A GUIDE TO WHAT YOUR DEED REALLY MEANS

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HOME OWNERSHIP 101--A Guide to What Your Deed Really Means

Your own home! It's your little starter house, your grand Victorian, your mountain hideaway, your suburban townhouse. After years of renting and saving and dreaming, you've bought a home and it's yours.

Now what do you need to know, to make sure you can keep right on enjoying that special home? Certainly, if you don't already know how to start a reluctant lawnmower, change a faucet washer, fix a broken windowpane and cope with rising water in the basement, you'd better be prepared to learn.

But there are a few legal matters you'll want to understand right away to make sure your ownership of the home means what you think it does. This chapter will give you a basic introduction to the law of home ownership, including rights and possible restrictions. Note that the laws of each state govern the ownership of property within state borders, so the general principles that follow are only intended to give you an idea of the options that may be available and what they might mean to you.

CHECK THAT DEED

Begin by checking the way your ownership is described on the deed, because the wording may have serious ramifications years from now. All homeowners should make sure the deed says what you want it to.

Although a deed almost never mentions the house or other structures standing on a property, it provides an exact description of its location and boundaries. If there's any question about where the

boundaries lie, you can usually resolve the question through a survey or by talking things out with your neighbors. See the section on boundary lines in chapter seven, "Love Your Neighbor?"

Although property buyers tend to focus on how big their property is and where its boundaries lie, two other items on the deed have far-reaching implications: the form of ownership and the way it's shared between owners.

Forms of Ownership

Let's start with the forms of home ownership, which have to do with how long the title is valid. These days, the most common form is **fee simple.** It's also the most complete, because, in theory, titles in fee simple are valid forever, unlike some of the older forms, such as an **estate for years,** where the title reverts to the former owner at some specified time. People who own property in a fee simple form may sell it, rent it out, transfer it to their heirs, and to some extent limit its use in the future.

The term **fee simple** comes from feudal England, where a noble landholder would grant an estate, called a fee, to a faithful subject in exchange for service or money. In the thirteenth century the grant would normally be a **life estate**, which meant that when the tenant died the land would revert to the lord. But if the lord intended for the tenant to be able to keep the estate in the family after he died, he'd include the phrase "and his heirs" in the legal document. That's still the phrase to include on a deed if the owner is to hold the property in fee simple, able to sell it or bequeath it.

It's still possible to transfer property as a life estate, but it is not often done any more. The form allows owner A to bequeath the house to B, say his wife, until she dies, then to C, their child. People used to do that to avoid estate taxes, but there's no need now that the marital tax deduction

protects property bequeathed by one's spouse from estate taxes. Some people still use the form to retain their homestead exemption without having the property tied up in probate when they die, or to give title to a descendent who may better qualify for financing, while retaining an assured roof over their head.

A life estate severely restricts the new owner's ability to sell the property. If Mrs. Smith has a life estate in her home and decides to sell it, she'd likely have trouble doing so because the title would no longer be valid when Mrs. Smith died. If you want to give a house to your elderly parents until they die and then have it go to your children, it makes more sense either to set up a trust to that effect, or to provide in your will that they may stay there as long as they live. Consult an estate-planning attorney on how to accomplish your goals while avoiding legal pitfalls.

Joint Ownership

The other critical aspect of a deed is who's named as the owner, and, if there's more than one owner, precisely how their ownership is shared.

If you're a single homeowner living alone, it's probably very simple. Your name would be the only one on the deed, unless, for example, you bought the house with your parents in order to qualify for a loan, or your ex-spouse is still a co-owner.

When there's more than one owner, things get complicated. Which of these forms of ownership is listed on the deed really does make a difference. Long-term implications include who can transfer interests to someone else, how much of the property is available to one owner's creditors, whether the property goes through probate when one party dies, and whether the surviving owner faces a whopping tax on capital gain when it's time to sell the property. It's

important to think about what you want the deed to accomplish and take the necessary steps to get that in writing and properly filed.

Unmarried co-owners have to choose whether to be **tenants in common** or **joint tenants with right of survivorship**. Married co-owners could choose either of those forms, or in some states might opt to be **tenants by the entirety** or in others to hold their home as **community property.**

Let's take a look at an imaginary couple facing this decision. To see the full range of options we'll make them married, because while married couples can choose either form available to unmarried co-owners, most states have at least one form available to married couples only.

Suppose that Bob and Susan Smith are buying a split-level house in Gainesville, Florida. It's their first house, and they aren't sure how to title it. What are their options?

