Real Estate Ownership:
Rights and Options for Unmarried Couples

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INTRODUCTION

Sharing a piece of real estate with a partner is a major decision with many important considerations to weigh. The purpose of this pamphlet is to provide information about the rights and obligations of unmarried individuals who want to legally share property.

Married individuals, simply by virtue of being married, have a different set of legal rights and obligations as to their property. For example, if a married couple divorces, property acquired during the marriage is presumptively owned by the couple jointly, not by the individual who might actually have chosen or paid for it. Upon death, the surviving spouse routinely inherits a portion of the estate, regardless of the existence or contents of a will. Of course, there are advantages and disadvantages to the marital scheme of property ownership. Although it may seem that married couples possess privileges denied to others, at times those "privileges" can become liabilities.

Unmarried individuals are not precluded from owning property jointly as married couples do, but joint ownership is not automatic. Instead, you can create the rights and obligations that work for you through the use of contracts and deeds.

The information contained in this booklet is meant to provide general guidance and facts to give you a basic understanding of this area of the law. However, this information is no substitute for the individual legal advice you can receive from an attorney who can tell you how the law may apply to your specific situation. The information contained herein does not constitute legal advice.

Same-Sex Couples and Property Ownership

Most of the laws governing ownership of real estate assume that most owners fall into one of three categories: (1) a single person owning real estate; (2) a person sharing ownership with a spouse or a relative; or (3) a business. Thus, the law provides options to meet the needs of each of these types of owners. Unfortunately, the law does not usually recognize the needs of two unrelated individuals who want to own property together, whatever their relationship.

Common questions from same-sex couples include:

- If two people live in a house owned by only one of them, who has rights to the house?
- What if both of them contribute to the mortgage?
- What of one of them dies?
- Does putting both names on the deed ensure that each person has equal rights to the property?
- How do you transfer ownership from one partner to another?
- What happens if the couple breaks up?

Same-sex couples (as well as other unrelated individuals who desire joint property ownership) have several options, which will be described below, in deciding how to structure their financial affairs.

What does it mean to be an owner?

The owner of a particular piece of real estate is the person or persons whose name(s) is/are on the deed. If only one name is on the deed, that individual is the sole owner. If there are two or more names on the deed, the named individuals share ownership. There are three ways in which ownership can be shared.

A. Tenancy in Common

A tenancy in common is the most prevalent form of shared ownership between two individuals who are not married to each other (for example, multiple business owners). Each owner, no matter how small her fractional interest, has the right to possess the entire parcel, unless there is an agreement to the contrary. In other words, the right of ownership is not limited to a portion of the land, despite fractional ownership. The fractional amount becomes important only when selling the property, when the amount of money each owner receives from the sale is based upon the percentage owned.

B. Joint Tenancy With Right of Survivorship

The other major joint ownership arrangement is the joint tenancy. Like the tenancy in common, each joint tenant has the right to possess the entire parcel. However, there are also some important differences. Joint tenants are required to possess an equal share in the property: in other words, if there are two owners, the property must be split 50/50 between them. Another important difference is the right of survivorship. When one joint tenant dies, the property automatically belongs to the other; it does not pass to the deceased joint tenant's heirs or legatees. Mississippi, like most states, has an explicit preference for tenancy in common.[1] Thus, to create a joint tenancy with right of survivorship, those words must be explicitly written into the contract. Without this statement, the court will declare it to be an ambiguous contract and interpret it as a tenancy in common – even if the contract expressly states that it is intended to be a joint tenancy. Traditional language in Mississippi to create a joint tenancy is "to A and B as joint tenants with full rights of survivorship and not as tenants in common."

C. Tenancy by the Entirety

In some states, when two legal spouses buy real estate, they automatically share ownership as a tenancy by the entirety. In Mississippi, if the spouses want to have this kind of tenancy, that language must be put in the deed since the default tenancy is a tenancy in common. However, tenancy by the entirety is still an option for married couples. This kind of tenancy means that both spouses own equal shares, and neither of them can transfer their share to anyone else. The law also provides certain protections and benefits for married couples. For example, the marital home is protected against

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[1] Miss. Code Ann. § 89-1-7.

certain kinds of creditors, against challenges from survivors of a deceased spouse, and the like. Obviously, a tenancy by the entirety is not applicable to any joint owners other than those who are legally married to each other.

Which kind of tenancy is right for me?

