

## ***Property Ownership and Deed Recording***

California was admitted to the Union by the United States on September 9, 1850. One of the first acts of the California Legislature was to adopt a recording system by which evidence of title or interests in the title could be collected and maintained in a convenient and safe public place. The purpose of establishing a recording system was to inform persons planning to purchase or otherwise deal with land about the ownership and condition of the title. This system was designed to protect innocent lenders and purchasers against secret sales, transfers, or conveyances and from undisclosed encumbrances/liens. The purpose of this system is to allow the title to the real property to be freely transferable.

The California Government Code provides that, after being acknowledged (executed in front of a Notary Public, or properly witnessed as provided by applicable law), any instrument or judgment affecting the title to or possession of real property may be recorded.<sup>1</sup> The word "instrument" as defined in section 27279(a) of the Government Code "...means a written paper signed by a person or persons transferring the title to, or giving a lien on real property, or giving a right to a debt or duty." A similar definition is set forth in a historic 19th century case.<sup>2</sup> The definition of an "instrument" does not necessarily include every writing purporting to affect real property. However, the term "instrument" does include, among others, deeds, mortgages, leases, land contracts, deeds of trust and agreements between or among landowners/property owners.

The general purpose of recording statutes is to permit (rather than require) the recordation of any instrument which affects the title to or possession of real property, and to penalize the person who fails to take advantage of recording. Because of the recording of instruments of conveyance or encumbrance/lien, purchasers (and others dealing with title to property) may in good faith discover and rely upon the ownership of title or an interest therein. While the Government Code does not specify any particular time within which an instrument must be recorded, priority of recordation will ordinarily determine the rights of the parties if there are conflicting claims to the same parcel of land/property, i.e., the title thereto or an interest therein. The instrument recorded first in the chain of title would generally achieve priority over subsequently recorded instruments (fact issues such as subordination or *actual* notice may affect priority notwithstanding recording dates).

All property has an owner, the government – federal, state, or local – or some private party or entity. Ownership of property can take many forms. The form of ownership is usually selected based on the needs of the owner or owners. Very broadly, real property may be owned in the following ways:

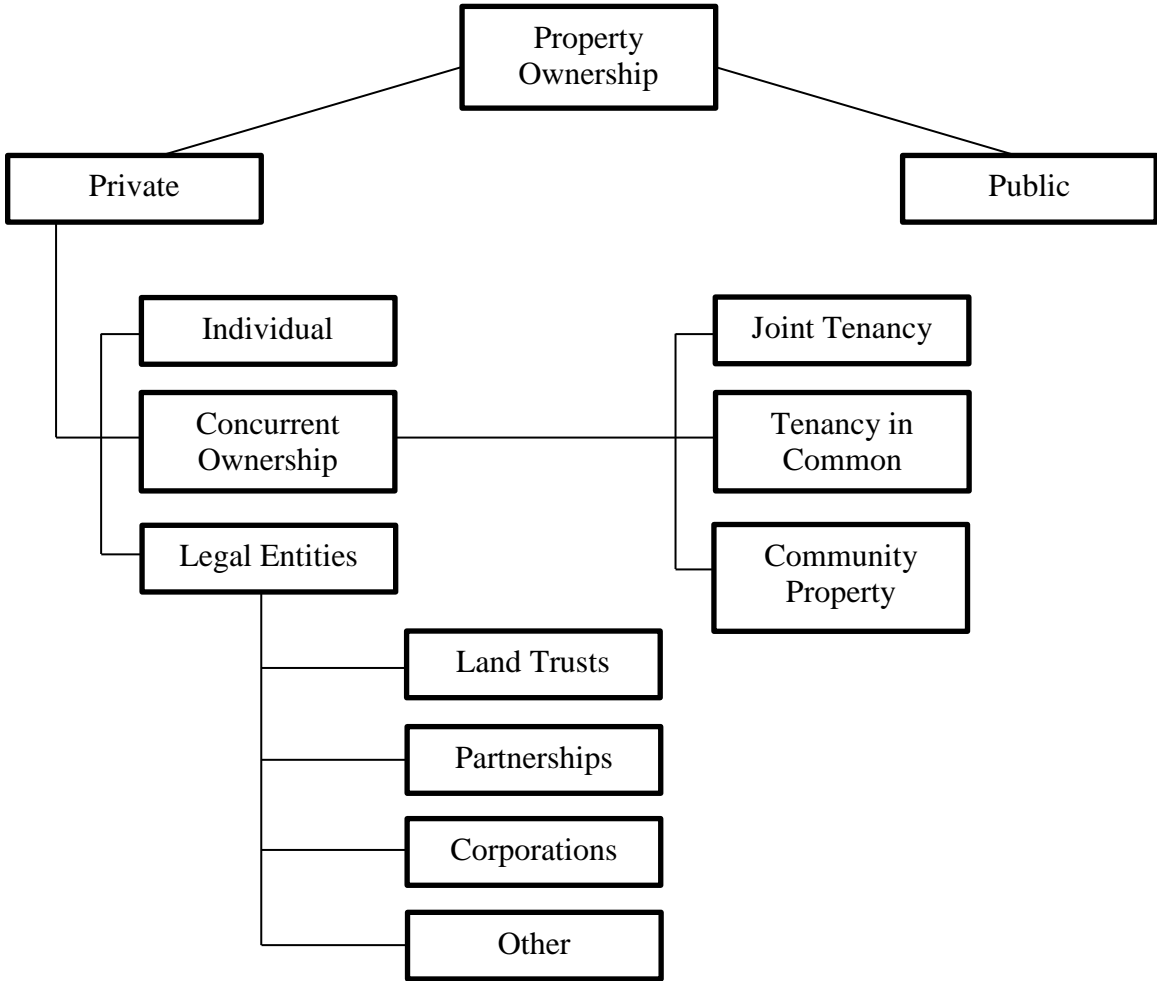
1. Sole ownership;
2. Joint, common, or community ownership;
  - a. Tenancy in common;
  - b. Joint tenancy; or,