- **One name only.** Bob's kind of a traditional guy. He's the one who earned the money they used to buy the house, so why not put just his name on the deed? That was common practice 50 years ago--and you can bet the one name wasn't the wife's. The custom of the property being in the husband's name was especially hard on wives before the marital deduction, because wives inheriting property from their husbands would sometimes have to sell the property to pay estate taxes on it.

  These days, one of the chief concerns when considering property ownership in a single name is liability for court judgments. Suppose Bob insists on titling the house in his name alone. A few years later he's driving home from an office party, swerves into the wrong lane and causes a horrible car crash. He lands in court, where the judge assesses a hefty judgment against him--and his insurance won't cover it. Because the house legally belongs only to him, in most states it could be sold to cover the judgment.

Living in Florida, Bob and Susan would be better off than most. Twenty-two states offer some protection through their **homestead exemption**, which allows people subject to big judgments (or going bankrupt) to keep a small house to live in. But the maximum lot size and value may be quite small--such as, in Arkansas, a quarter acre and $2,500 value. Florida's homestead exemption places no limit on the home's value.

If Bob were a doctor with no malpractice insurance, he might want to avoid the risk of losing the house because of a judgment against him by putting the house in Susan's name (or vice versa, if she were the doctor). Some people do that. But they should consult an attorney about all the aspects of their situation, including whether such ownership would accomplish that purpose and tax implications, before making a decision like that.

- **Tenants in Common.** If Bob and Susan decide to own their home as tenants in common, they're each considered the owner of an undivided interest in the whole property. They each own half of the value of the house (unless the deed specifies a different proportion), but it's not as if Susan owned the north half and Bob owned the south. They may each sell their interest to someone else or leave it to someone in their will, whether or not the other approves. If they couldn't agree on management of the property (say following a divorce), it could be partitioned by a court and either interest sold. And when Bob gets that big court judgment against him, the creditor may wind up owning his interest in the house.
- **Joint Tenants with Right of Survivorship.** If Bob and Susan decide to hold the property as joint tenants with right of survivorship (JTROS), again they'll each have an undivided interest. The chief difference is the "right of survivorship." That means if one dies, the property automatically belongs to the other, with no probate.

What if Bob and Susan own the house as joint tenants with a third person, say, Susan's mother, Ellen? When one owner dies, the other two automatically each own half (unless the deed or another agreement specifies otherwise). As in a tenancy in common, joint tenants are legally free to transfer their individual interests to someone else. Doing so ends the joint tenancy, so the new owner becomes a tenant in common with the remaining original owner(s). (The arrangement is complex if, say, Bob, Susan and Ellen own the house as joint tenants and Ellen sells her interest to her friend Mary. Bob and Susan are still joint tenants with respect to two-thirds of the property, but tenants in common with respect to Mary's third.) If Bob and Susan want to be joint tenants, they have to say so on the deed. The usual language for this is "Bob Smith and Susan Smith, as joint tenants with right of survivorship and not as tenants in common." That way if there's a question, say from Susan's children from another marriage who think they should inherit her half-interest in the property, the intent of the owners will be clear. If the deed doesn't specify joint tenancy, the law assumes that the owners are tenants in common (unless, in some states, if they're married to each other; see below).

If Bob or Susan want to be able to bequeath half of their house to someone else--say to Susan's children--they'd want to avoid joint tenancy. But if they each want their spouse to end up with the house, joint tenancy might be a good idea because then if one them died the house wouldn't be tied up in probate, which is the process of proving a will is valid and sharing out the property among heirs. In some states probate is a long and wearying process; in others it's very simple and no big deal.

- **Tenancy by the Entirety**. In Florida and a number of other states, usually in the east, married couples traditionally own property in a tenancy by the entirety. The form is rooted in the common-law concept that a husband and wife are one legal entity (that's one reason many states

have eliminated the form, believing it's inconsistent with today's view of women). As with a joint tenancy, this form bears a right of survivorship, so if one spouse dies, the other automatically owns the property.

In most of the states that still recognize this form, a husband and wife who purchase property together are considered tenants by the entirety unless the deed specifically states that they are tenants in common (or joint tenants with right of survivorship) and not tenants by the entirety. Otherwise, a deed saying "to Bob Smith and Susan Smith, his wife," or "to Bob Smith and Susan Smith (husband and wife)," creates a tenancy by the entirety.