Each of these forms of ownership has its own advantages and disadvantages. Unmarried individuals who wish to own property jointly should pay special attention to these differences, keeping in mind the way the law interacts with their specific situation in order to ensure that their rights are protected to the fullest extent possible.

For example, tenancies in common allow for unequal property shares of the monetary value of the property. This can potentially lead to serious legal problems. If the relationship ends due to death or separation, there could be questions or problems as to the size of each owner's share. It is a good idea to record at least a rough estimate of the percentage owned by each owner to avoid possible legal disputes.

A second issue with tenancies in common is who gets a deceased owner's share. When one tenant in common dies, her share of the property goes to whoever is named in her will (or passes under the state intestacy statute if she leaves no will). Executing a will that bequeaths a share of the land from one tenant in common to the other may not settle the issue. If one owner dies, the family of the deceased owner may bring a lawsuit against the surviving owner challenging the will in order to gain that share.

The key advantage of a joint tenancy is that each owner is guaranteed to acquire the property should the other owner die, regardless of what a will says. A joint tenancy with right of survivorship is far more difficult to challenge in court than a will. While the owners in a joint tenancy are alive, either of them can sell their share to a third party; however, the remaining owner and the new owner would have a tenancy in common unless they chose to execute a new deed specifying that they wanted another joint tenancy.

Who has the right to the property?

The general rule is that the person with the title to the land has exclusive property rights. If both names are not on the title, a non-titled partner is considered a "mere licensee" – in essence, a houseguest – regardless of how long she has lived there and can be ejected from the property at the discretion of the owner. (Verbal contracts dealing with real property are not enforceable in court). If for some reason you choose to have only one name on the title, the only way to give the non-titled partner some rights to the property is to create some sort of contractual arrangement. Again, all contracts dealing with real estate must be in writing to be enforceable.

Who pays for the property?

The owner of the land is responsible for any taxes or government-imposed payments. The more complicated issue is who pays the purchase price of the land. Most people have to get a loan in order to purchase real estate. Typically, such a buyer of real estate receives three documents upon completing the purchase: the deed, the mortgage, and the note. The mortgage and note are usually referred to together as the mortgage.

However, the note is the promise to repay the loan in specified amounts and at specified times. One does not have to be on the deed to pay the note; conversely, there are no ownership rights connected to the note. The mortgage is concerned with assuring that the note will be paid, the property will be maintained, and the property insurance will be paid. Most importantly, the mortgage states that the property is the collateral for the loan. Thus, the mortgage specifies that if the conditions of the loan are not met, then the bank can foreclose and seek to take ownership of the property. Anyone can be listed on the note to help pay off the debt (commonly called a "co-signer"). Only individuals who have at least an ownership share in the property can be added to the mortgage. It is important to note that a co-signer, despite the fact that he does not have an ownership share of the property, can still be called upon by the bank to pay the entire debt if the owner defaults, and would then have to take the owner to court for reimbursement.

What options are available to unmarried, unrelated individuals who wish to share property?

There are a number of ways in which property can be shared. The goal of most couples is to assure that both individuals have some right to live on the property and to share in the proceeds if it is sold. Many of these options overlap; in other words, you don't have to choose just one. In fact, it is probably a good idea to utilize more than one option in order to maximize the legal protections available.

A. Joint Ownership

The first and safest option is for both individuals to have title to the land. The easiest way to do this is to place both names on the deed when you initially purchase the property. However, if one individual already owns the property, the owner of the property must execute a deed conveying the property to herself and her partner as either tenants in common or as joint tenants with right of survivorship. The deed should then be recorded in the Chancery Clerk's office in the county in which the property is located.

Using this option solves many legal questions and is a somewhat hassle-free way of assuring property rights, but it may not be the best option for all situations. If you decide to add a second name to the deed, you must be prepared to add it to the mortgage as well. This is because adding a second name may trigger the "due-on-transfer" clause. Thus, both individuals must be credit-worthy and ready to assume the obligations of a mortgage.

B. Adding Another Name to the Deed

The best way to add another person's name to your deed is to have an attorney do it. This is not necessary, however; many people do it themselves. To begin the process, you must obtain a copy of your current deed. If you do not have one, your local Chancery Clerk's office should have it on file. Be sure to ask for an official copy.

If you decide to add another name without the aid of an attorney, seek advice from the Chancery Clerk's office. They may suggest that you get a Quitclaim Deed. A quitclaim deed is essentially a quickie title exchange which foregoes the traditional title search. Any interests that run with the land from the previous deed are still in existence. A quitclaim deed does not carry with it the same warranties as a standard deed. However, for the purposes of adding a person's name to the deed, a quitclaim deed is appropriate for most people.

