

## **8.0 Ownership and Transfer of Ownership Rights**

### **1 Definition**

Ownership may be defined as ultimate and exclusive right conferred by a lawful claim or title, and subject to certain restrictions to enjoy, occupy, possess, rent, sell, use, give away, or even destroy an item of property.

Ownership may be corporeal (title to a tangible object such as a house/having a material, physical, tangible, and/or visible existence) or incorporeal (title to an intangible object, such as a copyright, or a right to recover debt). Possession (as in tenancy) does not necessarily mean ownership because it does not automatically transfer title.

Ownership of property may be private, collective, or common and the property may be objects, land/real estate or intellectual property. Determining ownership in law involves determining who has certain rights and duties over the property. These rights and duties, sometimes called a 'bundle of rights', can be separated and held by different parties.

The question of ownership reaches back to the ancient philosophers, Plato and Aristotle, who held different opinions on the subject. Plato (428/427BC-348/347BC) thought private property created divisive (troublesome) inequalities, while Aristotle (384BC-322BC) felt private property enabled people to receive the full benefit of their labor. Private property also circumvents what is now referred to as the “tragedy of the commons” problem, where people tend to degrade common property more than they do private property.

Ownership is the basis for many other concepts that form the foundations of ancient and modern societies such as money, trade, debt, bankruptcy, the criminality of theft and private vs. public property. Ownership is the key building block in the development of the capitalist socio-economic system. Adam Smith stated that one of the sacred (holy, blessed) laws of justice was to guard a person's property and possessions.

## **2 Types of owners**

### **In person**

Individuals may own property directly. In some societies only adult men may own property; in other societies, property is matrilineal and passed on from mother to the offspring. In most societies both men and women can own property with no restrictions and limitations at all.

### **Structured ownership entities**

Throughout history, nations (or governments) and religious organizations have owned property. These entities exist primarily for other purposes than to own or operate property; hence they may have no clear rules regarding the disposition of their property. Cooperatives, corporations, trusts, partnerships, condominium associations are only some of the many varied types of structured ownership; each type has many subtypes.

### **Liability for the group or for others in the group**

Ownership implies responsibility, for actions regarding the property. A "legal shield" is said to exist if the entity's legal liabilities do not get redistributed among the entity's owners or members. An application of this, to limit ownership risks, is to form a new entity to purchase, own and operate each property. Since the entity is separate and distinct from others, if a problem occurs which leads to a massive liability, the individual is protected from losing more than the value of that one property. Many other properties are protected, when owned by other distinct entities.

In the loosest sense of group ownership, a lack of legal framework, rules and regulations may mean that group ownership of property places every member in a position of responsibility (liability) for the actions of each other member. A structured group duly constituted as an entity under law may still not protect members from being personally liable for each others' actions. Court decisions against the entity itself may give rise to unlimited personal liability for each and every member. Thus, being a partner or owner in a group may give little advantage in terms of share ownership while producing a lot of risk to the partner, owner or participant.

## **Sharing gains**

At the end of each financial year, accounting rules determine a surplus or profit, which may be retained inside the entity or distributed among owners according to the initial setup intent when the entity was created.

Entities *with a member focus* will give financial surplus back to members according to the volume of financial activity that the participating member generated for the entity.

Entities *with a focus on providing service in perpetual* do not distribute financial surplus; they must retain it. It will then serve as a cushion against losses or as a means to finance growth activities. Examples of this are not-for-profit entities: they are allowed to make profits, but are not permitted to give any of it back to members except by way of discounts in the future on new transactions.

## **Sharing use**

The owning entity makes rules governing use of property; each property may comprise areas that are made available to any and every member of the group to use. When the group is the entire nation, the same principle is in effect whether the property is small (e.g. picnic rest stops along highways) or large such as national parks, highways, ports, and publicly owned buildings. Smaller examples of shared use include common areas such as lobbies, entrance hallways and passages to adjacent buildings.

One disadvantage of communal ownership, known as the Tragedy of the Commons, occurs where unlimited unrestricted and unregulated access to a resource (e.g. pasture land) destroys the resource because of over-exploitation. The benefits of exploitation accrue to individuals immediately, while the costs of policing or enforcing appropriate use, and the losses due to over exploitation, are distributed among many, and are only visible to these gradually.

### 3. Ownership models

- **State ownership** - Assets that a state or certain state agency has jurisdiction over in terms of use.
  - **Government ownership** - Assets belonging to a body of government.
  - **Public property** - Assets owned by a government or state that are available for public use to all their constituents.
- **Personal ownership** - Assets and property belonging to an individual, also known as individual ownership.
- **Common ownership** - Assets and property that are held in common by all members of society (or non-ownership).
  - Communal ownership - Property held in common by a commune.
- **Collective ownership** - Assets and property that belong to a collective body of people who control their use and collect the proceeds of their operation.
  - **Private ownership** - A subset of collective property whereby a collective group of owners (such as shareholders) own productive property that is used by employees, usually for the purpose of generating a profit.
  - **Cooperative ownership** - Property that is owned by those who operate and use it. Also referred to as social ownership.

