

Modern Real Estate Practice in Illinois, 6th Edition
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Chapter 8: Forms of Real Estate Ownership

Learning Objectives

After reading this chapter, students should be able to:

- Identify the four basic forms of co-ownership.
- Describe the ways in which various business organizations may own property.
- Explain how a tenancy in common, joint tenancy and tenancy by the entirety are created and how they may be terminated.
- Distinguish cooperative ownership from condominium ownership.
- Define the following key terms: common elements; community property; condominium; cooperative; co-ownership; corporation; general partnership; joint tenancy; joint venture; limited liability company; limited partnership; marital property; partition; partnership; proprietary lease; right of survivorship; separate property; severalty; syndicate; tenancy by the entirety; tenancy in common; time-share estate; time-share use; time-sharing; trust.

Why Learn About Forms Of Real Estate Ownership?

As we have seen, many different interests in land exist—fee simple, life estates and easements, for instance. Licensees also have to understand how these interests in real property may be held. Although questions about forms of ownership should always be referred to an attorney, successful brokers and salespersons must understand the fundamental types of ownership so they will know who must sign various documents. They also must know what form of ownership a purchaser wants and what options are possible when more than one individual will take title. Because the form of ownership determines how the property can be reconveyed later, it is very important that the licensee gets it right the first time.

Suggested Items to Bring To Class

1. Sample deeds showing different methods of taking title (for example, a tenancy in common deed, a joint tenancy deed).
2. Sample trust documents showing the provisions of a trust.
3. Sample partnership agreements and sample articles of incorporation and by-laws.
4. Advertisements, brochures, and sample documents for a cooperative, and any other documents indicating responsibility for the cooperative's expenses.

5. Advertisements, brochures, and sample documents for a condominium, including the documents for the creation of the homeowners' association and its by-laws.
6. Advertisements, direct mail solicitations, brochures, and sample documents for a time-share, particularly those that relate to its selling strategies.

Lecture Outline

I. Forms of Real Estate Ownership

A. Forms of Ownership

A fee simple estate may be held in three basic ways:

1. In severalty, where one individual holds title
2. In co-ownership, where two or more individuals hold title
3. In trust, where a third individual holds title for the benefit of another

II. Ownership in Severalty

When one individual owns title to real estate, he or she is said to own the property in severalty. The severalty owner has sole rights to the ownership and sole discretion over the transfer of the ownership.

IN ILLINOIS . . . *sole ownership of property is quite common, and title held in severalty presents no unique legal problems. However, when either a husband or wife owns property in severalty, lenders, grantees and title insurers in Illinois usually do require the spouse to sign in order to release any potential homestead rights. A nonowning spouse who is a minor will also have to sign.*

III. Co-Ownership

When two or more individuals hold title to one parcel of real estate, those parties are called co-owners or concurrent owners.

IN ILLINOIS . . . *Illinois recognizes ownership in severalty and all the forms of ownership discussed in this chapter (except community property): tenancy in common, joint tenancy or tenancy by the entirety, as well as ownership in trust, partnership and by commercial entities such as corporations and limited liability companies.*

A. Tenancy in Common

Two or more people as tenants may own a parcel of real estate in common.

- Each tenant holds an undivided fractional interest in the property.

- The co-owners have unity of possession; if no fractions are stated in the deed, the tenants are presumed to hold equal shares.

IN ILLINOIS . . . *a single deed may show the proportional interests of each tenant in common, or a separate deed issued to each tenant may show his or her individual proportional interest. When a single deed is used, lack of a description of each tenant's share means all tenants hold equal, undivided shares.*

1. Severalty

Tenants in common hold their ownership interests in severalty: each can sell, convey, mortgage or transfer his or her interest without the consent of the other co-owners.

- When one co-owner dies, the tenant's undivided interest passes according to his or her will.

IN ILLINOIS . . . *There is a statutory presumption in Illinois that two or more grantees hold title as tenants in common if the deed fails to specify how title is to be held.*

B. Joint Tenancy

Title is held as though all owners collectively constitute one unit. The death of one joint tenant does not destroy the ownership unit; it only reduces by one the number of people who make up the unit. This is the right of survivorship.

1. Right of survivorship

The joint tenancy continues until only one owner remains. This owner then holds title in severalty. The right of survivorship cannot pass to any co-owner's heirs.

- As each successive joint tenant dies, the surviving joint tenants acquire the deceased tenant's interest. The last survivor takes title in severalty as sole owner.

