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Phil McCollum's Real Estate Articles & Advice Newsletter

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Articles and Advice

Homeowners, be careful signing divorce papers

By Benny Kass

DEAR BENNY: I am recently divorced. We had two houses. In the divorce, I got one and he got one. We both signed quitclaim deeds to each other. However, I needed to refinance mine to pay off the bills I accumulated just to get my house back into livable shape. (It was a rental while we were married.) Both houses have mortgage loans: Mine carries a rate of 6 percent and his is at 5.75 percent interest. Needless to say, there is no incentive for him to refinance that favorable loan rate.

My ex is not the healthiest man, and my name is still on his loan. I told my lawyer several times through the divorce process that I wanted it stated in the divorce agreement that we both have to refinance. It did not happen.

Even though a quitclaim was signed, what is my exposure if something happens to my ex, considering my name is still on the loan? –Becky

DEAR BECKY: Why did you sign the divorce papers when they did not require your ex to refinance so that your name will get off of that loan? You might want to explore whether your lawyer did not properly represent you -- although there may be legitimate reasons why that did not happen.

Should your ex die, his estate will most likely have to be probated. The most likely outcome will be either that the heirs to the property will assume the mortgage and keep the property, or will arrange to have it sold. Under either scenario, you are protected.

However, if your ex stops making the monthly mortgage payments, and goes into default, since your name is still on the loan, the lender has the right to either foreclose on the property -- which will be a blemish on your credit rating -- or sue you for the balance of the note. I assume that when you were married and borrowed the money, you signed a promissory note, which indicated that you were both -- jointly and severally -- obligated to repay the loan.

You should immediately contact the other lender and advise them that you no longer own the property. Make sure that you provide them with your current mailing address, so that any notices of default will go to you as well as to your ex. Should that happen, you should immediately retain a lawyer (a different one) who can take all appropriate steps to protect you, including filing suit against your ex.

You have a problem that at the present time can be resolved only if your husband refinances.

DEAR BENNY: I am a recently divorced woman. After many years of marriage in the same residence, I was decreed full ownership of the family home. However, I had to secure a substantial loan on the home to give to my ex-husband in order for him to move out. Because of my financial situation, I could not secure the loan without keeping him on the loan and on the deed. However, in the divorce settlement there is a quitclaim deed stating that I have five years to refinance the loan and get my ex-husband's name off the loan and off the house deed.

I will not quality for a loan myself. However, I have a son, a recent college graduate, who has an excellent job and salary, and who is living downstairs and helping to pay the mortgage.

Should I go ahead and record the quitclaim deed? My name has been changed. Would the mortgage company be alerted and would they then require the loan to be paid in full? Would I then be forced to sell sooner than the five years? Also, I know my ex-husband's name would

still be on the loan. They may make me refinance with my name alone (I would not qualify), but maybe with my son's credit I could qualify, making him part owner with his name on the deed. Could you please clarify the most prudent steps for me to take to keep my home and free myself of the quitclaim deed? –Amy

DEAR AMY: I bunched your question with the one above, since the issues are similar. First, federal law does not permit the lender to call your loan just because you changed your name or add your son to title.

I suggest the following: Assuming that your son qualifies for a loan, have him buy half of the house. You then will both apply for a new loan, which if approved will pay off the existing loan, and your ex will be out of the picture.

DEAR BENNY: My husband and I own a rental property that is paid off. We have been talking about separating, and my husband has said that I can keep the house. How can I get his name off the house and put my name on, or should we just sell it? I would like to continue to rent the property for a while longer because my daughter lives in it. –Virda

DEAR VIRDA: I assume that your daughter is paying you rent. If you think that the property will continue to be a good investment, it's quite easy to have the property put exclusively into your name. Your husband just has to prepare a deed -- usually called a "quitclaim deed" -- conveying the property to you. In some states, it may be necessary for the two of you to convey back to you as sole owner.

If you are still married, then (depending on state law) you may not have to pay any recordation or transfer tax. The filing fee should be nominal.

But that's the easy part. You also have to explore the tax consequences of such a transfer. According to the tax code (section 1041 to be exact), when your husband transfers the house to you there is no taxable gain. Thus, your husband will not have to pay any capital gains tax. However, you should consult your tax advisors to determine if this will trigger any gift-tax consequences.

When the house is transferred to you, (unless your husband is a nonresident alien) your husband's tax basis becomes yours. What does this mean? Let's say you initially paid $100,000 for the house. Each of your bases for tax purposes was $50,000. Now, when you become the sole owner of the property, your tax basis will be the full $100,000 (plus any improvements that have been made to the property over the years).