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<sup>1</sup> See Government Code Sections 27201, 27201.5, 27287, and 27288.

<sup>2</sup> See *Hoag v Howard* (1880) 55 Cal. 564-567.

- c. Community property
- 3. Ownership by lawfully created entities.



**SOLE OWNERSHIP**

Sole ownership is defined to mean ownership by one person. Being the sole owner, one person enjoys the benefits of the property and is subject to the accompanying burdens, such as the payment of taxes. Subject to applicable federal and state law, a sole owner is free to dispose of property at will. Typically, only the sole owner's signature is required on the instrument of transfer/deed of conveyance.<sup>3</sup>

<sup>3</sup> See Civil Code Section 681.

## JOINT, COMMON, OR COMMUNITY OWNERSHIP

Joint, common, or community ownership or co-ownership means simultaneous ownership of a given piece of property by several persons (two or more).<sup>4</sup> The types of such ownership interests include the following:

### *Tenancy in Common*

Tenancy in common exists when several (two or more) persons are owners of undivided interests in the title to real property. It is created if an instrument conveying an interest in real property to two or more persons does not specify that the interest is acquired by them in joint tenancy, in partnership, or as community property. Some instruments of transfer/deeds of conveyance clearly state the intentions of the persons acquiring are to hold title as tenants in common.<sup>5</sup> No right of survivorship exists for individual tenants when title is held as tenants in common. The undivided interest of a deceased tenant in common passes to the beneficiaries (heirs or devisees) of the estate subject to probate, pursuant to the last will and testament of the deceased or by intestate succession. The heirs or devisees of the deceased simply take the tenant's place among the other owners who continue to hold title to the property as tenants in common.<sup>6</sup>

### *Joint Tenancy*

Joint tenancy exists if two or more persons are joint and equal owners of the same undivided interest in real property. Generally, to establish a joint tenancy a fourfold unity must exist: interest, title, time, and possession. Joint tenants have the same interest, acquired by the same conveyance, commencing at the same time, and held by the same possession.<sup>7</sup>

The most important characteristic of a joint tenancy is the right of survivorship that flows from the unity of interest. The words "with the right of survivorship" are not necessary for a valid joint tenancy deed, although they are often inserted. If one joint tenant dies, the surviving joint tenant (or tenants) become(s) the owner(s) of the property to the exclusion of the heirs or devisees of the deceased. Thus, joint tenancy property cannot be disposed of by the last will and testament, is not subject to intestate succession, and typically does not become part of the estate of a joint tenant subject to probate.