You can obtain blank deeds, including a quitclaim deed, at many office supply and stationery stores. The deed will have a space to write the names of the new owners, in which you will write your name and the name of the new co-owner. You will also have to specify the manner in which you intend to share ownership (as tenants in common or as joint tenants with rights of survivorship). Finally, you will have to recopy all the

subsequent text describing the real estate onto the new deed – you cannot simply add the new name(s) and then write "see other deed." Each county may have different procedures and requirements. You should call the Chancery Clerk's office in your county for more specific information about what is required.

Due on Transfer Clauses: What You Need to Know

Many people are unaware of the fact that adding another name to the deed without also adding that name to the mortgage may allow the bank to foreclose. Standard in most mortgages, a due-on-transfer clause states that if the owner of the land subject to a mortgage transfers any portion of the land to someone else, then the entire mortgage becomes due immediately.

This is because adding a name to the deed is considered the same as transferring a share of the property to the new owner, even if the new owner is not paying for her share. Under federal law, certain types of transfers are expressly excluded from due-on-transfer enforcement: involuntary transfers resulting from the death of a borrower, transfers that rearrange ownership rights within a family, transfers resulting from separation or divorce, and further encumbrances such as second mortgages to finance a college education or home improvements.

The language used to define who is considered a "family member" under the exemptions is *relative*, *spouse*, or *children*. Therefore, unmarried, unrelated individuals who wish to share property are subject to enforcement of due-on-transfer clauses.

In order to avoid foreclosure, the new co-owners can refinance and acquire a new mortgage. Or, if the lender permits such a change, the new owner's name can be placed on the existing mortgage such that the two owners would together assume the old mortgage. Lenders may permit a mortgage assumption at the existing contract rate or at a "blended" interest rate – an average of the current market rate and the original rate of the mortgage loan.

If you are considering adding a second person to your mortgage, you should contact your lender and perhaps some additional mortgage brokers to find out what options are available to you.

Cohabitation Contracts

If having both names on the title and mortgage is not a viable possibility, one alternative is for both partners to create a cohabitation contract, an agreement that defines the financial and legal relationship between two people who live together. A cohabitation contract does not transfer ownership of property, but it can define who pays for certain expenses associated with the property, who gets money upon the sale of the property, etc. It is one way, short of actual co-ownership, to make sure that both parties retain some

legal rights with respect to the property. However, one downside of contracts regarding real property is that they will be subordinate to other real property interests without notice of the contract, such as a later mortgage. Be sure to update your contract if you refinance or make other changes after you sign it.

A cohabitation agreement can also encompass issues of ownership of personal property (furniture, collectibles, automobiles, etc.). For example, a cohabitation agreement can spell out issues such as what property is owned jointly and what is owned separately, how expenses are to be divided, and who is in charge of various maintenance expenses. It is necessary to consult an attorney in order to make this contract official, and because cohabitation agreements are very individualized, necessitating individual legal advice.

It is important to note that a cohabitation contract should be carefully written so as to avoid any implication that it might be based on a "prurient interest" (in other words, on sex). All contracts must have consideration, meaning that the promisor and the promisee are exchanging something of value. However, if the consideration for a contract is sexual, the court will invalidate the contract. Any clause dealing with companionship or fidelity can be construed by a judge to imply a sexual relationship. If such an implication is found, regardless of its location or significance, the entire contract is void. For this reason, it is prudent to write separate contracts for real and personal property, as a mingling of these types of property could potentially be used to imply a prurient relationship. In general, a cohabitation contract should be written so as to resemble a business agreement.

It is an open question as to whether the Mississippi courts would enforce a cohabitation contract, but the prospects look good.[2] In *Estate of Reaves v. Owen*, 744 So.2d 799 (Miss. App. 1999), the Court of Appeals held that "the prohibition against same-sex marriages does not preclude individuals in homosexual relationships from exercising their rights to privately commit by contract to spend their money and distribute their property as they wish."[3] In addition, the court noted that "no authority states that a contract between two unmarried persons is illegal." (Presumably the court meant two unmarried persons who are or were in an intimate relationship, as parties to contracts are usually unmarried). For more information on cohabitation agreements, see *Life Planning: Protecting Your Rights as a Lesbian, Gay, or Bisexual Mississippian*.[4]

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[2] You might have heard of something called "palimony," which is a legal theory that gives unmarried persons a right to enforce a property division and perhaps obtain support when the relationship dissolves. Please note that palimony is not recognized in Mississippi, since it is considered void as against public policy. *See* Weeks v. Weeks, 654 So.2d 33, 36 (Miss. 1995).