If Bob and Susan have reason to expect creditors to come after their house, they may want the protection offered by a tenancy by the entirety because property owned by both of them in that form generally isn't subject to a judgment against one owner (except in cases involving fraud), though this will vary by state. In the case of Bob's court judgment, the house would be safe because it belonged to the tenancy by the entirety, not just to Bob.

What if Susan decided she wanted to transfer her half of the house to her son by a former marriage? In Florida, like most of the states that recognize tenancy by the entirety, title can only be transferred if both spouses sign the deed indicating that they both agree to the sale of their half-interest. If they lived in Arkansas, New Jersey, New York or Oregon, either spouse could transfer his or her interest, including the right to survivorship.

- **Community Property**. Now suppose that Bob's company transfers him to California, where he and Susan buy a house in San Francisco. California is one of the nine states (the others are Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin) that have adopted a different conception of the relationship of husband and wife, rooted in Spanish and French law. In the absence of any directives to the contrary, these states consider all

property acquired during a marriage, except by gift or inheritance, to be community property. Each spouse owns half of the community property. Community property means that there's no right of survivorship, so when one spouse dies half of the couple's property--including half of the house--goes through probate. To transfer the property to someone else, both husband and wife must sign.

Because California is a community property state, the law assumes that if Bob and Susan acquired their house during the marriage by the efforts of either spouse (not by inheritance or gift), it's community property unless they specifically say otherwise in the deed. So if Bob's dear departed uncle Fred left the place to Bob in his will, it would be Bob's house should Bob and Susan split up. But if Bob and Susan make payments on the mortgage with his earnings or hers, it's community property. Why would a couple choose to hold a house as community property when they could choose to be tenants in common or joint tenants with right of survivorship?

Because there are two significant tax advantages in holding the house as community property rather than as a joint tenancy. One has to do with tax on capital gain, the difference between the selling price and the house's "basis," its cost when they got it. If the home is community property when Bob dies, it receives an entirely new tax basis when Susan inherits the whole. So if she sells it soon thereafter there's no capital gain. But if they held it as joint tenants, only half an interest would change hands when Bob died, so only half the property would get a stepped-up basis. The capital gain upon sale is likely to cost Susan thousands of dollars in taxes.

The other tax advantage to community property involves estate taxes, and the fact that every American may bequeath up to $675.000 under current law (scheduled to go up to $700,000 in

2002 and eventually to $1 million in 2006) without paying estate taxes. If Bob and Susan held all their property as joint tenants, Susan would own it all when Bob died. He wouldn't transfer any property to her, because legally the property was already hers. Since he didn't transfer any property, his $675.000 lifetime exemption on estate taxes would in effect be lost. Since Susan's estate would increase by the value of his half of the house and all the other property held as joint tenants, but she only gets her own $675.000 exemption, her estate would be subject to hefty estate taxes when she died if the total value of her estate exceeded her $675.000 exemption.

Now suppose they'd opted for community property. As soon as he died his share of the estate would be subject to estate taxes, but they'd be offset by the marital deduction (on property bequeathed from one spouse to another). Then when Susan died, the taxable share of her estate would be much lower.

Like Bob and Susan, you have to look at your own circumstances and decide which form is best for you. Again, which of these options is available to you depends on the state you live in. Every state except Louisiana permit joint tenancy and tenancy in common. The nine community property states are listed on page 7 of this chapter. See your lawyer if you want to know if tenancy by the entirety is permitted in your state.

If after reviewing all this information you decide to change your form of ownership, the paperwork is fairly simple. Basically the appropriate parties sign a new deed and file it with the local recorder of deeds.

The consequences of using the wrong deed or the wrong wording are serious, though, because your intent might not be clear. Should there be uncertainty in the future, your spouse or heirs might

have to go to court to sort it out. So consult an experienced property lawyer to make sure you consider all the aspects of your situation and get it done right.

A straightforward change will probably have a nominal cost, more if you get a thorough review and consultation. Still, it's well worth the price if it helps you meet your long-term goals for home ownership.

LIFE, LIBERTY AND PROPERTY

Now on to the rights of homeowners and some restrictions you should know about.

Why is it so satisfying to spend that first night in your very own home? Because owning a home really means something. The right to own property is so deeply embedded in the American legal system that the Bill of Rights puts the right to property on the same level as the right to life and liberty. It declares that no one may deprive someone of life, liberty or property without due process of law, and the government may not take private property for public use without paying fairly for it. (See the section on "eminent domain" in chapter three.) The English political philosopher John Locke, whose ideas underlie the U.S. Constitution, proclaimed that "government has no other end than the preservation of property."

