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How are You Holding Title in Your Home or Investment Property?

A deed is a document that transfers ownership of real estate. It serves as written proof of ownership of your home or building. For a deed transaction to have legal effect it generally must comply with certain legal requirements, such as:

1. the deed must contain an adequate legal description of the property;
2. the names of the new and old owners of the property must be clearly identified;
3. the owner(s) transferring the property must sign the deed; and
4. the owner(s)' signatures must be notarized, and sometimes, even witnessed.

Once an owner executes a deed and transfers property the deed should be recorded with the County Clerk's office in the county where the property is located immediately to ensure the new owner(s)' rights to the property are properly secured. Recording creates a chronological chain of title so the history of ownership of a particular property can be researched. It also protects a new owner; if a deed is not recorded that new owner runs the risk that the former owner might sell or mortgage the property to someone else. If that happens and the later buyer or lender records their deed or mortgage first the new owner's interest could disappear entirely or be subject to that mortgage.

When buying and selling real estate the choice of deed and wording used defines exactly what the buyer(s)/grantee(s) is getting for his or her money. There are various types of deeds, all of which include different rights, guarantees, and legal protections. Below please find a list of commonly-used deeds:

Warranty Deed with Full Covenants – transferor promises that he/she *and* all previous owners of the property have done nothing to impair the quality of title to the property. This is a dangerous deed for a seller/transferor because the seller/transferor is taking responsibility for the actions of all previous owners of the property.

Bargain and Sale Deed with Covenants against Grantor's Acts – transferor provides a representation that he/she has done nothing that would impair the quality of that title to the property. This deed is the most common form of deed in residential real estate transactions and is generally acceptable to buyers because they further protect themselves with title insurance when buying property.

Quitclaim Deed – does not guarantee that the transferor's interest in the real estate is valid, but simply transfers any interest, claimed by the owner to the new owner. This type of deed is probably most commonly used between spouses in a divorce.

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NEWSLETTER

- SEPTEMBER 2010 -

VOLUME 2010 NUMBER 7

MEMBER OF NEW YORK STATE BAR ASSOCIATION, WESTCHESTER COUNTY BAR ASSOCIATION AND YONKERS LAWYERS' ASSOCIATION

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Once a seller or transferor determines the type of deed he/she is willing to provide, he/she must determine how the buyer or grantee wants to take title or ownership to the property.

On the deed grantees generally have the option to take title as “joint tenants” or as “tenants in common.” If a grantee chooses joint tenants and one of them passes away the other person would automatically become sole owner of the property.

With tenants in common when one of the owners of the property passes away the other owner(s) does not automatically take over the deceased’s interest in the premises. Instead, the deceased person’s interest would pass to their heirs at law, which may be a brother, sister, child, etc.

Married couples also have the option of taking title as “tenants by the entirety.” A tenancy by the entirety allows spouses to own property together as a single legal entity. Under this form of ownership creditors of an individual spouse may not attach (seize the property) and sell the interest of a debtor spouse; only creditors of the couple may attach and sell the interest in the property. Further, as a tenant by the entirety one spouse may not sell or give away his or her interest in the property without the consent of the other spouse/tenant. Upon the death of one of the spouses, the deceased spouse’s interest in the property goes directly to the surviving spouse, and not to the deceased’s spouse’s heirs, just like with joint tenants. One of the differences between joint tenants and tenants by the entirety is that with joint tenants you can sell your interest in the property without the consent of the other tenant (spouse), whereas with tenants by the entirety neither spouse can deprive the other of that person’s survivorship rights without a court order or consent.

In addition to buying and selling real estate, deeds are useful tools for conveying property following a marriage, divorce, or when attempting to limit one’s liability with regard to a property. Deeds are crucial to legally transfer a certain property from one to another. Further, it is often recommended that landlords transfer property they own individually into a corporate name. By establishing a corporation for rental property, a landlord establishes a “legal wall” between their personal and other business assets and those associated with that rental property.

Whenever a property is subject to a mortgage, one must remember that a property owner’s ability to transfer title generally depends on the lender’s consent. This is because the lender holding a mortgage has an interest in the property. Loan documents often specifically prohibit a transfer of the property unless the loan is paid in full or the lender consents. Whether or not the lender holding the mortgage will permit a transfer will depend on the circumstances. Failing to obtain the lender’s consent prior to transferring the property – even to your own company – could result in a lender holding you in default, which would cause the entire amount of the loan to become immediately due.

The type of deed used and the way in which one transfers property is very important for one’s particular situation. As such, let the experienced real estate lawyers at James G. Dibbini & Associates, P.C. assist you in determining your needs and in preparing a deed and related transfer documents that will obtain the result that most appropriately fits your situation.

Our office provides legal services in the areas of:

Real Estate Law
Landlord-Tenant Law
General Business Law
DHCR Representation

Lender Representation
Civil Litigation
Tax Certiorari
Zoning Matters