

# 4

## Ownership

**Sole Ownership**

**Co-Ownership**

**Estates in Trust**

**Condominiums**

**Cooperatives**

**Time-Shares**

There are numerous ways of holding ownership of a freehold estate according to how many parties share the ownership and how they share it. The primary distinction is between ownership by a single party, and ownership by multiple parties. Various trust structures enable an owner to employ a trustee to hold and manage an estate. Condominiums, cooperatives and time-shares are hybrids that combine several forms of ownership.

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### SOLE OWNERSHIP

#### Tenancy in severalty

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**Tenancy in severalty** If *a single party owns* the fee or life estate, the ownership is a **tenancy in severalty**. Synonyms are **sole ownership**, **ownership in severalty**, and **estate in severalty**. When the would-be sole owner is a husband or wife, state laws may require homestead, dower or elective share rights to be released to allow ownership free and clear of any marriage-related claims.

The estate of a deceased tenant in severalty passes to heirs by probate.

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### CO-OWNERSHIP

**Tenancy in common**

**Joint tenancy**

**Tenancy by the entireties**

**Community property**

**Tenancy in partnership**

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If more than one person, or a legal entity such as a corporation, owns an estate in land, the estate is held in some form of co-ownership. Co-owners are also called **cotenants**.

## Tenancy in common

The tenancy in common, also known as the **estate in common**, is the most common form of co-ownership when the owners are not married. The defining characteristics are:

- ▶ two or more owners
- ▶ identical rights
- ▶ interests individually owned
- ▶ electable ownership shares
- ▶ no survivorship
- ▶ no unity of time

**Two or more owners.** Any number of people may be co-tenants in a single property.

**Identical rights.** Co-tenants share an indivisible interest in the estate, i.e., all have equal rights to possess and use the property subject to the rights of the other cotenants. No co-tenant may claim to own any physical portion of the property exclusively. They share what is called undivided possession or unity of possession.

**Interests individually owned.** All tenants in common have distinct and separable ownership of their respective interests. Co-tenants may sell, encumber, or transfer their interests without obstruction or consent from the other owners. ( A co-tenant may not, however, encumber the entire property.)

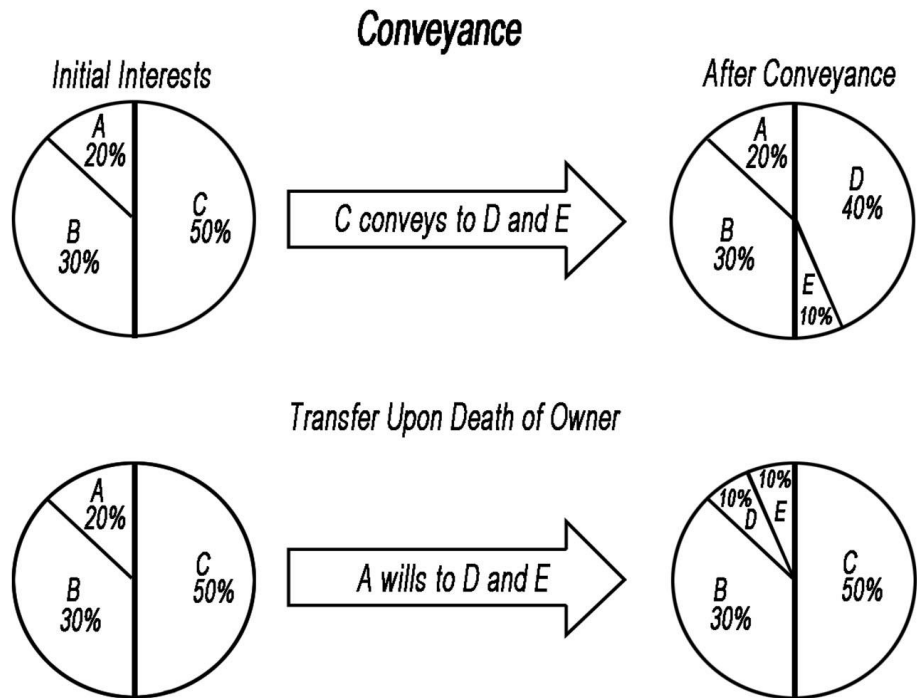
**Electable ownership shares.** Tenants in common determine among themselves what share of the estate each party will own. For example, three co-tenants may own 40%, 35%, and 25% interests in a property, respectively. In the absence of stated ownership shares, it is assumed that each has a share equal to that of the others.

