

# LEGAL NOTES

## FROM THE DESK OF HAROLD CHU

When you acquire real property, you typically file documents to show your ownership of that real property. The main reason for doing this is to give constructive notice of your claim or interest in that property. The filing of any claim or interest against the property provides a means of determining priority to the proceeds from the sale of the property.



We appreciate the many comments we receive from our clients about our newsletter. We are pleased that many of you find our newsletter informative and helpful to you. When we started this newsletter, we had two primary goals: 1) to provide useful information to our clients, and 2) to provide the information without the typical legalese. As part of that effort, we added humor to lighten the seriousness of the newsletter topics.

One of the most popular portion of the newsletter are the jokes. A number of clients have sent us suggested jokes to include in our newsletters. We appreciate all forms of humor and jokes that we consider within the bounds of good taste will be considered for inclusion in our newsletter.



Our newsletters are intended to be a benefit to our clients and is our attempt to give back to the community, which has so graciously embraced our law firm these 32+ years. If there are any suggestions or topics that you would like us to possibly discuss in our newsletters, please forward your suggestions or comments to us by mail, e-mail or by telephone.



## If the Title Holder Dies, Marries or Gets Divorced

When a title holder passes away, marries, or gets divorced, it may be necessary to file documentation of that event.

Real property in Hawaii is typically recorded in one of two systems. One system is called the "Regular System" in which documents are merely filed sequentially and no determination is made as to the quality of title. Other properties are registered in what is called "Land Court". If the document for a real property is recorded in one system, all subsequent documentation must be recorded in the same system. For example, anything which affects the title to property registered in Land Court must, by law, be recorded in Land Court to affect that property.

For property registered in Land Court, when a title holder dies, gets married, or gets divorced, a Petition to note the change **must** be filed in the Land Court system. The Petition must be accompanied by the relevant document, such as the certified copy of the Certificate of Marriage, Death Certificate or Divorce Decree.

The filing must be done before the Land Court property can be transferred, or before an event like refinancing occurs. It is best to file the Petition soon after the actual event has occurred, because significant delay can make this simple procedure unnecessarily expensive. A significant delay may make it more difficult to locate the necessary records and documents. For some reason, this seems to occur when time is a critical factor.

A delay in noting these changes may or may not make a transaction more difficult, but why run the risk of making a transaction more difficult or more costly? Our advice, as always, is to file the appropriate documentation as soon as possible.

## Why Is It Important To File Those Documents?

Matters involving ownership of real property often require the filing of documents with the Bureau of Conveyances. Why is it necessary to file these documents? The purpose of filing those documents is to give **constructive notice**. Constructive notice is notice of facts which may be discovered by inquiry into the public record. Whether or not the public has actual knowledge, the public is presumed to know. Recording of the document gives constructive notice to the world of your interest in or claim against that property. This is compared to actual notice in which the person actually knows of your interest or claim.

Why is constructive notice important? The priority of claims against real property is typically based upon

the order of recordation. The order of recordation usually dictates the order of entitlement to any net proceeds from the sale of the real property. For example, when you acquire real property, your title to the property is recorded. If you had to borrow money to acquire this property, the lender filed its mortgage claim immediately after you filed the document showing your title interest. The mortgage lender would then have the first priority to the proceeds from the sale of the real property. If you sell the property or if there is a foreclosure, the lender has the first right to receive any proceeds from the sale of the property.

Any one who wants to assert a



claim or an interest against a real property should file their interest or claim as soon as possible. It's like getting tickets for a good concert. The earlier you file, the better your seats are to see some money from the sale of the real property.

There is at least one exception to this priority in rights. Claims for non-payment of **real property taxes** have priority. Typically, when you pay your mortgage, the lender collects monies as part of a continuing escrow account for the payment of the real property taxes. This is to ensure that the real property taxes are paid and do not have priority over the lender's mortgage.

## Filing Liens Against the Property

Occasionally, we are asked to file a lien against someone's real property. This request is often coupled with a desire to prevent a party from doing something with the property without the filer's knowledge.

There are basically two types of liens: consensual and non-consensual.

Consensual liens generally can only be filed with the consent of the parties. An example of a consensual lien is when the owners of the real property borrow money from a bank and agree that the lender can file a mortgage lien against their real property.

Liens filed without the consent of the real property owner are called non-consensual liens. In most cases, the law **requires** a Court order permitting you to file a non-consensual lien. The penalty for filing a non-consensual lien without a Court order is \$5,000, or actual damages, whichever is greater plus the costs of suit and reasonable attorney's fees. An

exception to this requirement is if you have filed a lawsuit involving the property, you are entitled to file a notice of the pending lawsuit against that property. This should especially be done if the basis of the lawsuit is a claim of an ownership interest in the real property.

Part of the rationale for these requirements before filing a non-consensual lien is to ensure that the liens are reasonable and to prevent people from filing frivolous liens against real property and tying up the real property. For example, a frivolous non-consensual lien is when an individual files a lien against all real property in Hawaii claiming all real property in Hawaii belongs to him because he is a direct descendant of King Kamehameha.