[3] It is important to note the court's consideration of how much the contract resembled a business agreement. It stated, "this contract arose out of arms-length negotiation between these two parties who were represented by attorneys." 744 So.2d at 802. Thus, being represented by counsel in making a contract may make it more likely to be taken seriously by a court.

[4] You can order this handbook from the ACLU of Mississippi by calling (601) 355-6464, or from Equality Mississippi by calling (601) 936-7673. In addition, these publications are available online at www.msaclu.org and www.EqualityMS.org.

Landlord-Tenant Relationship

Although not as secure as co-tenancy, a landlord-tenant relationship is another alternative arrangement for unmarried, unrelated individuals who wish to share property. This method keeps the title in one partner's name while allowing the other partner to retain some rights to the property. Generic leases can be obtained at many office supply or stationery stores, or you can write your own lease to provide for whatever rights and benefits you feel are appropriate for your situation. Most basically, a lease protects the tenant from being evicted without cause or reasonable notice. As long as the tenant is paying rent and the landlord is accepting the rent, the tenant has the right to remain on the property.

Adult Adoption

Because courts generally view relatives as having a closer, and therefore more legally protected, relationship than two unrelated individuals who live together, some same-sex couples establish themselves as relatives through adult adoption – in other words, one partner legally adopts the other. There is nothing in Mississippi's adoption statute that prohibits adults from being adopted by other adults, although in practice it is unlikely that an adult adoption between individuals in a same-sex relationship would be allowed to proceed. Furthermore, there are some major disadvantages to adult adoption – chiefly that it is virtually permanent, which would create a legal nightmare if the relationship between the two parties ended.

Constructive Trusts

For the protection of all parties involved, it is advisable that unmarried, unrelated individuals who share property choose one or more of the aforementioned options to secure legal rights to the property. However, if a relationship ends and a former partner, whose name is not on the deed, mortgage, or a contract, is seeking a right to the property, there is one other possibility.

In very rare circumstances, non-owners may obtain property rights through a constructive trust. What this means is that if a court decides that one party has been wrongfully deprived of rights, benefits, or title to a piece of property by mistake, fraud, or some other breach of trust, it may decide that, in order to prevent any unjust enrichment, the current landowner is holding the property for the benefit of the other party. A constructive trust will only be ordered under exceptional circumstances.

What are the tax consequences of transferring property, adding another name to the title, or buying property jointly?

Federal Taxes. When the name of a partner is placed on a property deed that was previously owned solely by one member of the couple, the titling of the property may be treated under the Internal Revenue Code as a gift. Members of same-sex couples may be liable for federal gift tax on any transfer in excess of $10,000 in a single tax year, unlike married couples, who may make unlimited gifts to each other during their marriage without tax consequences.

Under federal law, the IRS levies a tax, called the Unified Federal Estate and Gift Tax, on property you leave at the time of your death or give away while living. Therefore, you cannot evade the estate tax by giving away property before you die. However, there are a few exceptions to this rule. Because of these exceptions, most people do not end up paying Federal Estate and Gift Tax.

One exception allows each taxpayer to allocate up to $10,000 per year in gifts tax-free. If you exceed the $10,000 exception, you must file a gift tax return with the IRS during that tax year.

The second, more important, exception allows each person to transfer after death an estate worth $1,000,000 free of federal estate taxes.[5] In addition, at death, gifts over $10,000 per year allocated over a lifetime are combined with the donor's estate to determine the net worth of the estate. Consequently, whenever the combined taxable gifts plus estate exceed $1,000,000, there is an estate tax due. The rate of tax is very high, starting at 37% and going up to 55%.

In practical terms, most Americans do not have to worry about paying federal gift and estate tax, because so few accumulate estates of sufficient size to be subject to the tax.