2. Creating joint tenancies

A joint tenancy can be created only by the intentional, specific act of conveying a deed or giving the property by will as a joint tenancy.

3. The four unities

Four unities are required to create a joint tenancy:

- Unity of possession (all joint tenants hold an undivided right)
- Unity of interest (all joint tenants hold equal ownership)
- Unity of time (all tenants acquire their interests simultaneously)

- Unity of title (all tenants acquire interests by one document)
- a. The four unities are present when the following requirements are met:
 - Title is acquired by one deed.
 - The deed is executed and delivered at one time.
 - The deed conveys equal interests to all of the parties.
 - The parties hold undivided possession of the property as joint tenants.

IN ILLINOIS . . . *a sole owner may execute a deed to himself or herself and others "as joint tenants and not as tenants in common" to create a valid joint tenancy. A joint tenant may unilaterally sever the tenancy by conveying to himself or herself as a tenant in common even without the consent of co-owners. The tenancy may also be severed by mutual agreement of all cotenants, by conveying to third parties or through a partition suit.*

4. Terminating joint tenancies

A joint tenancy is destroyed when any one of the four unities of joint tenancy is terminated. A joint tenant who conveys his or her interest in the property destroys the unity of interest. The new owner cannot become a joint tenant. Rights of other joint tenants, however, are unaffected.

IN ILLINOIS . . . *one or more of the owners in the circuit court of the county in which the subject parcel is located may file a partition suit. The court appoints one or three commissioners who must, if possible, divide the property by legal description among the owners in title. If such division cannot be made without harming the rights of the co-owners, the commissioners must report a valuation of the property. The commissioners then offer the property for public sale for not less than two-thirds of the value as set.*

All defendants to the suit are required to pay their proportionate share of court costs and the lawyer fees of the plaintiff. However, this requirement may be waived if the defendants have a sound and substantial defense. Upon completion of the sale, confirmation of the sale by the court and delivery of a proper conveyance to the purchaser at the sale, the proceeds of the sale are delivered to the former cotenants according to the court order. Generally, the proceeds of the sale are divided among the former owners according to their fractional interests.

C. Tenancy by the Entirety

Each spouse has an equal, undivided interest in the property with right of survivorship.

1. Limitations on Ownership

During their lives, tenants by the entirety can convey title only by a deed signed by both parties. One party may not convey a one-half interest, and generally they have no right to partition or divide. Upon the death of one spouse, the survivor automatically becomes the sole owner.

IN ILLINOIS . . . *Tenancy by the entirety is recognized in Illinois. To create a tenancy by the entirety, the deed must:*

- *indicate "not as joint tenants or tenants in common, but as tenants by the entirety."*

2. Termination

A tenancy by the entirety may be terminated by:

- the death of either spouse.
- agreement between both parties.
- divorce (the parties become tenants in common).
- a court-ordered sale of the property to satisfy a judgment against the husband and wife as joint debtors.

3. Community Property

Community property laws are based on the idea that any property acquired during a marriage was obtained by mutual effort.

- a.** Separate property can be mortgaged or conveyed by the owning spouse without the signature of the nonowning spouse. Separate property is any real or personal property that:
- was owned solely by either spouse before the marriage.
 - was acquired by gift or inheritance during the marriage.
 - was purchased with separate funds during the marriage.
 - is income earned from separate property.
- b.** Community property is all other property, both real and personal, acquired by either spouse during the marriage. Any conveyance or encumbrance of community property requires the signatures of both spouses.

- When one spouse dies, the survivor automatically owns one-half of the community property. The other half is distributed according to the deceased spouse's will.

IN ILLINOIS . . . *Illinois is not a community property state. In dissolution of marriage proceedings our courts apply a test that results in property being classified as either non-marital or marital. Nonmarital property is property acquired prior to the marriage or by gift or inheritance during a marriage. If nonmarital property is exchanged for other property, increases in value or returns income, the exchange, increase or income would also be considered nonmarital property. If nonmarital property is commingled with marital property it is presumed at the time of dissolution to be marital property by transmutation unless exempted by agreement between the spouses. The parties must prove their claim of percentage of ownership.*

The Illinois Marriage and Dissolution of Marriage Act gives the courts flexibility in determining the precise division of marital property. The major test is one of "contribution". What contribution was made by the spouse to the acquisition and maintenance of the property?