Liens can be filed. They should be done either with consent of the owner or by following the appropriate statutory procedures.

## HUMOR

The following is not meant to be a political statement. It is merely a joke and nothing more.

An airplane was about to crash. There were five passengers on board, but only four parachutes. The first passenger said, "I am Kobe Bryant, the best NBA basketball player. The Lakers need me, and I can't afford to die." So he took the first parachute and left the plane.

The second passenger, Hillary Clinton said, "I am the wife of a former U.S. President, a New York State Senator and a potential future president. I am the smartest woman in American history, so the American people don't want me to die." She took the second parachute and jumped out of the plane.

The third passenger, Ted Kennedy said, "I am a U.S. Senator, the democratic party needs me and my liver still has some good years left." So he grabbed the parachute next to him and jumped.

The fourth passenger, a nice old man said to the fifth passenger, a 10 year old school girl, "I am old and frail and don't have many years left. As a Christian, I will sacrifice my life and let you have the last parachute." The girl said, "That's okay. There's a parachute left for you. America's smartest woman took my school bag."

## How Should A Married Couple Hold Title?

Couples who are married and who acquire real property have a number of choices as to how they may hold title to real property in Hawaii.



### Tenant in Severalty

Someone who is married does not necessarily have to own the property with the spouse. They can own the property in their individual name. If they do so, they would hold title to the property as tenant in severalty. The property, upon death would go to that person's designated heirs. Creditors of the spouse can go after this property.

### Joint Ownership

There are several ways a married couple can own property jointly. One of the considerations that a party should consider when owning property jointly is the potential consequence if the parties were to get divorced.

### Tenants in Common

A married couple can own the real property jointly as tenants in common. They would each own an agreed upon fractional share of the property. The effect of owning property as tenants in common is that when a party dies, the deceased party's share would go to his or her heirs as designated in the deceased person's will or trust. If there is no will or trust, it would go to whomever the State, by law, has designated as the heirs. Creditors can go after a spouse's fractional interest.

### Joint Tenants

Some married couples own property as joint tenants thinking that by doing so, it is not necessary to do a will and the property will automatically pass to the surviving spouse. Joint tenancy does have this effect. The property will go to the surviving spouse. However, given the value of real property in Hawaii, the couple may wish to consider whether they need to do more sophisticated estate planning to possibly minimize estate taxes and control what happens to the real property upon death. Creditors can also go after a spouse's joint tenant interest. If a married couple is considering owning a property as joint tenants, they should consider owning the property as tenants by the entirety.

### Tenants by the Entirety

Couples who are **married** may own real property in Hawaii as tenants by the entirety. This has a similar effect as owning the real property as joint tenants, but there is an important difference. A 1977 Hawaii Supreme Court case called *Sawada v. Endo* provides that if a **married** couple owns property as tenants by the entirety, a creditor cannot attach this property unless **both** spouses are liable to that creditor.

There are limitations to this protection. This protection could lapse depending upon which spouse dies first. For example, if the spouse who owes the debt passes away first, title to the property would go automatically to the non-debtor spouse. The

surviving spouse who did not owe the debt, would own the property free and clear of the claims of the deceased spouse's creditor. If the non-debtor spouse dies first, the property will then be in the sole name of the debtor spouse. The creditors of the spouse owing the debt can then proceed against the real property.

The tenants by the entirety protection expires if there is a divorce. Tenancy by the entirety is only for **married** couples. Upon divorce, the couple would own the property as tenants in common and the creditors can proceed against the interest owned by the debtor spouse.

### Reciprocal Beneficiary

A couple can own the property as reciprocal beneficiaries. Reciprocal beneficiaries are people who are not married and who are not a party to another reciprocal beneficiary. The parties must be legally prohibited from marrying one another under the marriage laws of Hawaii. Reciprocal beneficiaries must register with the Director of Health. Reciprocal beneficiaries shall have the same rights and obligations under the law that are conferred through marriage under the Hawaii laws of marriage.

### Summary

The tenancy that one chooses has legal and practical consequences. A couple should put some thought in deciding how they wish to own the real property and should consult with their legal adviser.

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**HUMOR**

A very successful lawyer parked his brand-new Lexus in front of his office, ready to show it off to his colleagues. As he got out, a truck passed too close and tore off the door on the driver's side.

The lawyer immediately grabbed his cell phone, dialed 911, and within minutes a policeman pulled up.

Before the officer had a chance to ask any questions, the lawyer started screaming hysterically. His Lexus, which he had just picked up the day before, was now completely ruined no matter what the body shop did to it.

When the lawyer finally wound down from his ranting and raving, the officer shook his head in disgust and disbelief.

"I cannot believe how materialistic you lawyers are," the cop said. "You are so focused on your possessions that you don't notice anything else."

"How can you say such a thing?", asked the lawyer.

The cop replied, "Don't you know that your left arm is missing from the elbow down? It must have been torn off when the truck hit you."

"My God!" screamed the lawyer. "My Rolex!"



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