**No survivorship.** A deceased co-tenant's estate passes by probate to the decedent's heirs and devisees rather than to the other tenants in common. Any number of heirs can share in the ownership of the willed tenancy.

**No unity of time.** It is not necessary for tenants in common to acquire their interests at the same time. A new co-tenant may enter into a pre-existing tenancy in common.

The following exhibit illustrates how tenants in common may transfer ownership interests to other parties by sale or will.

## Exhibit 4.1 Tenancy in Common



The exhibit shows three owners of a property as tenants in common: A owns 20%, B owns 30%, and C owns 50%. C decides to sell 4/5 of his interest to D and 1/5 to E. D's interest in the estate will be 40% (4/5 times 50%), and E's will be 10% (1/5 times 50%). Both new tenants are tenants in common with A and B. Note that any owner may sell any portion of his or her interest to other owners or outside parties.

The second part of the exhibit shows how, when co-owner A dies, she might bequeath her 20% share of the ownership to heirs D and E equally. In such a case, the heirs would each acquire a 10% share of ownership as tenants in common with B and C.

### Joint tenancy

In a joint tenancy, two or more persons collectively own a property as if they were a single person. Rights and interests are indivisible and equal: each has a shared interest in the whole property which cannot be divided up. Joint tenants may only convey their interests to outside parties as tenant-in-common interests. One cannot convey a joint tenant interest.

The defining characteristics and requirements of joint tenancy are:

- ▶ unity of ownership
- ▶ equal ownership
- ▶ transfer of interest
- ▶ survivorship

**Unity of ownership.** Whereas tenants in common hold separate title to their individual interests, joint tenants together hold a single title to the property.

**Equal ownership.** Joint tenants own equal shares in the property, without exception. If there are four co-tenants, each owns 25% of the property. If there are ten co-tenants, each owns 10%.

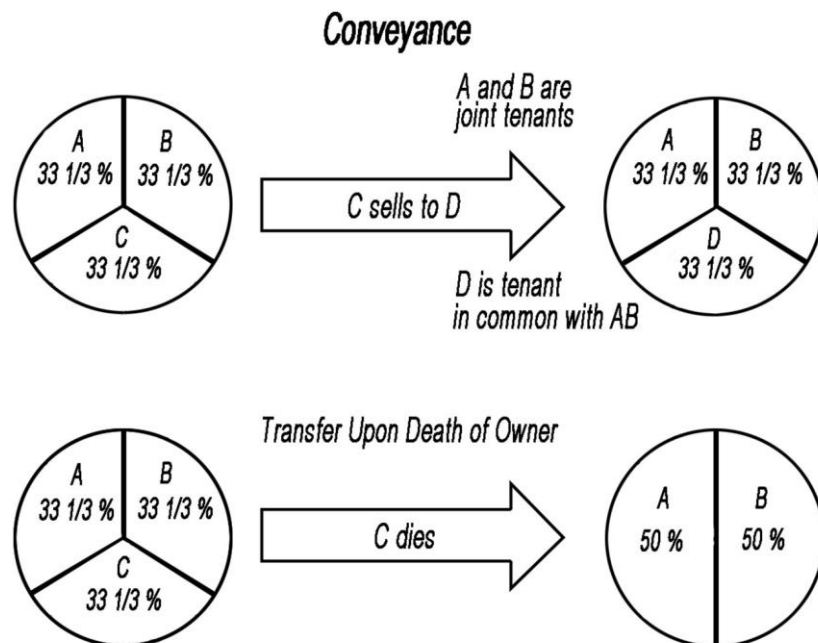
**Transfer of interest.** A joint tenant may transfer his or her interest in the property to an outside party, but only as a tenancy in common interest. Whoever acquires the interest co-owns the property as a tenant in common with the other joint tenants. The remaining joint tenants continue to own an undivided interest in the property, less the new cotenant's share.