IV. Trusts

A device by which one person (trustor) transfers ownership of property to someone else (trustee) to hold or manage for the benefit of a third party (beneficiary).

IN ILLINOIS . . . *real estate may be held in trust as part of a living or testamentary trust or as the sole asset in a land trust.*

A. Living and Testamentary Trusts

A trust may be created by agreement during the property owner's lifetime (a living trust) or established by will after the owner's death (a testamentary trust).

B. Land Trusts

A few states permit the creation of land trusts, in which real estate is the only asset and the beneficiary retains management and control of the real property as well as the right of possession and the right to any income or proceeds from its sale.

- The public records usually do not name the beneficiary.
- A land trust is personal property, and can be transferred by assignment, making the formalities of a deed unnecessary.

IN ILLINOIS . . . *the trustee must disclose the beneficiary's name to certain parties under specific circumstances:*

- *to the concerned housing authority within ten days after receiving a complaint of a violation of a building ordinance or law.*
- *when applying to any state of Illinois agency for a license or permit affecting the entrusted real estate.*
- *if selling the entrusted property by land contract.*
- *to the plaintiff if the trustee is named as a defendant in a private lawsuit or criminal complaint regarding the real estate.*
- *if a fire inspector or another officer has a statutory right to knowledge of beneficiaries during an arson investigation.*

1. Term

A land trust ordinarily continues for a definite term usually 20 years. If the beneficiary does not extend the trust term when it expires, the trustee is usually obligated to sell the real estate and return the net proceeds to the beneficiary.

C. Real Estate Investment Trust (REIT)

A real estate investment trust (REIT) is a method of pooling investment money using the trust form of ownership. In the 1960s Congress provided favored tax treatment for certain business trusts by exempting from corporate tax certain qualified REITs that invest at least 75% of their assets in real estate and that distribute 95% or more of their annual real estate ordinary income to their investors.

The REIT offers some of the flow-through tax advantages of a partnership or syndication while retaining many of the attributes and advantages of a corporation.

V. Ownership of Real Estate By Business Organizations

A. Partnerships

- An association of two or more persons who carry on a business for profit as co-owners.
1. General partnership: all the partners participate in the operation and management of the business and share full liability for business losses and obligations.
 - If one partner dies, withdraws or goes bankrupt, the general partnership is dissolved and must be reorganized.
 2. Limited partnership: run by a general partner or partners, with limited partners who are not legally permitted to participate; each can be held liable for business losses only to the extent of his or her investment.

The partnership agreement may provide for the continuation of the organization following the death or withdrawal of one of the partners.

B. Corporations

- A legal entity created under the authority of the laws of the state from which it receives its charter, managed and operated by its board of directors.
- The charter sets forth the powers of the corporation.
- Because the corporation is a legal entity, it can own real estate in severalty.
 - Shareholders do not have direct ownership interest in real estate owned by a corporation because stock is personal property.
 - Shareholder's liability for the corporate losses is limited to the amount of his or her investment.
- A corporation continues to exist until it is formally dissolved. The death of one of the officers or directors does not affect title to property owned by the corporation.

IN ILLINOIS . . . *The creation and regulation of corporations in Illinois are governed by the Illinois Business Corporation Act.*

1. Double Taxation

As a legal entity, a corporation must file an income tax return and pay tax on its profits. The portion of the remaining profits distributed to shareholders as dividends is taxed again as part of the shareholders' individual incomes.

2. S Corporation

Alternate form of business ownership that provides the benefit of a corporation as a legal entity but avoids double taxation. Only the shares of the profits that are passed to the shareholders are taxed, not the profits of the S corporation.

- Subject to strict requirements regulating structure, membership and operation.

C. Syndicates and Joint Ventures

Two or more people or firms joined together to make and operate a real estate investment.

- A syndicate is not a legal entity and may take a variety of ownership forms.
- Characterized by a time limitation resulting from the fact that the joint venturers do not intend to establish a permanent relationship.

D. Limited Liability Companies (LLCs)

Combines the most attractive features of limited partnerships and corporations: limited liability and the tax advantages of a partnership.

- Allows flexible management structures without the complicated requirements of S corporations or the restrictions of limited partnership.

IN ILLINOIS . . . *With passage of the Illinois Limited Liability Company Act in 1994, Illinois joined the majority of states that recognize limited liability companies.*

VI. Condominiums, Cooperatives, and Time-Shares

A. Condominium Ownership

- The owner of each unit holds a fee simple title to the unit and a specified share of the undivided interest in the common elements as a tenant in common.