In general, what you do with the home you own is up to you. It's yours to maintain or neglect, preserve or remodel, keep, sell or give away, and enjoy as you see fit. If someone damages your property, you have a legal right to compensation. (To obtain that compensation, though, you may have to sue.) In addition,

- You may rent or lease your home or part of your home (depending on zoning restrictions) to someone else. However, if there is a mortgage on your home you should review it to make

certain it contains no restrictions on your ability to rent your home while the mortgage is in existence. The law protects your right to decide who you'll allow to live there, so long as you don't discriminate on the basis of race, sex, religion or other protected categories. If you rent it out you have a legal right to inspect the property periodically, protect your property from damage and receive a reasonable rent, with an option to evict renters who fail to uphold their end of the bargain. (See box, "Planning to Rent It Out?")

- You may use, sell or restrict the use of your property's natural resources, from stands of timber on the surface to minerals lying beneath. Note, though, that because surface and underground water, oil and gas move about without regard to property lines, you don't necessarily have the right to pump out as much as you want from a well on your property. Removing these resources is subject to state and federal regulation. For instance, if there's a stream running through your land, in most states you can't dam it up completely so your downstream neighbors get no water. (In some Western states, the property owners who are furthest upstream can take as much water as they wish.)
- You may place limitations on the use of your home long after you die. You could, for instance, bequeath your property to your children, provided that they not sell or transfer it to anyone other than your direct descendants. In many states a restrictive covenant like that expires at the end of the state's limit on perpetuities--typically 21 years after the death of last heir alive when the covenant was made A woman in Elyria, Ohio wanted to make. sure that her beloved home wouldn't turn into an office or boarding-house like so many others in her changing neighborhood, so she provided in her will that after her death the house should be razed. The local historical society objected in court, noting the home's distinctive architecture. The court ruled that since the deceased woman's request wasn't contrary to public policy, it should be

carried out--unless the historical society could find a way to ensure that the house would forever be maintained for the use and enjoyment of the public.

Restriction

Although the rights our society affords to homeowners are extensive, they aren't absolute. The people who live around you have rights too, so the law places certain restrictions on the use of your property. If you're not mindful of zoning, building codes, easements, water rights and local ordinances on noise, you could find yourself in trouble.

- **Zoning**. To avoid urban mishmash, municipalities often restrict business and industry to particular areas. Others are zoned residential, including apartment buildings, or zoned strictly for single-family homes. If your neighborhood is zoned residential, you won't have to worry about a pool hall or gas station going up next to your house. The down side is that you may not be able to do everything you might want to with your home.

  A typical residential zoning law may not preclude you from starting a home-based business that won't alter the character of the neighborhood, such as freelance writing, telephone sales, or mail-order distribution. But if the home-based business you envision is going to require signs or frequent traffic from customers, better check with the local department of building and zoning.

  If you wish to make a change to your property that would violate zoning restrictions, one option is to apply for a **variance**, which is essentially permission from the governing body to deviate from the zoning laws. The zoning department will give you a packet of materials explaining the steps to take, which may involve a public hearing, an appearance before the planning commission and approval by the town council. You might have to show that the change you have in

mind is required by a hardship caused by the shape, condition or location of your property, and won't change the character of the neighborhood or decrease your neighbors' property values.

Another option, if your plans call for a major change, is to apply for a **zoning change.** If, say, you live just beyond the edge of an area zoned commercial and you want to turn your nineteenth-century mansion into a doctor's office, you might be able to convince the zoning authorities to extend the boundaries a bit. Again, you'd have to show that the change wouldn't bring down property values. Such a request may spark opposition from your neighbors, though.

- **Private Restrictions** may also affect what you may do with your property. Usually limited to relatively new housing developments, these covenants, conditions, or restrictions are designed to maintain quality control--so that after you've bought a top-quality home, no one may erect a shack on the lot next door and collect junk cars in the back yard. Usually drawn up by the developer, private covenants often specify such things as lot size, minimum square footage and architectural design. They may preclude livestock, satellite dishes, boats and motor homes, certain types of fences and unsightly activities such as auto repair.

  These covenants "run with the land," which means they bind all future owners of the property unless a sizable majority of property owners in the affected development join in releasing them. Covenants may restrict your use of your land even if municipal zoning laws permit the proposed use. You should have received a copy of them from your real estate agent, attorney, or title insurance office when you bought your home. If not, they should be available from the homeowner's association (if there is one) or from the county recorder's office. As with zoning, you may be able to negotiate a minor variance, such as building an addition that's two feet taller than the covenant's limit. Restrictive covenants may be enforced by a court of law if negotiations fail and a neighbor who objects to a violation files a lawsuit. The objecting party, however, must not

have violated that restriction himself. And if your neighbor watched you reroof your house and waited until you were done before complaining that the shingles were the wrong color, he probably won't get very far in court. Ditto if enough other people have violated the restriction to render it meaningless. (For more on these restrictions and on homeowners' associations, see chapter two, Sharing Ownership.)