**Survivorship.** In most states, joint tenants enjoy rights of survivorship: if a joint tenant dies, all interests and rights pass to the surviving joint tenants free from any claims of creditors or heirs.

When only one joint tenant survives, the survivor's interest becomes an estate in severalty, and the joint tenancy is terminated. The estate will be then probated upon the severalty owner's death.

The survivorship feature of joint tenancy presents an advantage to tenancy in common, in that interests pass without probate proceedings. On the other hand, joint tenants relinquish any ability to will their interest to parties outside of the tenancy.

#### Exhibit 4.2 Joint Tenancy



The exhibit shows three parties, A, B and C, who acquired a property as joint tenants. By definition, each owns a one-third share. If C sells to D, A and B

automatically become joint tenants of two-thirds of the property. D becomes a tenant in common with A and B. D's interest will pass to her heirs upon her death.

If C dies, A and B receive equal shares of C's estate, making the remaining shares an equal 50%. If B then dies, A acquires the whole estate and becomes the sole owner. This event terminates the joint tenancy estate, and it becomes an estate in severalty.

**Creation of joint tenancy.** To create a joint tenancy, all owners must acquire the property at the same time, use the same deed, acquire equal interests, and share in equal rights of possession. These are referred to as the **four unities**.

▶ **Unity of time**

all parties must acquire the joint interest at the same time

▶ **Unity of title**

all parties must acquire the property in the same deed of conveyance

▶ **Unity of interest**

all parties must receive equal undivided interests

▶ **Unity of possession**

all parties must receive the same rights of possession

In most states, the conveyance must name the parties as joint tenants with rights of survivorship. Otherwise, and in the absence of clear intent of the parties, the estate will be considered a tenancy in common. In addition, a joint tenancy can only be created by agreement between parties, and not by operation of law.

In some states, a severalty owner may create a joint tenancy with other parties without the presence of the four unities by deeding the property to himself or herself and other parties as joint tenants.

**Termination by partition suit.** A partition suit can terminate a joint tenancy or a tenancy in common. Foreclosure and bankruptcy can also terminate these estates.

A partition suit is a legal avenue for an owner who wants to dispose of his or her interest against the wishes of other co-owners. The suit petitions the court to divide, or **partition**, the property physically, according to the owner's respective rights and interests. If this is not reasonably feasible, the court may order the property sold, whereupon the interests are liquidated and distributed proportionately.

## Tenancy by the entireties

Tenancy by the entireties is a form of ownership traditionally reserved exclusively for **husband and wife**, though now available for same-sex spouses in some states. It features survivorship, equal interests, and limited exposure to foreclosure.

**Survivorship.** On the death of husband or wife, the decedent's interest passes automatically to the other spouse.

**Equal, undivided interest.** Each spouse owns the estate as if there were only one owner. Fractional interests cannot be transferred to outside parties. The entire interest may be conveyed, but only with the consent and signatures of both parties.

**No foreclosure for individual debts.** The estate is subject to foreclosure only for jointly incurred debts.

**Termination.** The estate may be terminated by divorce, death, mutual agreement, and judgments for joint debt.

**Community property** Some states have established a community property form of ownership. This type of ownership defines property rights of legal spouses before, during, and after their marriage, as well as after the death of either spouse.

Community property law distinguishes real and personal property into categories of **separate** and **community** property. Separate property belongs to one spouse; community property belongs to both spouses equally.

Separate property consists of:

- ▶ property owned by either spouse at the time of the marriage
- ▶ property acquired by either spouse through inheritance or gift during the marriage
- ▶ property acquired with separate-property funds
- ▶ income from separate property

Community property consists of:

- ▶ all other property earned or acquired by either party during the marriage

For instance, John owns a car and a motorcycle, and Mary owns a car. They marry and buy a house. A year later, Mary's father dies and leaves her \$10,000, which she uses to buy furniture. John, meanwhile, sells the motorcycle and buys a computer. John rents the computer to a programmer for \$50 a month. The ownership of these properties is as follows:

John	Mary	Community
car 1	car 2	house
motorcycle	\$10,000	
computer	furniture	
\$50 income		

A spouse owns separate property free and clear of claims by the other spouse. He or she can transfer it without the other spouse's signature. Upon the death of the separate property owner, the property passes to heirs by will or laws of descent. Community property cannot be transferred or encumbered without the signatures of both spouses. Upon the death of either spouse, half of the deceased's community property passes to the surviving spouse, and the other half passes to the decedent's heirs.

