

Title Issues and Low-Income Older Adults

CHAPTER SUMMARY • April 2019

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Founded in 1975, Legal Counsel for the Elderly (LCE) is the leading provider of free legal services and advocacy for vulnerable District seniors. LCE’s mission is to improve the quality of life for older District residents, and its primary goals are to serve and empower thousands of low-income District seniors each year in those areas of law involving basic human needs: income, housing, long-term care, personal autonomy, and consumer protection. For more than two decades, LCE attorneys have defended District homeowners in cases involving home ownership, financial fraud and abuse, and related consumer and tort matters.

Key Lessons

1. Questions about ownership of real property come up across a legal aid practice, and knowing the full ownership status of your client’s home may be important for cases involving probate, benefits, foreclosure, and fraud.
2. Property can be titled in several different ways, and how the property is titled will affect a client’s ability to occupy or possess the property exclusively, whether the client can transfer an interest by selling or obtaining a mortgage, and how the property will be passed to the owner’s heirs.
3. Not all title questions can be resolved easily. Some title questions cannot be resolved in a way that benefits a client. Advocates must be sure to think through all of the ramifications of “cleaning up” title issues and whether success there means a hardship to a client in another area.
4. Property law is often state-specific. Although general title principals are discussed in this Chapter Summary, advocates must be sure to review their local laws.

When is Title an Issue?

Questions about ownership of property come up in all sorts of unexpected ways in a legal aid practice. Consider a client who wants information about needs-based assets and lives in the family house where they grew up. Figuring out whether your client has a property interest—and whether that interest is an asset under the benefits rules—will impact what programs your client may be eligible for. Another client may have estate-planning questions about how to ensure that their home—perhaps their sole asset of value—will be passed to an heir without requiring time-consuming or expensive probate proceedings. Yet another client may be facing an eviction from a house they thought they owned; you may need to uncover and unravel a scam that took the client off title to their own house.

The first steps in all cases and many others will be a little legwork figuring out exactly who is on the title to your client’s home and what that means for the client.

Types of Ownership Interests

The ownership of a house will be evidenced by a Deed, which is usually found among the public land records in a jurisdiction. The Deed should identify the property being transferred and should name the Grantor

(or “Party of the First Part”) and the Grantee (or “Party of the Second Part”). The Grantee in the most recently-executed deed is the owner of the property. The Deed may also include the amount of consideration (payment) made when the house was transferred, although the document may only include a nominal amount (e.g. \$10.00), so advocates may need to look elsewhere to determine the actual consideration.

The Deed will also state what type of ownership interest is held by the Grantee(s). The ways that the ownership “pie” can be sliced to fit the particular needs of the owners are limited only by the creativity of the drafters (taking into account local laws, of course), but there are five common ownership types that come up repeatedly in a legal services practice:

- I. **Sole ownership:** There is one owner who typically has the sole occupancy and possessory rights in the house. This one owner generally has unrestricted rights to transfer an interest in the house, which means the owner can sell or mortgage the property at will.
- II. **Joint Tenants:** Two or more individuals who jointly own the whole property together are joint tenants. Each joint tenant has occupancy and possessory rights, and generally neither will be able to encumber the property without participation of the other. This means that generally both joint tenants have to sign off on any mortgage. It may be possible for only one joint tenant to take on the personal obligation of the loan itself, but generally the lender will require each joint tenant to sign the security document that ties the loan to the house (otherwise the lender would probably be unable to foreclose for nonpayment of the loan).

Typically, each joint tenant enjoys the right to unilaterally transfer (that is, sell or gift) their share of the property without involving or requiring consent from other owners. Doing so will sever the joint tenancy. For example, if one of two joint tenants sells their half to a new owner, the remaining original owner will then own the property as a 50/50 tenant in common with the new owner.

Often a joint tenancy expressly will include “with the rights of survivorship,” which means the ownership will vest in the surviving joint tenant if one dies. Local law may provide a presumption of rights of survivorship even without the express language. Assuming rights of survivorship, title vests in the surviving owner without the need for probate.

Depending on local law, it may be possible for one joint tenant unilaterally to sever the joint tenancy while remaining an owner, turning the ownership interest into tenancy in common between the original two joint tenants. Severing a joint tenancy can allow a former joint tenant to ensure that their half of the interest will pass to their heirs, rather than to the other joint tenant.