### 4. Ownership issues in developing Countries

#### 4.1 Issues of Land

- ✚ Issues related to land have existed for centuries around the world including developing countries. Land issues are frequent topics of discussion as well as trigger of disputes. Most land issues are legacies of history, while some new issues emerge from time to time.
- ✚ Due to limitations of the resource and ever growing population, it may not be practically possible for everybody to own a piece of land. Nepal is an agriculture-based country, where agriculture employs more than two-thirds of the total population, non-farming employment opportunities are few and far between.

- ✚ The average land holding per household in Nepal is about 0.7 hectare, which remains below the FAO recommendation of at least 0.9 ha to be economically viable. A deeper look at the distribution of land ownership shows seven percent of the households virtually landless (with less than 0.1 ha each) and 47 percent households holding less than 0.5 ha each.
- ✚ Inequalities and landlessness have existed since ages. The concept of Hindu Varna system based upon occupation extended to caste system, and many menial (unskilled) job-holders, mainly dalits, grew to become deprived of land.
- ✚ Historically women have been denied adequate ownership of land and property. In Nepal only 19.7 percent of women have ownership of fixed assets at present. The status of women is defined in terms of their marital or sexual status; the right to ansha (right over property) is fragile, temporary and imperfect. A woman is entitled to her husband's property not as an independent co-partner but because she is his wife. What she receives in terms of ansha from her husband is governed by the continuation of the marital relation with her husband. She can only continue to hold the right to ansha until she remains chaste (family member) or sexually faithful to the husband. She is uncompromisingly and strictly prohibited to have sexual relation with any man other than her husband, failure to maintain which deprives her of the right to ansha. A daughter is not entitled to ansha because she gets her status changed by marriage. Yet, under the existing legal system, once she reaches an age of 35 years, she is entitled to ansha because the general presumption is that the chance of changing her status through marriage then becomes almost rare.
- ✚ Other major problems are absentee landlordism, acute fragmentation of land parcels, and unplanned and haphazard land use practices which deplete productivity as well as total agricultural produce.
- ✚ This indicates that land administration and land management system in developing countries are not sufficiently equipped to address the issues. The cumbersome manual processes of land survey and recording and land

registration is prone to a multitude of errors, contributing to more potential conflicts.

- ✚ The system of archival, storage and security of records is weak beyond doubt. The available infrastructure and human resources are not capable of handling a fool-proof land administration system. Therefore, a total intervention to improving land administration and land management is the need of the day.

## **4.2 Shared ownership**

- ✚ How the co-ownership will be regulated, and what requirements apply to creation of the shared ownership and the sale or resale of shared ownership interests?
- ✚ How the co-owners will be taxed on money they make from operating the property (if any) as well as profits they make when it is sold?
- ✚ Whether the co-owners are protected against claims that can be made against them in connection with the property, such as when someone is injured on the property or when those providing services for the property are not paid.
- ✚ Whether the property and/or a co-owner are protected from another co-owner's creditors.
- ✚ How shared ownership disputes are resolved and the consequences when a co-owner does not fulfill his/her obligations?
- ✚ How the death of a co-owner will affect the other co-owner(s), and what will happen to the deceased co-owner's share ?

When you buy real estate, either alone or with another person, you need to decide how title will be held, and your decision will determine what is written on the deed to the property. Title to real estate can be held either directly, meaning the co-owners names show on the land registry or deed, or indirectly, meaning a company, trust or other entity is shown on title and the co-owners share ownership of the entity.

But while the manner of holding title is important, it is not always the final determinant of how the property is owned. An owner's behavior (and that of his/her co-owner) can sometimes override what the deed says, and that is one of the many reasons a written agreement is critical.

### 4.3 Ownership issues for Intellectual Property

Refer Chapter 7 Intellectual Property rights.

## 5 Transfer of Ownership

Transfer of property is governed by legislation. It contains specific provisions regarding what constitutes transfer and the conditions attached to it. According to legislation, 'transfer of property' means an act by which a person conveys property to one or more persons, or himself and one or more other persons. The act of transfer may be done in present or for future. The person may include an individual, company or association or body of individuals, and any kind of property may be transferred. It includes transfer of immovable property.

One can gain ownership of property in a number of ways.

- ✚ *purchase it with money,*
- ✚ *trade it for other property,*
- ✚ *receive it as a gift,*
- ✚ *steal it,*
- ✚ *find it, make it*

One can transfer or lose ownership of property by

- ✚ *selling it for money,*
- ✚ *exchanging it for other property,*
- ✚ *giving it as a gift,*
- ✚ *being robbed of it, misplacing it, or having it stripped from one's ownership through legal means such as eviction (expulsion, exile), foreclosure, seizure or taking.*

You can transfer your interest in your house and other real property to another person by selling the property; giving it away during your lifetime; or giving it away upon your death through a will, a trust agreement (such as a living trust), or a survivorship estate.