### Tenancy in partnership

Tenancy in partnership is a form of ownership held by business partners, as provided by the **Uniform Partnership Act**. The partnership tenancy grants equal rights to all partners, but the property must be used in connection with the partnership's business. Individual rights are not assignable.

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## ESTATES IN TRUST

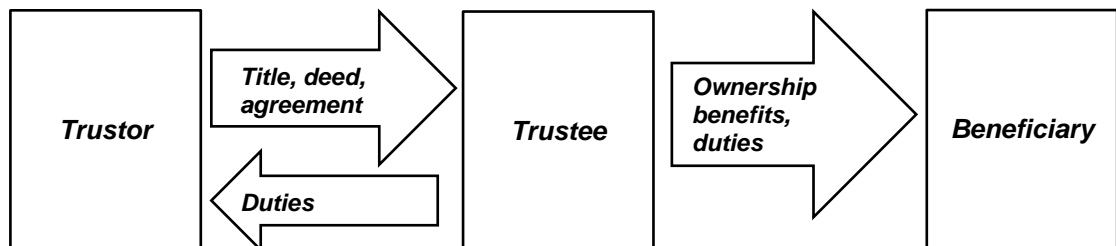
### Living trust Land trust

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In an estate in trust, a fee owner-- the **grantor** or **trustor**-- transfers legal title to a fiduciary-- the **trustee**-- who holds and manages the estate for the benefit of another party, the **beneficiary**. The trust may be created by a deed, will, or trust agreement.

The trustee has fiduciary duties to the trustor and the beneficiary to maintain the condition and value of the property. The specific responsibilities and authorities are set forth in the trust agreement.

**Exhibit 4.3 Estate in Trust**



### Living trust

A living trust allows the trustor, during his or her lifetime, to convey title to a trustee for the benefit of a third party. The trustor charges the trustee with all

necessary responsibilities for managing the property, protecting its value, and securing whatever income it may produce. The trustee may also be ordered to sell the property at a given point. The beneficiary receives all income and sales proceeds, net of the trustee's fees.

**Testamentary trust.** A testamentary trust is structurally and mechanically the same as a living trust, except that it takes effect only when the trustor dies. Provisions of the decedent's will establish the trust.

Living and testamentary trusts may involve personal property as well as real property.

## Land trust

A land trust allows the trustor to convey the fee estate to the trustee and *to name himself or herself the beneficiary*. The land trust applies only to real property, not to personal property. The agreement, or **deed in trust**, grants the beneficiary the rights to possess and use the property, and to exercise control over the actions of the trustee.

**Conventional trust structure.** The trustee holds legal title and has conventional fiduciary duties. The trustor must be a living person, but the beneficiary may be a corporation.

The distinguishing features of the land trust are:

- ▶ **Beneficiary controls property**  
this includes occupancy and control of rents and sale proceeds
- ▶ **Beneficiary controls trustee**  
the trustee is empowered to sell or encumber the property, but generally only with the beneficiary's approval
- ▶ **Beneficiary identity not on record**  
public records do not identify the beneficiary; the beneficiary owns and enjoys the property in secrecy
- ▶ **Limited term**  
the term of the land trust is limited and must be renewed or else the trustee is obligated to sell the property and distribute the proceeds

**Beneficial interest.** The beneficiary's interest in a land trust is *personal property*, not real property. This distinction offers certain advantages in transferring, encumbering, and probating the beneficiary's interest:

- ▶ **Transferring**  
the beneficiary may transfer the interest by assignment instead of by deed

▶ **Encumbering**

the beneficiary may pledge the property as security for debt by collateral assignment rather than by recorded mortgage

▶ **Probating**

the property interests are probated in the state where the beneficiary resided at the time of death rather than the state where the property is located

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## CONDOMINIUMS

### Airspace and common elements

#### Interests and rights

#### Condominium creation

#### Organization and management

#### Owner responsibilities

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A condominium is a hybrid form of ownership of multi-unit residential or commercial properties. It combines ownership of a fee simple interest in the **airspace** within a unit with ownership of an undivided share, as a tenant in common, of the entire property's **common elements**, such as lobbies, swimming pools, and hallways.

