the transfers of the property in most cases. There are documentary stamp taxes on the value of the conveyance, and stamp taxes on the value of the outstanding mortgage(s) secured by the property that are not being paid off. This applies even if the transfer is from one spouse to another, one spouse to both, or both spouses to one. It also applies for any other inter-family transfers of the property, or transfers from an individual to or from an entity solely owned by the individual.

If the property is subject to a mortgage when it is transferred, and that mortgage is not being satisfied concurrently with the transfer of the property, then documentary stamp taxes must be paid on the outstanding amount of the mortgage. This is so, regardless of whether a quitclaim, warranty or other type of deed is used. It also applies if the property is being given for nominal or no consideration to the other party. Many clients are under the mistaken impression that documentary stamp taxes are not required to be paid if there is no document recorded (i.e. if the deed is just held in escrow, or if the property is conveyed via assignment of beneficial interest within a land trust). This is not the case. Documentary stamp taxes are due upon the signing, sealing and delivery of the deed or assignment of beneficial interest. In the case of assignments of contract, documentary stamp taxes are calculated based on the sales price plus all assignment fees. Although the conveyance document may never be recorded on the Official Records, the documentary stamp taxes due on the transfer and/or the assumption of indebtedness must be paid to the Florida Department of Revenue. Penalties and interest are stiff for violations.

It is also important to note that conveyance of a property without the satisfaction of the underlying mortgage, as in "subject-to" closings, usually violates the due-on-sale clause of the underlying mortgage. This is considered a default upon which the lender can rely in a foreclosure of its mortgage. It is our advice to notify the lender of the conveyance via certified mail, return receipt requested. The notice should be sent to the lender's correspondence address, rather than its payment address. We have never heard of a lender invoking its rights to foreclose under the due on sale clause upon receipt of this notice. However, if it is never sent, the lender may later – at its leisure or a more opportune time – invoke the due on sale clause and foreclose on the property.

If the notice has been sent with proof of receipt, at least the new owner could argue that the lender waived its rights to foreclose when it continued to accept the new owner's payments after notice was given.

There are several ways to hold title. The first method is holding it in sole ownership. In this way, the property is titled solely in one person's individual name as either an unmarried or married person. In Florida, you are permitted to own property solely in your name, even if you are married. There is no requirement that your spouse appear on the title to the property. However, if the property is your Florida homestead, or your spouse's homestead, then your spouse will be required to join in the execution of any mortgages or other liens to be placed upon the property. If the property is not your or your spouse's homestead, then the joinder is not required. However, in North Carolina, regardless of the use of the property (whether homestead or not), and regardless of how it is titled, if you are married, your spouse must join in the execution of any deed or deed of trust on the property.

If you are married, the property may be titled in both spouses' names. This is called "tenancy by the entirety." It is a special class of titling real property that is reserved for married couples. If property is owned by the entirety, then judgment creditors of only one spouse cannot seize the real property to satisfy the judgment debt. Further, upon the death of one spouse, the property will pass directly to the surviving spouse without the need to pass through probate. Tenancy by the entirety has been abolished in many states, but is still available in Florida as well as North Carolina.

If you are unmarried, but desire many of the same benefits provided by tenancy by the entireties, you may elect to take title to the property as "joint tenants with rights of survivorship." Unfortunately, unlike tenancy by the entireties, if you hold title this way, a judgment debt of one of the owners will still attach to that owner's interest in the property. Any owner (including a judgment creditor who has foreclosed his interest on the property), can sue the other co-owners to partition the property as well. Finally, the joint tenants must hold their interests in the same proportion to each other, meaning that if there are two owners, they must hold their interests at fifty percent each. If there are four, then each must have a twenty-five percent interest. If the title to property is held this way, then the title to the property will pass automatically to the surviving owners upon the death of any other owner. The property will not have to pass through the probate process for the deceased owner. However, any joint tenant may destroy the right of survivorship by simply conveying her interest in the property to a third party "straw person" who can then deed the

interest back to her. This will convert the joint tenancy with right of survivorship to tenancy in common.

Tenancy in common is the most prevalent form of ownership when there are multiple owners who are not married. It shares a lot of the same attributes with joint tenancy with right of survivorship, but it does not include survivorship. Upon the death of a co-owner, his share of the property passes through probate to the deceased owner's heirs at law or by will. Also, unlike joint tenancy with right of survivorship, co-tenants are permitted to hold title to the property in unequal shares. Any tenant in common is permitted to place mortgages or liens upon their interest in the property without the joinder of the other co-tenants, and there is still the same risk of judgment creditors of the co-tenants seeking foreclosure and partition of the property to satisfy their lien. Also, it is important to note that bankruptcy of any owner of property held in either type of joint or co-tenancy will have adverse implications for the other co-owners.

Life estates are often reserved in deeds to meet the desires of the client. In this method, the property is conveyed to a third party, but the person conveying the property retains the right to live on the property during their life. Upon their death, the property's title will automatically vest in or belong to the person to whom the property was conveyed prior to death. Judgments will attach to either party's interest in the property, but it is often more difficult to value the interest for purposes of satisfying the judgment. Therefore, judgment creditors often are reluctant to foreclose upon their debtors' interests in life estates.

As you can see, there are many issues that arise from the client's simple request of "I need a deed." For this reason, we suggest that you discuss these issues with an attorney in person so you will have a complete understanding of the consequences of what you are asking.

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