State Taxes. Mississippi does not have a state gift tax, but it does have an estate tax.[6] The exemption is the same as the federal exemption -- $1 million in 2002 and 2003, and so on, as described in footnote 2 below. For decedents who died prior to January 1, 2000, the estate tax was the higher of the following two items: the State Death Tax Credit[7] or

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[5] This exemption amount will increase each year until the estate tax is eliminated in 2010. The exemptions are as follows: 2003, $1 million; 2004 & 2005, $1.5 million; 2006-2008, $2 million; 2009, $3.5 million. In 2011, the tax is reinstated with an exemption of $1 million unless Congress decides otherwise in the interim. Because it is a good possibility that the law with respect to federal gift and estate tax could change in the upcoming years, be sure to consult the IRS or a knowledgeable attorney to find out how the law will apply to your situation.

[6] See Miss. Code Ann. § 27-9-1 through § 27-10-25.

[7] The State Death Tax Credit is a credit you receive on your federal gift and estate tax form. As of 2002, if your adjusted taxable estate amounts to less than $40,000, you get no state credit, meaning you do not have to pay the state any estate tax. If your estate is valued at between $40,000 and $90,000, your credit is 0.8% of the amount over $40,000 (for example, if your estate was valued at $60,000, your credit and the estate tax you would pay to the state would equal $480). If your estate is valued between $90,000 and $140,000,

the tax calculated from the Mississippi table. For decedents dying on or after January 1, 2000, the tax due is the maximum amount of the State Death Tax Credit. However, federal law is reducing the State Death Tax Credit such that it will be eliminated in 2005. Although you will still have to file an estate tax form with the state, there will be no estate tax to pay **unless** the legislature passes legislation to reinstate the state estate tax ***or*** Congress reinstates the State Death Tax Credit. These are both possibilities, so be sure to check the Mississippi State Tax Commission website (www.mstc.state.ms.us) for the most up-to-date information on Mississippi estate tax.

Property Taxes. Another thing to note about state taxes is the state property tax, known as the **ad valorem tax**. The phrase "ad valorem" simply means that property is taxed at a flat rate according to its value. The first thing you should know about the ad valorem tax is that property is divided into 5 classes that are taxed at different rates. Class I property is defined as "single-family owner-occupied, residential real property," and Class II property is all other real property except for that in Class I or Class IV (public service property). The important distinction for these purposes is that Class I property is taxed at a rate of 10%, and Class II property is taxed at a rate of 15%. According to Mississippi State Tax Commission, Property Tax Bureau Rule 5, "[p]roperty owned by multiple persons is not eligible for treatment as Class I Property unless the owners are related in the third degree and are otherwise eligible." Thus, when two unmarried, unrelated individuals own property together, the property tax rate is 15% rather than 10% as for married or related people.

A second thing to be aware of about the ad valorem tax is the **homestead exemption**. This is an exemption of tax on the first $6000 of the value of the property, intended to give a tax break to residential property owners. In order to be eligible for a homestead exemption, the individual requesting it must make a written application, be a natural person (as opposed to a corporation or partnership), be the head of a family, have ownership of the eligible property, occupy the dwelling as a home, and be a Mississippi resident. The two requirements to be concerned with here are the head of family and eligible property requirements.

In terms of the head of family requirement, if two single unrelated individuals jointly own and occupy a home, only one of them can file for the homestead exemption because only one individual can be considered head of the family with respect to one piece of property. The other should be listed as an occupying joint owner.

Property owned by two or more unrelated individuals is eligible for the homestead exemption as long as the property meets all other requirements; however, the exemption is only available for the percentage share of the property owned by the person filing for the homestead exemption, and then only that share of the exemption is available to her. For example, if Susan and Barbara own their residence jointly in equal shares (50/50) and

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your credit is $400 plus 1.6% of the amount over $90,000. Thus, if your estate was valued at $110,000, your credit and your Mississippi estate tax would be $720 ($400 + ($20,000) x (.016)). The table where you can find this information is Table B in the document entitled Instructions for Form 706, which you can download from the IRS website at no charge.

the residence is valued at $60,000, and Susan filed for the homestead exemption, the exemption would apply to the first $3000 of her $30,000 share. To give another example, if Nathan and Dave jointly owned a residence valued at $12,000 and Dave filed for the homestead exemption, the exemption would apply to the first $3000 of Dave's $6000 share of the property. If Nathan and Dave or Susan and Barbara were married or related, they would get the full $6000 exemption on the entire value of the property.

Conclusion

As you can see, ownership of real estate involves many important issues that require careful planning and consideration. This brochure was intended to answer many of your questions and make you aware of some of the matters you might need to address. However, laws and procedures change and are subject to varying interpretations. If you need individual legal advice, you should consult a knowledgeable attorney who practices property or real estate law.