- III. **Tenants by the Entirety:** Married couple who own the whole property as one. Each owner has occupancy and possessory rights, and neither can alienate the other’s interest; neither one can transfer any interest without the other. Creditors of only one spouse generally cannot obtain a lien against the property.

This ownership interest probably cannot be severed unilaterally by one owner, and upon the death of one owner, title vests in the surviving owner without the need for probate.

- IV. **Tenants in Common:** Two or more individuals own the property, each with an identifiable part of the whole. Each owner has occupancy and possessory rights, and each can transfer his own portion of the whole without involving or getting consent from the others.

When an owner dies, their portion of the whole transfers through their estate—whether through probate or through some other means they have established through estate-planning (e.g. Transfer on Death Deed or into a trust, etc). The decedent’s portion does not automatically vest in any surviving co-owners.

- V. Life Estate:** Form of joint ownership that allows a “Life Tenant” ownership rights during their lifetime, with the title vesting in the “Remainderman/men” upon the Life Tenant’s death. During their lifetime, the Life Tenant has occupancy and possessory rights and can transfer their interest (subject to the life estate limitations), which means they may be able to sell their life estate or obtain a mortgage. Title vests automatically in the Remainderman/men without the need for probate.

Should a Client Add Someone Else to Title?

A common question clients ask legal aid attorneys is whether to add someone else to title. Usually the client is asking for estate planning purposes, maybe because a surgery or other medical procedure is scheduled, or else the client wants to add someone to title so that the other person can handle the client’s affairs in case the client becomes incapacitated. In almost every occasion, clients are advised *against* adding anyone to title, for a number of reasons:

- Adding another person to title means the owner will no longer have complete control over the property, including occupancy and possessory rights, as well as rights to encumber or transfer interest in the property.
- Depending on local rules, owners who currently qualify for certain real property tax deductions (such as “homestead” deductions for owner-occupants or senior/disabled credits, which in some jurisdictions may reduce tax burdens by more than half) may find that they lose those benefits once someone else is added to title.
- It may be very difficult to get someone off the title once they are added. The original owner would need the consent of the added person to remove them from the deed.
- The house may now be subject to attachment or seizure by the added person’s creditors, e.g. if the added owner is sued for unpaid credit cards, those judgments may attach to the original owner’s home.
- Instead of adding someone else to title, there are some ways a client may be able to address the real underlying questions: *how can I make sure someone can take care of my affairs if I’m unable to? Is there a way that my family may be able to avoid a lengthy and expensive probate?*
- Rather than add a name to the deed, the client may instead be interested in executing a Financial Power of Attorney to allow someone else to help handle affairs as needed. There may be other options in your jurisdiction for avoiding probate, like a Transfer on Death Deed (TODD). TODD’s name a beneficiary to take title to a property after the owner dies, without the need for probate.

Some Title Problems Cannot — or Should Not — Get Resolved

As advocates, sometimes the best advice we can give a client is to let a sleeping dog lie; advice that occasionally comes up in cases involving questions about title.

EXAMPLE

Cathy, a client who lives in family “heir property,” meaning the property is still titled in the name of her deceased grandparents, comes to your office for help with large property tax bills. She may qualify for a reduction in taxes if she can get on title to her home. But you learn that in order to put Cathy on title, there would have to be a probate of her grandparents’ estate—and there are several other heirs, some of whom may prefer to have the house sold and the sale proceeds distributed.

Cathy’s request for help with the tax program applications must be weighed against the possible harm to her housing security, with the likely end result that you advise her not to take any actions that would disrupt their status quo.

Conclusion

Questions of property ownership—whether your client actually owns their home, and if so, in what form—will inform your advice on a range of primary topics. Fluency with title and property ownership issues will enable you to better serve your clients by uncovering scams, ensuring they are secure and stable in their housing, maximizing benefits, and helping them plan for the future.

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

This Chapter Summary was supported by a contract with the National Center on Law and Elder Rights, contract number HHSP233201650076A, from the U.S. Administration on Community Living, Department of Health and Human Services, Washington, D.C. 20201.