- **Building Codes.** The local government is likewise concerned with maintaining quality, but its concerns have less to do with aesthetics and more to do with safety. Local building codes include specifications for such things as plumbing and wiring. If you're having home improvements done, you might need to get a building permit before you start and have the work inspected to make sure it complies with the codes. (See chapter six, "Remodeling?")
- **Easements** grant someone else a right to use part of your property for a specific purpose, such as the power company having an easement to run a power line over your back yard. They're recorded at the county courthouse and normally turn up in a title search. See chapter three for more information.
- **Historic Homes.** You might expect restrictions if your grand old home is listed on the National Register of Historic Places, but private owners are free to alter, add to, convert or even (surely not!) demolish their home even if it's on the list. The only restriction is that no federally funded or federally licensed program may harm a home on the list without a hearing before a federal agency. Your restoration projects may be eligible, though, for a federal preservation grant on a 50 percent matching basis. Check with your local landmark commission or historic preservation board to see if there are state or local restrictions you should know about.
- **Restricted Activities.** In general, what you do in the privacy of your home is your own business. Two exceptions: when your activities are illegal and when they make it difficult for other people to

enjoy their own homes. If you mow your lawn at 4:00 a.m. or blast your stereo until your neighbors' windows rattle, don't be surprised if someone calls the police. Local noise ordinances may restrict the hours in which you can conduct certain noisy activities.

Most activities that are illegal in public are also illegal in private--such as selling cocaine or serving alcohol to minors. Police generally need a search warrant to enter your home, and to get one they have to show "probable cause"--reasonable evidence that they're likely to find something illegal inside.

Respect these few restrictions and you'll find that home ownership provides you with a welcome retreat from the cares of the world.

Sidebar: PLANNING TO RENT IT OUT?

If you wish to rent out part or all of your home, check with the local building and zoning department to see what restrictions apply. If your area is zoned for single-family homes, you may not be free to fix up the basement as a rental apartment. When you have the place ready to rent, prepare a rental contract that sets out each party's responsibilities, including the tenant's responsibility to keep the place reasonably clean and safe. It should include the term of the rental, amount of monthly rent and when it's due, late charges, amount of security deposit, who pays for utilities, taxes, maintenance and repair, who may live on the premises, provisions on subleasing, and under what circumstances the landlord may enter to inspect or make repairs. Office supply stores generally carry fill-in-the-blank forms tailored to the laws of your state, which make good starting points. Some include a property condition report to fill in when the tenant moves in and out.

Landlord-tenant law is complex. For instance, tenants hold a **leasehold interest** in the land that can be subjected to the judgments and liens against the tenant. Consider running your rental contract past an experienced attorney to make sure your rights are protected.

Sidebar: SPLITTING UP

Chances are very few couples were contemplating divorce at the time they bought themselves a home. But if they later agree to call it quits, what effect does the form of ownership indicated on the deed have on the property settlement?

Less than you'd think. To begin, in about 90 percent of all divorces the property is divided up by the parties themselves out of court, often with the help of lawyers and mediators. They decide what's fair and reasonable in a process of give and take.

In contested divorces, it's up to the judge to decide who gets what. Years ago, courts in most states had no authority to redistribute property in a divorce, so their job was to sort out the legal titles. Only jointly held property was subject to judicial division. But these days, courts are more concerned with what's fair than with whose name is on a deed. They consider a wide range of factors from the length of the marriage to the needs of each party.

So who gets the house? If there are minor children, usually the home goes to the custodial parent. If there are other assets to divide, the non-custodial parent may get a bigger share of them to balance out loss of the home. If not, courts typically award possession of the house to the custodial parent until the children grow up, when it's to be sold and the proceeds divided. If neither party can afford to maintain the home, the court may order it sold promptly and the equity split both ways.

Even if the property settlement specifies that the property is to be divided, it's critical to sign and record deeds to accomplish the conveyance and create a clear record of the title. Otherwise, sometime down the road you may have to track down a long-gone or uncooperative ex-spouse, or maybe file a quiet title lawsuit. That's a real mess. Get the deed.