The How-Tos of Co-Buying

Iler Campbell LLP and the Center for Social Innovation
January 26th, 2017

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Please note this presentation is not legal advice. It is provided as general information only.

We'd be happy to discuss your specific situation with you.

Get in touch – email us info@ilercampbell.com

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Considerations

- Same considerations that affect all home-owners
- Added complication: another party to think about

Legal relationship between co-buyers

- Tenants in common vs. Joint tenants
- Tenants in Common (TIC)= each party owns an undivided share of house and both are on title to the property. No right of survivorship.
- Typically, co-buyers would be TICs
- Possible to incorporate for tax planning purposes

Legal relationship

- Rates and terms may differ but ultimately bank's remedy against parties is joint and several
- This means that if there is a default under the mortgage, the bank's remedy is to take possession of the home.

Issues for co-buyers

- What is my proportionate share of the property?
- What is my contribution to repairs and operating costs?
- How will we divide the space?
- What if the other side defaults on their contribution to the mortgage?
- What if I want to leave?
- What if we can't come to an agreement about something?

Best practices

- Ask detailed questions to determine compatibility and minimize risk
- Formalize arrangement through co-ownership agreement

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Pre-contract discussions

- Financial Background Check
- What are your expectations with respect to the property (Residential/Investment)? Term of ownership?
- Finances (joint bank account)
- Capital Repairs
- Extent of Co-Living
- Exit Plan

Formalizing the discussion

- Co-ownership Agreement
- Outlines the rights and obligations of each party
- Can be tailored to suit specific relationship between the parties and to mitigate against certain risks
- Can be brief or extensive
- Consider a mission statement

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Key issues to address in agreement

1. Proportionate Share
2. Operating Expenses
3. Capital Repairs/Contributions
4. Division & Use of Space
5. Default
6. Indemnity
7. Exit Clause
8. Decision Making and Dispute Resolution

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1. Proportionate share of the property

- Can be determined based on:
  - layout of property
  - each party's financial position and needs
  - other factors
- Informs:
  - Contribution to capital costs (including purchase price and capital repairs)
  - Contribution to operating expenses and maintenance
  - Possibly division of space
  - Return on investment

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2. Operating expenses

- Property Insurance
- Hydro
- Electricity
- Internet
- Leasing of hot water units
- Day to Day/ “Wear and Tear” Repairs
- Property Taxes

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2. Operating expenses cont'd

- Can be apportioned:
  - 50-50
  - Based on proportionate share
  - Based on use of space
  - With each party responsible for certain utilities/costs

2. Operating expenses cont'd

- Establish a joint account with contributions by each party based on anticipated monthly expenditure
- Require signature of both parties for release of funds
- Consider also: time & labor contribution

3. Capital contributions and improvements

- Acquisition (i.e. $$ contribution to property purchase)
- Capital Expenditures: Improvements to property that give a “lasting benefit or advantage”
  - Can include large-scale repairs and renovations
  - Consider whether time & labour can be substituted for financial contributions

4. USE OF SPACE

- Exclusive Use vs. Common Use
- Rules re: Common Use: hours, noise, maintenance, etc.
- Consider extent of communal living
  - Co-living duties?
- Ability to rent (a portion of) space, and if so, is approval of other party required

5. Responsibility for Mortgage

- Variable financial contribution, but:
- Single Mortgage- Joint and Several Liability
- Bank's remedy against co-owners is the same as it would be against a single defaulting home-owner: possession of home

5. Default on mortgage cont'd

- Minimizing Risk:
  - Establish slush fund of savings equivalent to 3 months' worth of mortgage payments so that you have time
  - Establish internal deadline for contribution to mortgage
  - Consider insurance products

5. Default on mortgage cont'd

Enforcement

- Notice of default
- Opportunity to correct default within X period of time
- Power of conveyance
  - gives non-defaulting party right to deal with the whole property
- Converting any amount paid by one party for other as a loan

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5. Default cont'd

- Enforcement provision may apply to default under mortgage or default under co-ownership agreement (assignment/sale of ownership share without consent, encumbrance)

6. Indemnity clause

- Indemnity for all damages and Losses resulting from breach of co-ownership agreement, negligence, misrepresentation, misconduct, etc.
- Includes indemnity for any lien or charge against property that prevents its sale

7. exit strategy

- Imagine Buyer 1 wants to leave:
- Gives notice of intent to leave.
- Other party's options may include:
  - Option for to Buyer 2 to purchase Buyer 1's share
  - Allow Buyer 1 to lease proportion of space
  - Allow Buyer 1 to sell interest to third buyer subject to approval of Buyer 2
  - Both parties agree to sell

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7. exit strategy

- Assessing Fair Market Value
  - Process for obtaining FMV of property
  - Consider obtaining appraisal by independent party

8. decision-making

- Consider including mechanism for decision-making
  - Consensus
  - Votes by members of household
  - Decision-making on topics according to expertise (e.g. with design expertise might be responsible for decisions relating to property design)

9. Dispute resolution

- Consider including a process for resolving conflicts
- Good Clause should:
  - Be enforceable
  - Be a precursor to any legal action
  - Provide a clear and certain mechanism to follow
  - Anticipate problems
  - Preserve relationships
- Consider agreeing on an external mediator in advance
- Arbitration as "last resort"

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10. Other legal considerations

Family Law

Death and estates

Zoning