## **6 Legal provisions related to ownership and transfer of ownership**

People choose to transfer ownership of property for a variety of reasons. Transferring property to another individual or spouse can legally be done through a deed only. Three common deeds used to transfer property are:

- ✚ General warranty deed,
- ✚ Specialty warranty deed and
- ✚ Quitclaim

### **General warranty Deed**

A general warranty deed guarantees that the title to the property is free from any defects or encumbrances before and after the actual transfer of title. It conveys the seller's interest in the real estate property, and the implied warranties are also transferred with the deed. Moreover, if the property title has any defects, the seller can be held liable for these defects.

#### **Present Covenants**

By transferring a general warranty deed, the seller assures the buyer of property that no other person owns the property. Therefore, the seller warrants that he is the sole owner of the property being transferred. As the sole owner of the property, the seller also promises that he has the actual authority to convey the property without any encumbrances.

#### **Future Covenants**

Future covenants within a general warranty deed guarantees that the buyer of the property will continue to possess a secure title after the actual transfer of property. Thus, the seller represents that he has superior title to the property. Additionally, the seller warrants that the buyer will be free from any disturbances in his possession and enjoyment of the property. The covenant of further assurances assures that, if there are any defects or encumbrances attached to the property, the seller promises that he will cure any defects.

### **Specialty warranty deed**

When a general warranty deed is used, the grantor is held responsible for issues clouding the title both before and during his ownership. The special warranty deed implicates that the grantor is only responsible for any title problems that originated during his ownership. The special warranty deed can also state provisions explaining what problems the grantor will offer a warranty against. For this reason,



a title search should be completed before buying a property to ensure that there are no liens or other defects listed on the title report .

## **Quitclaim**

A quitclaim deed will remove someone from or add someone to the title to your home or other property. A common occurrence of this would be two people who are married to each other and one spouse gives up any interest in the property in question that the other spouse owns.

A quitclaim deed, for instance, lets one party "quit" any interest in the property. They are used in divorces, when one spouse transfers any legal claim or interest in a house to the other spouse. This type of deed has no guarantees .

A quitclaim deed is a common legal document used to transfer title to land. When a person "quitclaims" interest to land, she is giving up any and all interest she has. No other promises are made. Contrast this to a warranty deed which contains promises that the person giving away title actually has the right to do so. No such promise is contained in a quitclaim deed. For this reason, the deed is generally used between people who are familiar with the land and are familiar with each other.

## **Property Sale**

Property is usually sold for cash or for installment payments (money paid over a period of time). The balance due is secured by a mortgage, trust deed, or land sale contract. Each of these ways to secure the transfer of property has special characteristics.

## **Steps to Transfer**

To transfer real property to someone by deed, you must accomplish each of the following:

1. Complete the deed properly;
2. Sign it in front of a notary public; and
3. Give it to the person you want to receive the property.

A deed is not a will and does not legally operate like a will. To give property to someone on your death, you must set up a survivorship estate by deed (as discussed before), set up a trust, or transfer your property through your will.

### **Power of attorney for real Property**

A power of attorney is a written document used to give another person the same legal authority as you have for yourself. A power of attorney can be general or specific.

A general power of attorney gives authority to another person to act on your behalf in all your affairs. A specific power of attorney (also called a limited power of attorney) allows a person to act on your behalf only on specific issues, such as selling a business or a piece of property. Special limitations can be placed on a general power of attorney as well, such as prohibiting the sale of particular property. The power of attorney should limit the authority of the agent to put property in his or her own name only as an agent for you, not as the sole owner of the property himself or herself.

If you want another person to sell or transfer your real property, you should specifically say so in the power of attorney. The power of attorney must be notarized and recorded with the County Clerk or Recorder.

If you create a power of attorney but decide later you do not want the person appointed to act for you, you must revoke the power of attorney in writing. The revocation should be notarized and recorded where the power of attorney was recorded. The power of attorney will automatically be revoked upon your death.

### **Gifts**

A gift is a voluntary transfer of personal or real property. The person who makes the gift, called the donor, receives nothing in return. The donor must intend to make the gift. The gift must be delivered, and the person who is offered the gift must accept it. You cannot make a gift that is to take effect on your death unless you put it in a will or a trust.

## Gifts during Your Lifetime

Most gifts are made during the lifetime of the donor. Once this type of gift is given, it cannot be taken back unless the person receiving the gift agrees and actually returns it.

Often, older adults want to give their property away for various reasons such as:

- To give property to a deserving friend or relative;
- To avoid payment of estate taxes;
- To preserve and protect their estate before incurring large medical bills so there is something left to give away; or
- They are asked to do so by friends or relatives.

A gift must be delivered to be valid. For example, suppose you want to give a special ring to your niece. If you put a note on it saying, “This ring is for my niece when I die,” the gift will not be valid because the ring was not delivered. If you want to give something that is very large, such as a piano, you may do so by symbolic delivery. Symbolic delivery occurs when you give something that represents what you actually want to give, such as a written description of the item or a model of it. Sometimes a person may be too sick to give the actual gifted item. In this situation, a constructive delivery of the gift will work. A constructive delivery means the person receiving the gift is given the means to obtain the gift. For example, that person may be given the keys to a safety deposit box or to a car. If there is a dispute, the court will decide if the donor intended to make a gift, if the gift was delivered, and if the gift was accepted.

## References

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