### **Creating A Joint Tenancy**

With limited exception, California appellate courts have accepted and enforced the common law rule that if any one of the four unities — time, title, interest or possession — is lacking, a tenancy in common, not a joint tenancy, exists. An exception to the general rule has been more recently applied in connection with the time of acquisition of the title to the property. Consultation with knowledgeable legal counsel is recommended to answer questions that may be posed by property owners regarding the establishment of joint tenancies and the legal, practical, tax, estate planning, and other considerations involved.

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<sup>4</sup> See Civil Code Section 682.

<sup>5</sup> See Civil Code Section 685.

<sup>6</sup> See Probate Code Section 6400 et seq.

<sup>7</sup> See Civil Code Section 683.

However, by statute a joint tenancy may be created:<sup>8</sup>

1. By transfer from a sole owner to himself or herself and others as joint tenants.
2. By transfer from tenants in common to themselves or to themselves, or any of them, and others as joint tenants.
3. By transfer from joint tenants to themselves, or to any of them, or to others as joint tenants.
4. By transfer from a husband and wife (when holding title as community property or otherwise) to themselves, or to themselves and others, or to one of them and to another or others as joint tenants.
5. By transfer to executors of an estate or trustees of a trust as joint tenants.

### Severance

A joint tenant may sever the joint tenancy as to his or her own interest by a conveyance to a third party, or to a cotenant. If there are three or more joint tenants, the joint tenancy is severed as to the interest conveyed but continues as between the other joint tenants as to the remaining interests. If title is in A, B and C as joint tenants, and A conveys to D, then B and C continue as joint tenants as to a two-thirds interest and D owns a one-third interest, as tenant in common. If A and B only are joint tenants and B conveys to C, then A and C would be in title as tenants in common.<sup>9</sup>

### Community Property

Community property generally consists of all property acquired by a husband and wife, or either, during a valid marriage, other than separate property acquired prior to the marriage, by gift, or as an individual heir or devisee of a deceased. Separate property may also include property designated as separate by the husband or wife or by court order. Separate property of either the husband or the wife is not community property.

## HOMESTEAD EXEMPTION

The principal purpose of the *homestead exemption* is to shield the home against creditors of certain types whose claims might be exercised through judgment lien enforcement.<sup>10</sup> The homestead exemption should not be confused with the property tax homeowners' exemption, which provides a \$7,000 reduction in the taxable value for a qualifying owner-occupied home. The recording of a homestead declaration has no effect on California property taxes.

## DEEDS IN GENERAL

When properly executed, delivered and accepted, a deed transfers title to real property from one person (the *grantor*) to another person (the *grantee*). Transfer may be *voluntary*, or *involuntary* by act of law, such as a foreclosure sale.

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<sup>8</sup> See Civil Code Section 683.

<sup>9</sup> See Civil Code Section 683.2

<sup>10</sup> Articles 4 and 5 of Chapter 4, Division 2, Title 9, Part 2 of the California Code of Civil Procedure (commencing with Section 704.710).

There are several different essentials to a valid deed:

1. It must be in writing;
2. The parties must be properly described;
3. The parties must be competent to convey and capable of receiving the grant of the property;
4. The property conveyed must be described so as to distinguish it from other parcels of real property;
5. There must be a granting clause, operative words of conveyance (e.g., "I hereby grant");
6. The deed must be signed by the party or parties making the conveyance or grant; and
7. It must be delivered and accepted.

Contrary to the law and established custom in other states, the expression "to have and to hold" (called the "habendum clause" of a deed) is not necessary, nor are witnesses or seal required. The deed should be dated, but this too is not necessary to its validity. Any form of written instrument containing the essentials above set out will convey title to land.

A typical grant deed may be in the form as follows:

"I, John A. Doe, a single man, grant to Emma B. Roe, a widow, all that real property situated in Sacramento County, State of California, described as follows: Lot 21, Tract 62, recorded at Page 91 of Book 7 of Maps of Sacramento County, filed January 21, 1965. Witness my hand this tenth day of October, 1983.

(Signed) John A. Doe"

Usually, a deed is executed for consideration, but this is not essential for a valid transfer. Moreover, even when consideration is given for the property, this point need not be mentioned in the deed. However, it should be noted that lack of consideration may affect the rights of the grantee as against the rights of certain third parties because the recording statutes are intended to protect bona fide purchasers.

