When investment co-ownership blooms, withers and dies | Home & Living

Linda Harrison Contributing Columnist

I recently received a query from a Norfolk resident who co-owns two properties with another individual. It reads, “I am currently in a ‘joint tenancy’ with a partner on an investment property that we own together, and we are also in a ‘tenants-in-common’ arrangement on another investment property. I wanted to know what options or strategies there are to dissolve the tenant-in-common agreement if the other tenant in common does not want to dissolve the agreement.”

Joint ownership of investment (e.g. rental) properties can be tricky, so let’s start by addressing what it means to “hold” title, thereby understanding what the benefits and detriments of holding title as “tenant in common” versus “joint tenancy” or even “tenants by the entirety.”

How and why is holding ownership of property in one way over another important? And when real estate goes sideways, what are the ramifications of the choice?

In a nutshell, there are three ways to title land when two or more people go in together on a business or joint venture: tenants in common, joint tenancy and tenants by the entirety. Why does this matter? How you take title will reflect one’s interest and ability to dispose of the real estate. Here’s an overview :

Tenants by the entirety: Tenants by the entirety is exclusive to those who enter into marriage, and taking title this way must be requested. Taking title as tenants by the entirety affords them certain benefits. First and foremost, they have unity of self, which simply means they must act as one unit. One half of this unit/couple could never dispose of their interests without the agreement and signature of the other half.

They cannot devise or will their half or interests to someone other than their spouse. Why? Because tenants by the entirety also have right to survivorship, which means that if one dies, the other receives their interest in the real estate. Even if someone attempts to be tricky and include their “interest” or their “half” in the real estate in a private will and testament, right to survivorship always takes precedence. The latter wins out over devise/will.

In short, to take title as tenants by the entirety you must request it, and title is taken by each spouse at the same time with the same instrument and has right to survivorship and cannot be devised by either. An additional benefit is that, if debt collectors come calling, those debts that do not include both spouses on the debt can’t be collected against the real estate.

Joint tenancy: Joint tenancy is similar to tenants by the entirety in that they both have unity of interests (they each have equal interest), time (they take title together at the same time), title (they take it with the same instrument) and possession (each has the right to occupy).

The only unity that tenants by the entirety has that joint tenancy does not is unity of self (both spouses being one unit). Both have right to survivorship, and taking title this way must be requested. In short, as partners pass away, their interests are divided by the remaining owners, and eventually the last man/woman standing gets the property as sole owner. Don't try to will your interest away, because remember – right to survivorship trumps devise/will.

If for some reason a partner in joint tenancy desires to sell his or her interests, he or she can do so. However, the new owner is accepted into the group as a tenant in common on a separate instrument – in short, three partners as joint tenants and one partner sell his interests. The two remaining partners are joint tenants, and the new person is a tenant in common. Two partners as joint tenants continue with right to survivorship, but the new tenant-in-common partner can devise/dispose of his interests how he or she sees fit.

Partners do not have a "say" in how or who the other partner(s) disposes or devises to.

Tenants in common: Tenants in common are very different from joint tenancy. First and foremost, there is no right to survivorship. They can devise/give/sell their property interests as they see fit.

Partners can also have different interests in the real estate. Two partners could hold 25 percent interests, and the third could hold 50 percent, and interest is not specific – meaning that you would not be able to pinpoint what "part" of the real estate belonged to a partner.

Also, there are no unities, and buying and selling of interests can change over time.

Tenants in common is the default arrangement for taking title in land. In short, if neither joint tenancy nor tenants by the entirety is requested, it defaults to tenants in common. And once again, partners do not have a voice in how or to whom partners dispose of their interests.

All that being said, let's discuss "withering." So what happens when real estate and priorities change over time for those involved in co-ownership? I am going to take tenants by the entirety off the table for this discussion, for in concept they cannot dissolve their relationship unless both agree. Period.

Law, marriage and divorce/death can complicate life, so always be sure to consult an attorney with your specific situation.

For our purposes here, partition to divide land under normal circumstances should not apply since they are one unit. If they divorce and remain partners in real estate, it will revert to tenants in common or, if requested, joint tenancy.

Now back to withering. When co-owners disagree and cannot come to terms on selling their interests in real estate, what is their recourse? The short answer is partition suit. The owner wishing to sever the ties of ownership can file a partition to divide real estate interests. Tenants in common and joint tenants can file in the jurisdiction in which the property/real estate is located.

There are two categories of partitions:

n Partition in kind, in which the real estate is large enough to be divided and distributed

to owners and is normally used for a large amount of land;

n Partition sale, the steps whereby the owners will be given the opportunity to first buy the other out and, if this doesn't work, then begin the process of filing a partition.

Virginia is a title theory state, which means that you need to keep your lender in the loop, for it has title through a deed of trust. Once you file the partition, the circuit court will appoint a commissioner to oversee the process of the sale. The best-case scenario is that owners work together and sell through a real estate brokerage, allowing for the best rate of return. The worse-case scenario is that the property goes to auction.

Either way, it is not as easy as it sounds. Since partitioning refers to the sale/disposition of the property, I have not touched on the tenant/lease conditions mentioned in the question because they will run with the sale of the real estate, and the tenants will not be affected by the conflict between the owners. The lease, securities, and such will run with the land once sold.

A few final things: Filing for a partition to divide land is not an easy, inexpensive or time-efficient process, so be prepared to be patient. The financial obligation for undertaking a partition to divide land may be incentive enough for all partners to find a better and more cost-efficient means to an end. It is much better to try to talk it out with the partners, but if this doesn't work, contact a lawyer's office that works in real estate and litigation.

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