A condominium **unit** is one airspace unit together with the associated interest in the common elements.

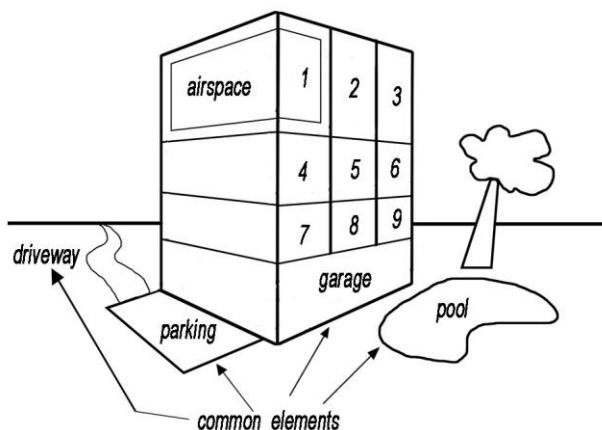
### Airspace and common elements

The unique aspect of the condominium is its fee simple interest in the airspace contained within the outer walls, floors, and ceiling of the building unit. This airspace may include internal walls which are not essential to the structural support of the building.

Common elements are all portions of the property that are necessary for the existence, operation, and maintenance of the condominium units. Common elements include:

- ▶ the land (if not leased)
- ▶ structural components of the building, such as exterior windows, roof, and foundation
- ▶ physical operating systems supporting all units, such as plumbing, power, communications installations, and central air conditioning
- ▶ recreational facilities
- ▶ building and ground areas used non-exclusively, such as stairways, elevators, hallways, and laundry rooms

## Exhibit 4.4 The Condominium



A buyer who purchases Unit #1 of the condominium illustrated obtains a fee simple interest in the airspace of apartment 1 and a tenancy in common interest in her pro rata share of the common elements. If all units in the building have the same ownership interest, the buyer would own an indivisible one-ninth interest in the common elements-- pool, parking lot, garage, pool, building structure, tree, etc.

### Interests and rights

The condominium unit can be owned jointly, in severalty, in trust, or in any other manner allowed by state law. Unit owners hold an exclusive interest in their individual apartments, and co-own common elements with other unit owners as tenants in common.

**Possession, use, and exclusion.** Unit owners exclusively possess their apartment space, but must share common areas with other owners. The property's legal documents may create exceptions. For example, unit owners may be required to join and pay fees for use of a health club.

Unit owners as a group may exclude non-owners from portions of the common area, for instance, excluding uninvited parties from entering the building itself.

**Transfer and encumbrance.** Condominium units can be individually sold, mortgaged, or otherwise encumbered without interference from other unit owners. As a distinct entity, the condominium unit may also be foreclosed and liquidated. An owner may not sell interests in the apartment separately from the interest in the common elements.

Resale of a unit interest may entail limitations, such as the condominium association's prior approval of a buyer.

Condominium units are individually assessed and taxed. The assessment pertains to the value of the exclusive interest in the apartment as well as the unit's pro rata share of common elements.

## Condominium creation

Condominium properties are created by executing and recording a condominium declaration and a **master deed**. The declaration must be legally correct in form and substance according to local laws. The party creating the declaration is referred to as the **developer**. The condominium may include ownership of the land or exclude it if the land is leased.

**Declaration provisions.** The condominium declaration may be required to include:

- ▶ a legal description and/or name of the property
- ▶ a survey of land, common elements, and all units
- ▶ plat maps of land and building, and floor plans with identifiers for all condominium units
- ▶ provisions for common area easements
- ▶ an identification of each unit's share of ownership in the overall property
- ▶ organization plans for creation of the condominium association, including its bylaws
- ▶ voting rights, membership status, and liability for expenses of individual owners
- ▶ covenants and restrictions regarding use and transfer of units

## Organization and management

**Organization.** Condominium declarations typically provide for the creation of an **owner's association** to enforce the bylaws and manage the overall property. The association is often headed by a board of directors. The association board organizes how the property will be managed and by whom. It may appoint management agents, hire resident managers, and create supervisory committees. The board also oversees the property's finances and policy administration.

