

# Real Estate Co-Ownership Brief

A Series of Briefs on Legal Issues Regarding Co-Ownership of Real Property



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## Co-Ownership Agreements – Key Issues

By Thomas B. Jacob

The following is a list of the major issues that should be addressed in an agreement among the co-owners of real property, either residential or commercial. Since real estate generally represents a sizable investment for its owners, and is relatively illiquid, carefully addressing these issues in a written agreement is most important to avoid unpleasant and costly disputes. These issues should be addressed whether the property is to be held as tenants in common or within a limited liability company or other entity.

1. **Owners:** Identify each owner's name and percentage ownership of the property. Avoid having ownership percentages change over time if possible by using loans and other alternatives.
2. **Term:** Determine the term of the agreement. The term can be set to a fixed date, or the term can be continuous until a specified event occurs (such as the entire property is sold to a third party, one owner acquires the entire interest in the property or the owners mutually decide to terminate). We usually recommend a term that ends on the first to occur of a number of specified events, including an outside fixed date (for example, 50 years).
3. **Decisions:** Determine what decisions need the consent of all of the owners and what decisions can be made by a single owner or majority of owners. Decisions to consider include insuring, encumbering, renting, renovating and selling the property. The decision on selling the property is particularly important, and the agreement should address what happens if not all owners wish to sell (i.e. can the owner wishing to sell force a sale of the entire property or the buyout of his or her interest?). This issue is covered more thoroughly in one of our other Co-Ownership Briefs, which can be found on our website.
4. **Owners' Rights:** Determine each owner's right to possession and use of the property. The specific rights to consider include:
  - a. whether use of the property (or any partition thereof) is exclusive or shared, and if shared, how will the use be coordinated between the parties;
  - b. whether there are any limitations on who can use the property (for example, whether an owner has to be present, whether there is a maximum capacity for the property, etc.);
  - c. whether the property can be rented to others, and if so, how the rental income will be distributed between the owners;
  - d. whether an owner can encumber the property (for example, obtain a loan and use his or her interest in the property as collateral); and
  - e. whether an owner can improve the property without the consent of other owners, and such owner's right to be reimbursed for the cost of such improvements.
5. **Management and Maintenance Obligations:** Determine who is responsible

- for managing and maintaining the property (or the partitions thereof).
6. Owners' Expense Obligations: Determine how the expenses of the property will be allocated among the owners. Such expenses include maintenance, property taxes, insurance, utilities, loan payments and other operating expenses.
  7. Right to Transfer Ownership Interest: Determine each owner's right to transfer its interest in the property. We recommend including a method of allowing the other owners to purchase the interest of someone who no longer wishes to be an owner. These provisions must address how the price is set, how to accommodate everyone if more than one of the other owners wishes to buy, and whether the owners waive the right to a judicial partition of the property. For example, an owner can have the right to force a sale of the property, and, in order to protect the other owners, the other owner can have the right to purchase the interest of the selling owner.
  8. Death of an Owner: Determine each owner's rights in the event of the death of an owner. Possible options include:
    - a. having the interest pass to the deceased owner's beneficiaries in accordance with his or her estate plan;
    - b. giving the surviving owners the right to purchase the deceased owner's interest in the property; and
    - c. having the interest of the deceased owner automatically go to the surviving owners.
  9. Default and Remedies: Determine each owner's rights in the event another owner breaches its obligations under the agreement. Possible rights upon an owner's default include:
    - a. the right to sue for breach and collect damages;
    - b. the right to perform on behalf of the defaulting owner and be reimbursed for the cost of such performance;
    - c. the right to purchase the defaulting owner's interest in the property;
    - d. and the right to force a sale of the property.

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