IN ILLINOIS . . . *creation of condominiums is governed by the Illinois Condominium Property Act. Under this law, an owner/developer may elect to submit a parcel of real estate to condominium ownership by recording a declaration to which is attached a three-dimensional plat of survey of the parcel showing the location and size of all units in the building. A building built on leased land may not be submitted for condominium ownership in Illinois. Every unit purchaser acquires the fee simple title to that unit, together with the percentage of ownership of the common elements that is set forth in the declaration and that belongs to that unit. This percentage is computed on the basis of the initial list prices of each unit.*

The survey required with each declaration of condominium ownership must indicate the dimensions of each unit. This survey will show the outlines of the lot, the size and shape of each apartment and the elevation or height above base datum for the upper surface of the floor level and the lower surface of ceiling level. The difference between these two levels represents the airspace owned in fee simple by the unit owner.

Many Illinois municipalities have adopted conversion ordinances to protect tenants in rental buildings whose owners decide to convert to condominiums. The ordinances also protect prospective purchasers. These laws typically allow tenants an opportunity to extend their leases, and often guarantee first purchase rights. Additional protections often include disclosure of all material information, building and construction soundness, adequacy of parking, and a variety of other concerns. The courts have generally upheld these ordinances as a valid exercise of police power.

1. Ownership

Each unit is a separate parcel of real estate that is owned in fee simple and may be held in any type of ownership or tenancy recognized by law, mortgaged, sold or transferred.

- Real estate taxes are assessed and collected on each unit as an individual property. An owner's default does not affect the other unit owners.

2. Operation and administration

An association of unit owners administers the condominium property.

- The expenses of maintaining and operating the building are paid through fees and assessments imposed and collected by the owners' association.

3. Special Assessments are special payments required of unit owners to address some specific expense.

IN ILLINOIS . . . *Under the Illinois Condominium Property Act, the property may be removed from condominium status at any time by the unanimous consent of all owners and all lienholders, as evidenced by a recorded written instrument. All owners would then be tenants in common.*

B. Cooperative Ownership

A corporation holds title to the land and building and offers shares of stock to prospective tenants. The purchaser becomes a shareholder in the corporation and receives a proprietary lease to the apartment for the life of the corporation. Because stock is personal property, the cooperative tenant-owners do not own real estate.

1. Operation and management is determined by the corporation's bylaws. Shareholders elect officers and directors who are responsible for operating the corporation and its real estate assets.

2. Advantages

Lending institutions view the shares of stock as acceptable collateral for financing. Tenants in cooperatives also enjoy certain income tax advantages from the payment of property taxes.

IN ILLINOIS . . . *Illinois real estate brokers and salespersons are permitted to list and sell cooperative units and interests.*

C. Time-Share Ownership

Permits multiple purchasers to buy interests in real estate, usually a resort property. Each purchaser receives the right to use the facilities for a certain period of time.

IN ILLINOIS . . . *The promotion or sale of all time-share units is regulated by the Illinois Real Estate Time-Share Act. The act, regulated by the Office*

of Banks and Real Estate, applies to both in-state and out-of-state time-share sales.

1. Time-share estate is a fee simple interest. The owner's occupancy and use of the property are limited to the contractual period purchased.
2. Time-share use is the right to occupy and use the facilities for a certain number of years. At the end of that time, the owner's rights in the property terminate — not a fee simple interest.

Discussion Questions

1. Why is the manner of taking title to property so important? What are some of the considerations that potential owners should think about before electing to take title in a particular manner?
2. What are the major differences between tenancy by the entirety and community property?
3. What are the major differences between cooperative ownership and condominium ownership? Which is more popular in your area? Why?

Classroom Exercises

1. Have your students discuss the relative benefits and drawbacks of each form of co-ownership. They should consider items such as the number of owners, whether their interests must be equal, whether such interests are inheritable, how they are created and terminated, etc. Have someone write these items on the board under the appropriate column headings.
2. Survey your class members for those who own real estate (or their parents, for a younger student population) and ask why they (or their parents) have the form of ownership that they do. See which form is most common. Ask those who responded if they (or their parents) consulted an attorney before selecting that specific method of taking title to their property. Discuss why competent legal advice might be appropriate before purchasing property.
3. Review the by-laws of a condo and give your opinion of appropriateness of such rules and regulations.