### **Acknowledgment**

An acknowledgment is a formal declaration before a duly authorized officer, such as a notary public, by a person who has executed an instrument that such execution is his or her act and deed. The piece of paper (or form) executed by the officer before whom the formal declaration was made (for example, the grantor in a grant deed) is a Certificate of Acknowledgment. This certificate is either printed right on the grant deed itself or is a separate piece of paper which is stapled to the grant deed. The acknowledgment of a writing is a way of proving that the writing was in fact signed (or executed) by the person who purported to sign (or execute) the writing. Moreover, an acknowledgment is a safeguard against forgery and false impersonation. Duly acknowledged writings are entitled to be introduced into evidence in litigation without further proof of execution.

Many instruments are not entitled to be recorded unless acknowledged. Unless by statute an acknowledgment is made essential to the validity of an instrument, the instrument itself is valid between the parties and persons having actual notice of it, though not acknowledged.

### **Recordation**

While recording a deed does not affect its validity, it is extremely important to record since recordation protects the grantee. If a grantee fails to record, and another deed or any other document encumbering or affecting the title is recorded, the first grantee is in jeopardy.

### **Consistency of Names in Title Instruments**

Complete record title to land cannot be established unless the various instruments in a chain of title in the recorder's office show direct connection by name between the different owners. Any substantial variation between the name of the grantee in one instrument and the name of the grantor in the next instrument executed by that grantee will, irrespective of the fact that identity may be shown by "off record" evidence, render the title defective. Furthermore, the subsequent instrument executed by the grantor of that grantee cannot impart constructive notice of its contents to a third person.

A legal name of an individual consists of one personal, or given, name and one surname/family name. The old common law recognized but one given name and frequently disregarded middle names or initials. It has been stated that the insertion or omission of, or mistake or variance in a middle name or initial is immaterial. However, while the omission or addition of a middle name or initial in an instrument affecting real property is generally considered immaterial, a variance in middle names or initials may result in defective record of title.

### **Delivery and Acceptance**

A deed is of no effect unless delivered. But delivery in this context means more than a turning over of the physical possession of the document. The grantor must have the *intention* to pass title immediately. It is possible in some cases to have a legal delivery without the instrument actually being handed to the grantee, if the grantor has the requisite intent to transfer title.

That intention is not present if A gives B a deed but tells B not to record it until A's death, both parties believing the deed is ineffective until recorded. Nor is such intention present in the typical case of cross-deeds between husband and wife placed in a joint safe-deposit box with the understanding that the survivor will record his or her deed.

The law presumes a valid delivery if the deed is found in the possession of the grantee or is recorded, but such presumption is rebuttable. A deed may be entrusted to a third party (such as an escrow agent) with directions that it be delivered to the grantee upon the performance of designated conditions. The deed itself may contain conditions. But with reference to delivery, by statute, a grant cannot be delivered to the grantee conditionally. Delivery to the grantee, or to the grantee's agent as such, is necessarily absolute, and the instrument takes effect immediately, discharged of any condition on which the delivery was made which is not expressed in the deed. (Or, no delivery may have occurred and the deed may be found to be void.) The grantor attempting a conditional delivery should withhold transfer of the deed to the grantee until the conditions are satisfied; or incorporate the conditions in the deed itself; or deposit the deed into

an escrow with appropriate instructions. Transfer of a deed conditioned on the grantor's death is ineffective as an attempted testamentary disposition failing to meet the requirements of a will.

A duly executed deed is presumed to be delivered as of its dated date. The dated date of a deed is often different from its recorded date. Possession or the rights thereto must be given when the deed is delivered.

## **TYPES OF DEEDS**

### **Grant Deed**

The grant deed is used when a person who is on the current deed transfers ownership or adds a new owner. The grantor (donor or seller) promises that all rights to the property are being transferred—there are no hidden owners or easements. Because of inclusion of the word "grant" in a grant deed, the grantor impliedly warrants that he or she has not already conveyed to any other person and that the estate conveyed is free from encumbrances done, made or suffered by the grantor or any person claiming under grantor, including taxes, assessments and other liens. This does not mean that the grantor warrants that grantor is the owner or that the property is not otherwise encumbered. The grant includes appurtenant easements for ingress and egress and building restrictions. The grantor's warranty includes encumbrances made during grantor's, but no other individual's, possession of the property. It conveys any title acquired after the grantor has conveyed the title to the real property (after-acquired title), generally. Observe that these warranties carried by a grant deed are not usually expressed in the grant deed form. They are called "implied warranties" because the law deems them included in the grant whether or not explicitly expressed in the deed.

