
CLIENT BULLETIN

A PUBLICATION FROM



MCGRATH
LAW OFFICE
—P.C.

Mackinaw Office • 113 S. Main St., P.O. Box 139 Mackinaw, IL 61755 • Phone: 309-359-3461
Morton Office • 1600 S. Fourth Ave., Suite 137 Morton, IL 61550 • Phone: 309-266-6211
Email: email@mcgrathpc.com • Web: www.mcgrathpc.com

TITLE INSURANCE: WHAT BUYERS AND SELLERS SHOULD KNOW

How do you know that the person who contracts to sell you a piece of real estate actually owns it? How do you determine whether there are liens against the real estate you are purchasing? Is there a way to make sure that you will be reimbursed if there is a problem with the title to real estate?

If you're like most people, a home is the largest purchase you will ever make. Making sure that your interests are protected is important. Selling real estate can also be a risky undertaking. No matter which side of the transaction you're on, title insurance is one of the many details you'll have to contend with.

In a typical transaction, the contract for sale requires the seller to provide the buyer with proof that the seller owns the property and that there are no unacceptable defects in or liens against the property. This proof is often in the form of a *title insurance commitment*, which is a promise to issue a title insurance policy once certain conditions are met.

A *title insurance policy* is a contract of indemnity: it protects against loss and pays the insured in the event of loss. If a covered defect exists with the title to a piece of property, the title insurer, while unable to guarantee that the defect in the property can be eliminated, will reimburse the insured owner for the loss that results from the defect.

There are two main types of title insurance policies: *owner's* and *lender's*. An owner's policy usually covers the new owner for an amount equal to the sales price of the property; the premium is generally paid by the seller. A lender's policy protects the lender against possible defects in title and insures the priority of the lender's lien; the premium is generally paid by the buyer.

Title insurance is retrospective rather than prospective. This means that your title insurance policy covers title problems that arose *prior to* the effective date of the policy but not *after*. Possible defects in the title to property include an outstanding unpaid mortgage from a predecessor in title, a lien against the property, unpaid taxes, or the forgery of a deed.

An owner's title insurance policy indemnifies the insured owner under the following circumstances:

- If title to the property is not vested in the insured owner;
- If there is any defect in, lien, or encumbrance on title;
- If title to the property is unmarketable. That is, the insurance company will indemnify an insured owner if there is a covered problem with title that would allow a buyer to get out of a contract with an insured owner who is trying to sell the property;
- If there is no legal right of access to and from the property

It is important to remember that the title insurance policy will make

exceptions to and place conditions upon the coverage discussed above. We would be happy to review your title insurance commitment or policy with you so that you fully understand the extent of your coverage. In fact, if you're buying or selling real estate, call our office before you sign any documents or make any agreements.

HOLDING JOINT TITLE TO REAL ESTATE

Two or more persons may own real estate together in an arrangement known as cotenancy. A cotenancy is created by a conveyance of property to two or more persons, usually by deed. The three most common types of cotenancy are *tenancy in common*, *joint tenancy*, and *tenancy by the entirety* (see table on reverse).

Each form of cotenancy has its advantages and disadvantages. For instance, a distinguishing characteristic of joint tenancy and tenancy by the entirety is the *right of survivorship*. This means that when a joint tenant or tenant by the entirety dies, the surviving joint tenant(s) or tenant by the entirety will automatically become the owner of that portion of the property that was owned by the deceased. The property interest of a joint tenant or tenant by the entirety may not be given away by will and will not pass to the heirs of the joint tenant or tenant by the entirety upon their death.

There are circumstances, however, under which a joint tenancy and a tenancy by the entirety may be destroyed, thereby destroying the right of survivorship. A tenant in common enjoys no right of

survivorship. Upon the death of a tenant in common, the property interest of the deceased tenant in common will be distributed to his/her heirs or devisees (those who receive property under a

will). Choosing a cotenancy is a decision that can affect your ability to use, protect, and dispose of your property. Please call our office for more information on this important decision.

Type of Cotenancy	Definition	Rights of Possession and Use	Survivorship
Joint Tenancy	A form of ownership whereby two or more persons own an equal undivided interest in property with each owner having the right of survivorship. <i>Example: A and B each own a one-half interest in property. If A dies, B will own the whole property and vice versa.</i>	<ul style="list-style-type: none"> ▪ A joint tenant enjoys the following rights with respect to the possession and use of the property <ul style="list-style-type: none"> - To possess and enjoy the entire property; - To collect a proportionate share of income and profit from the property; - To repair the property and make common improvements; - To receive contribution and reimbursement for common expenses from other cotenancy - To sell, convey, or mortgage his/her interest in the property without the consent of cotenants; and - To sue to sever the cotenant and divide the property. ▪ A creditor of a joint tenant may create a lien upon the interest of the joint tenant and this lien may be foreclosed during the life of the joint tenant. 	Yes*
Tenancy in Common	A form of ownership whereby two or more persons own an undivided interest in property, but their interest in the property may be unequal. <i>Example: A owns a one-quarter interest and B owns a three-quarter interest in the property.</i>	<ul style="list-style-type: none"> ▪ A tenant in common enjoys the same rights of possession and use as a joint tenant. A tenant in common also has the right to dispose of his/her interest in the property by will. ▪ A creditor of a tenant in common may create and foreclose a lien upon the property interest of a tenant in common. 	No
Tenancy by the Entirety	A form of ownership that can exist only between a husband and wife and only so long as the property is the primary residence of the husband and wife. Tenants by the entirety own the whole property jointly and enjoy the right of survivorship. <i>Example: Husband and Wife own their primary residence jointly. If Husband dies, Wife will own the whole property and vice versa.</i>	<ul style="list-style-type: none"> ▪ Tenant by the entirety may not sell, convey, or mortgage his/her interest in the property unless his/her spouse consents or joins in the conveyance or mortgage. ▪ Tenancy by the entirety property may not be sold to satisfy a judgment entered after October 1, 1990 against only one spouse. 	Yes***

*Because a joint tenant has a right of survivorship, a lien creditor who fails to foreclose during the lifetime of a Joint tenant may lose his/her lien when the debtor joint tenant dies, making the nondebtor joint tenant the sole owner of the property.

**The death of the nondebtor spouse will destroy the tenancy by the entirety protection, making the debtor spouse the sole owner of the whole property and making the property subject to sale by judgment creditors. Statutory changes and court decisions may affect the status of tenancy by the entirety property, making it subject to a creditor's foreclosure actions.

***The property interest of a joint tenant or tenant by the entirety may not be given to a third party by will and will not pass to the heirs of the joint tenant or tenant by the entirety upon death.

Legal advice varies depending on the facts. For that reason, the information in this Client Bulletin should not be acted upon without consulting a Lawyer. This publication is Advertising Material.