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REAL ESTATE LAW 101: HOW SHOULD A MARRIED COUPLE TAKE TITLE TO FLORIDA REAL PROPERTY?

Tenants by the Entireties vs.

Joint Tenants with Rights of Survivorship

The Question of the day is whether Tenants by the Entireties (T-by-E) is the same thing as Joint Tenants with Rights of Survivorship (JTROS)? The simple answer is that they appear to be very similar and therefore, they are often mistaken for one another. Buyer beware; they are not similar. While JTROS may be desired, if you are married, you will most often prefer the protections of T-by-E. Read on!

Tenants by the Entireties (we use T-by-E as a short cut in the business) is a "unity" of ownership that is only available for a married couple (I will leave the definition of marriage to the DOMA experts). T-by-E is a form of joint tenancy (like JTROS) but it has some very unique characteristics and benefits. It is easier to point out the similarities of JTROS and T-by-E than the differences, so we will first tackle the similarities. Both JTROS and T-by-E are an efficient way to pass assets to a spouse and avoid probate on the death of the first spouse. The title to the property immediately is vested (owned) by the survivor upon the death of the spouse by operation of law (very little legal paperwork is necessary to clear title to property upon this event). The other similarity is that it requires both joint tenants (spouses) to sign the deed if the entire property is to be sold to the third party. That is about the sum total of the similarities.

T-by-E is the more common form of ownership by a married couple unless there are extenuating circumstances or if you are in a state that does NOT recognize this special form of ownership.

T-by-E was established hundreds of years ago under the old English common law based on the fact that a husband and a wife were considered a "Unity" of One. It is considered a special tenancy or bond that cannot be broken without two signatures.

Benefits of T-by-E

1) Asset Protection - The first key benefit of T-by-E ownership is the protection from creditors if only one of the owners (spouses) is deemed liable for damages in a lawsuit.

You see, like chocolate and vanilla swirl ice cream, you cannot determine who owns T-by-E property because it is considered owned 100% by both parties. So, in a lawsuit environment, you cannot take assets from a spouse if the spouse is not liable as well.

2) Control of Disposition - Unlike JTROS, T-by-E requires both parties to sign any deed transferring ANY interest in the

property. One spouse cannot sell or dispose of that spouse's one-half interest without the other spouse's consent/ signature as they could with JTROS. Therefore, this provides an innocent spouse protection from losing the house for financial actions taken unilaterally by the other spouse. Example, one spouse cannot mortgage the house for a business deal without the other spouse's consent.

3) Lifetime Gifting and Disposition at Death - T-by-E will pass to the surviving spouse by operation of law at the death of the first spouse to die (same as JTROS). But, unlike JTROS, one spouse cannot gift away their respective interest in the real estate without the consent/signature of the other spouse. This protects the other spouse from losing an interest in the property without their knowledge. Example, one spouse wishes to gift their interest to their children from a prior marriage. This may be a great idea, but it is impossible with T-by-E without consent.

Second Marriage Scenario's

As you can glean from the above, in a second marriage scenario, you very well might want to hold real property as Tenants in Common (whereby you each control your exact interest) so that you can ultimately dispose of the real property as you deem appropriate.

This is what we call heavy lifting. How you take title to property is as important as making a Will or entering into a contract. It should not be a decision made at the real estate closing. It should be well thought out with the advice of counsel and other professional help.

Finally, if the real property is your "Homestead," the plot thickens and you should slow down once again to evaluate how to best title your real estate. Homestead has its own unique advantages and you may have more decisions to make. Please look forward to this topic in future articles.

Go to www.probate-florida.com to read more about this subject.
Learn how you can have your cake and eat it too.

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