**Management.** Condominium properties have extensive management requirements, including maintenance, sales and leasing, accounting, owner services, sanitation, security, trash removal, etc. The association engages professional management companies, resident managers, sales and rental agents, specialized maintenance personnel, and outside service contractors to fulfill these functions.

## Owner responsibilities

**Individual units.** Owner responsibilities relating to the apartment include:

- ▶ maintaining internal systems
- ▶ maintaining the property condition
- ▶ insuring contents of the unit

**Common area assessments.** Unit owners bear the costs of all other property expenses, such as maintenance, insurance, management fees, supplies, legal fees, and repairs. An annual operating budget totals these expenses and passes them through as **assessments** to unit owners, usually on a monthly basis.

Should an owner fail to pay periodic assessments, the condominium board can initiate court action to foreclose the property to pay the amounts owed.

The unit's pro rata share of the property's ownership as defined in the declaration determines the amount of a unit owner's assessment. For example, if a unit represents a 2% share of the property value, that unit owner's assessment will be 2% of the property's common area expenses.

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## COOPERATIVES

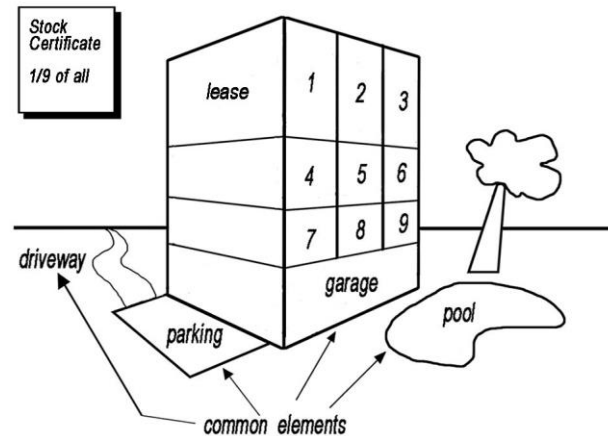
### Interests, rights, and obligations Organization and management

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In a cooperative, or co-op, one owns **shares** in a non-profit corporation or cooperative association, which in turn acquires and owns an apartment building as its principal asset. Along with this stock, the shareholder acquires a **proprietary lease** to occupy one of the apartment units.

The number of shares purchased reflects the value of the apartment unit in relation to the property's total value. The ratio of the unit's value to total value also establishes what portions of the property's expenses the owner must pay.

**Exhibit 4.5 The Cooperative**



The exhibit shows a nine-unit apartment building. A cooperative corporation buys the building for \$900,000. All nine units are of equal size, so the corporation decides that each apartment represents a value of \$100,000, or 1/9 of the total. The co-op buyer pays the corporation \$100,000 and receives 1/9 of the corporation's stock. The shareholder also receives a proprietary lease for

## Interests, rights and obligations

apartment 1. The shareholder is now responsible for the apartment unit's pro rata share of the corporation's expenses, or 11.11%.

**Cooperative association's interest.** The corporate entity of the cooperative association is the only party in the cooperative with a real property interest. The association's interest is an undivided interest in the entire property. There is no ownership interest in individual units, as with a condominium.

**Shareholder's interest.** In owning stock and a lease, a co-op unit owner's interest is *personal property* that is subject to control by the corporation. Unlike condominium ownership, the co-op owner owns neither a unit nor an undivided interest in the common elements.

**Proprietary lease.** The co-op lease is called a proprietary lease because the tenant is an owner (proprietor) of the corporation that owns the property. The lease has no stated or fixed rent. Instead, the proprietor-tenant is responsible for the unit's pro rata share of the corporation's expenses in supporting the cooperative. Unit owners pay monthly assessments. The proprietary lease has no stated term and remains in effect over the owner's period of ownership. When the unit is sold, the lease is assigned to the new owner.