### **Quitclaim Deed**

A quitclaim deed is a deed by which a grantor transfers only the interest the grantor has at the time the conveyance is executed. The grantor is not promising anything other than that they are giving up their own rights, if any. There are no implied warranties in connection with a quitclaim deed. This type of deed guarantees nothing and there is no expressed or implied warranty that grantor owns the property or any interest in it. Moreover, a quitclaim deed does not convey any after-acquired title. A quitclaim deed effectively says, "I am conveying all the title that I have in the property described in this quitclaim - if I have, in fact, any title."

A quitclaim deed is often used in divorces, when one spouse gives up any potential community property interest. In addition, a quitclaim deed is used to clear some "cloud on the title." A "cloud on the title" is some minor defect in the title which needs to be removed in order to perfect the title. Deeds of court representatives, such as guardians, administrators, and sheriffs, usually have the effect of a quitclaim pursuant to court order.

### **Warranty Deed**

Warranty deeds are rare in California. A warranty deed contains express covenants of title. The special feature of warranty deeds is that the grantor promises to pay for any lawsuits or damages due to undisclosed ownership disputes. In California, this is typically handled by title insurance, so warranty deeds are unneeded and potentially confusing.

### **Trust Deed or Deed of Trust**

A trust deed or deed of trust is never used to transfer ownership (not even to a trust). It is the functional equivalent of a mortgage. A trust deed is a three-party security instrument conveying title to land as security for the performance of an obligation. Like a mortgage, a trust deed makes a piece of real property security (collateral) for a loan. If the loan is not repaid on time, the lender can foreclose on and sell the property and use the proceeds to pay off the loan. A trust deed is not used to transfer property to a living trust. Other than terminology, trust deeds and living trusts have nothing in common. A living trust is used to avoid probate, not to provide security for a loan.

### **Reconveyance Deed**

A reconveyance deed is an instrument conveying title to property from a trustee back to the trustor-borrower when the money borrowed has been repaid to the lender.

### **Sheriff's Deed**

A sheriff's deed is a deed given to a party on the foreclosure of property, levied under a judgment for foreclosure on a mortgage or of a money judgment against the owner of the property. The title conveyed is only that acquired by the state or the sheriff under the foreclosure and carries no warranties or representations whatsoever.

### **Gift Deed**

A grantor may make a gift of property to the grantee, and use a grant deed form or a quitclaim deed form for the purpose. Grantor may, but need not, say in the deed that grantor makes the transfer because of love and affection for the grantee. A gift deed made to defraud creditors may be set aside if it leaves the debtor/grantor insolvent or otherwise contributes to fraud.

### **Revocable Transfer on Death Deed**

The revocable transfer on death deed is used to leave property to heirs without the need for probate. The grantor names the intended heirs as "beneficiaries." The deed has no effect until the grantor dies, when the beneficiaries record an affidavit to receive the property.

## **OTHER TYPES OF RECORDED DOCUMENTS**

### **Affidavit of Death of Joint Tenant**

The affidavit of death of joint tenant is used to remove the name of a deceased joint tenant from a property title.

### **Affidavit of Death of Trustee**

A successor trustee is named in a trust as the person who will take over the trustee's duties and fulfill provisions of the trust when the trustee dies. The transition process requires trust property to be transferred out of the trustee's name into the successor trustee's name. To transfer property to the name of the successor trustee, a form called "Affidavit of Death of Trustee" should be recorded in the county where the property is located. A separate affidavit must be filed for each real property title held in the trustee's name.



**References**

*Reference Book* (2010),<sup>11</sup> California Department of Real Estate, Chapters 5 and 7.

*The Appraisal of Real Estate*, Appraisal Institute, 14<sup>th</sup> edition.

Sacramento County Public Law Library, *Adding or Changing Names on Property*,  
<http://www.saclaw.org/wp-content/uploads/sbs-completing-and-recording-deeds.pdf>.

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<sup>11</sup> <http://www.dre.ca.gov/Publications/ReferenceBook.html>