

OPINION

Make sure you know how the deed to your marital home lists the title

By Lisa Spiwak

When a married couple goes to the escrow office to sign the documents to their new home, they are thinking about many things. Their minds are swirling with thoughts of the mortgage payment, furniture placement, the moving company, landscaping, area schools, etc. The last thing they are thinking about is how the deed to their new home should list the title. Who cares as long as it has both of their names on the document, right? Wrong!

Actually, it is a very big deal how married people choose to take title to their home. It has a tremendous impact down the road, which so few people understand. Couples sit in the escrow office and usually tell the title officer to simply list them on the title in the manner that it is typically done. Often the title officer (who is not a lawyer) doesn't even understand the impact of that decision.

California is a "community property" state, meaning that if two people are married and living in California, then all of their earnings and assets acquired while married are presumed to be owned by both spouses equally regardless of which spouse actually earned the money.

So, if a married couple buys a home together in California, do they automatically have to list title to their property as John and Jane Doe, a married couple, as community property? The answer to this question is absolutely not. They can choose to take the property as joint tenants if they so wish. There are benefits and negatives to both.

Taking title as community property: Taking title as community property has beneficial tax consequences. The value of real estate typically increases over time. Since the IRS declares the tax basis in real estate to be the original purchase price, if one spouse dies and the remaining spouse sells the home, there can be a huge financial gain between the original purchase price and the sale price. This is viewed as a capital gain by the IRS

and a gain that is taxable. However, if title to the property is held as community property, the IRS gives that remaining spouse a tax break and "steps up" the value of the entire property basis to the present fair market value. This means that the spouse will not have to pay taxes on any of the equity built up in the property. For couples that have lived in their home for several years and the value of the home has increased dramatically, this is a huge financial benefit.

The negative to holding title as community property is that if the couple is being pursued by creditors, the real estate is much more accessible if it is held in community property. Creditors of one of the spouses can legally foreclose on the home even if that creditor is only owed money by one of the spouses. If the husband had a business and got into financial trouble, the wife could lose her home even though she had nothing to do with her husband's business.

Taking title in joint tenancy: Another option for married couples is to take title to their home as joint tenants. With this title, if one of the spouses dies, the property only receives the "stepped up basis" to the current fair market value for the half of the property that belonged to the deceased spouse. The remaining spouse does not get the benefit of the entire property's basis being "stepped up." If the remaining spouse sells the home at that point, there will probably be a significant tax bill to contend with.

However, the benefit to owning a home in joint tenancy is that creditors can only reach that portion of the property that belongs to the debtor spouse's half. A creditor is prevented from foreclosing on the entire home. This could end up saving the home from foreclosure if the couple gets into financial trouble.

As you can see, how title is taken matters significantly and must be given a great deal of thought.

• *Lisa Spiwak is an attorney at Spiwak & Iezza LLP in Thousand Oaks.*

Viewpoint