**Expense liability.** The failure of individual shareholders to pay monthly expense assessments can destroy the investment of all the other co-op owners if the co-op cannot pay the bills by other means.

Since the corporation owns an undivided interest in the property, debts and financial obligations apply to the property as a whole, not to individual units. Should the corporation fail to meet its obligations, creditors and mortgagees may foreclose *on the entire property*. A completed foreclosure would terminate the shareholders' proprietary lease, and bankrupt the owning corporation. Compare this situation with that of a condominium, in which an individual's failure to pay endangers only that individual's unit, not the entire property.

**Transfers.** The co-op interest is transferred by assigning both the stock certificates and lease to the buyer.

## Organization and management

A developer creates a cooperative by forming the cooperative association, which subsequently buys the cooperative property. The association's articles of incorporation, bylaws, and other legal documents establish operating policies, rules, and restrictions.

The shareholders elect a board of directors. The board assumes the responsibility for maintaining and operating the cooperative, much like a condominium board. Cooperative associations, however, also control the use and ownership of individual apartment units, since they are the legal owners. A shareholder's voting power is proportional to the number of shares owned.

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## TIME-SHARES

### Time-share lease Time-share freehold Regulation

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Time-share ownership is a fee or leasehold interest in a property whose owners or tenants agree to use the property on a periodic, non-overlapping basis. This type of ownership commonly concerns vacation and resort properties. Time-share arrangements provide for equal sharing of the property's expenses among the owners.

**Time-share lease** In a leasehold time-share, the tenant agrees to rent the property on a scheduled basis or under any pre-arranged system of reservation, according to the terms of the lease. Generally, the scheduled use is denominated in weeks or months over the duration of the lease, a specified number of years.

**Time-share freehold** In a freehold time-share, or **interval ownership estate**, tenants in common own undivided interests in the property. Expense prorations and rules governing interval usage are established by separate agreement when the estate is acquired.

For instance, the Blackburns want a monthly vacation in Colorado once a year. They find a time-share condominium that needs a twelfth buyer. The available month is May, which suits the Blackburns. The total price of the condominium is \$120,000, and annual expenses are estimated to be \$4,800. The Blackburns buy a one-twelfth interest with the other tenants in common by paying their share of the price, \$10,000. They are also obligated to pay one-twelfth of the expenses every year, or \$400. They have use of the property for one-twelfth of the year, in the month of May.

Interval owners must usually waive the right of partition, which would enable an owner to force the sale of the entire property.

**Regulation** The development and sale of time-share properties has come under increased regulation in recent years. Developers and brokers in many states face more stringent disclosure requirements regarding ownership costs and risks. Other laws provide for a cooling-off period after the signing of a time-share sales contract, and require registration of advertising.

# 4

## Ownership Snapshot Review

### SOLE OWNERSHIP

- Tenancy in severalty**
- sole ownership of a freehold estate

### CO-OWNERSHIP

- Tenancy in common**
- co-tenants enjoy an individually owned, undivided interest; any ownership share possible; no survivorship

**Joint tenancy**

- equal, undivided interest jointly owned, with survivorship
- requires four unities to create: time, title, interest, possession

**Tenancy by the entireties**

- equal, undivided interest jointly owned by husband and wife

**Community property**

- per state law, joint ownership of property by spouses as opposed to separate property
- separate: acquired before marriage or by gift or inheritance

**Tenancy in partnership**

- ownership by business partners

### TRUSTS

- property granted by trustor to fiduciary trustee for benefit of beneficiary

**Living trust**

- personal and real property ownership created to take effect during one's lifetime (living trust) or after one's lifetime (testamentary)

**Land trust**

- real property ownership where grantor and beneficiary are same party; beneficiary uses, controls property, does not appear on public records

### CONDOMINIUMS

- freehold ownership of a unit of airspace plus an undivided interest in the common elements as tenant in common with other owners
- may be sold, encumbered or foreclosed without affecting other unit owners
- creation: by developer's declaration

### COOPERATIVES

- ownership of shares in owning corporation, plus proprietary lease in a unit; corporation has sole, undivided ownership

### TIME SHARES

- a lease or ownership interest in a property for the purpose of periodic use by the owners or tenants on a scheduled basis