So please explore all legal and tax implications before making the transfer.

DEAR BENNY: My question is about the two-year residence requirement for tax exemption when selling your main residence. We owned the bare land for years and built a home on it in 2006. We actually moved out of our rental and into the home on Nov. 6, 2006, and by Dec. 31 the home was 99 percent complete. However, the final approval wasn't signed off until March 2007 when the required pool cover was installed. When I read the law, it states "primary residence date," but would that be the date we actually moved in or from date of final sign off by the building department? –Carol

DEAR CAROL: Yours is an interesting question that will have lawyers and probably the IRS issuing dozens of opinions, many of which will be contradictory.

I don't know the answer. The law says that you have to have owned and lived in the house for two out of the five years before the property is sold. I would argue that the target date would be when you actually moved into the house, namely November 2006. But if you can hold off until March 2009 -- which will be two years after you received the final clear-off from the county -- that would be the safest course to take.

DEAR BENNY: I live in Florida and am executor of the will of a friend in New York City who owned a one-half interest in a condo in Ocean City, Md. She wanted to give that interest to my nephew upon her death. How do I go about transferring her interest to him? Do I need an attorney? –Ronald

DEAR RONALD: Even if you went through probate in New York, since the deceased owned property in Maryland, you will have to open up what is known as "ancillary" or "foreign" probate in Maryland. It's not too complex, although you may want to retain a local attorney in Ocean City to assist you.

Once the Maryland court probate proceeding has been established, you should have no problem issuing a personal representative (executor) deed to your nephew. To avoid any issues of conflict of interest, I assume that the will specifically states that the property interest is to go to your nephew.

Benny L. Kass is a practicing attorney in Washington, D.C., and Maryland. No legal relationship is created by this column.

Don't pay off entire mortgage with extra cash

By Benny Kass

DEAR BENNY: I am confused about paying off our mortgage on our primary home or on a

secondary home/rental. My husband is totally against paying off either loan, even though we could pay off at least one of the mortgages. Our home mortgage has 10 years left at 5.25 percent interest and the other is a 30-year at 5.75 percent interest.

One of my girlfriends says you should definitely get your mortgages paid off, and yet another person who has his own business and is in his fifties says he is going to get the longest (30- to 50-year) mortgage he can get on his next home.

I don't know what to do. I would feel much more secure personally if we had one of the mortgages paid off, especially our primary. I must say though that we may sell in the next couple of years and move our primary home to Florida. This is where the second home is. –Cynthia

DEAR CYNTHIA: You have asked perhaps the most difficult questions in residential real estate: Should I pay off my mortgage? And if so, when?

Some people like to have the comfort of having their home "free and clear" of any debt. Others -- like your 50-year-old friend -- want a large mortgage so that they can take advantage of the tax benefits.

But there is no easy answer. Personally, I believe in having a mortgage on my home. Why? Because over the years, my home will appreciate in value (notwithstanding the current real estate market). Let's take this example. If my home currently is worth $300,000, conservatively speaking it will appreciate 3-5 percent per year. And this appreciation will take place regardless of whether I have a mortgage. So instead of paying off my mortgage, why not use that money for some other purpose -- whether it is for personal travel, entertainment, or just to have it for that rainy day?

The more equity I have in my house -- and assuming that the property will appreciate -- the more it is "dead equity."

I know that readers will differ with me, but that's my opinion. You have to look to your own situation, as everyone has different issues and concerns.

In your case, because you plan to sell your current home in the next few years, I see absolutely no reason to pay off that mortgage. Use that money -- if you so choose -- to pay down the second home in Florida, which carries a slightly higher interest rate.

And here's a suggestion: Instead of paying off the mortgage completely, if you can make one additional payment each year, you can reduce a 30-year loan down to approximately 22 years. For example, if your monthly mortgage payment is $2,000, each month add $166.66 (1/12th of the monthly payment) when you send in your check. But make sure that your check -- and the coupon -- clearly indicates that you are making an extra payment.

DEAR BENNY: We are selling a $620,000 home. As a part of the inspection addendum, the buyers are demanding that we put down a $500 security deposit with the title company, refundable if there is no damage to the home between now and move out. Our home is in superb condition. The refund of our money would be based on the buyer's subjective opinion, because they included no specifics on how they would determine if we would receive the money back. (They also have asked for every single nit-picky item that the inspector found to be remedied). What are the pitfalls of agreeing to put down this deposit and how do we protect ourselves? –Shelly

DEAR SHELLY: If that's the only way to save the sale -- especially in today's market -- I would go along with their request. You could have an attorney prepare an escrow agreement, spelling out the terms and conditions by which the moneys would be returned, but the legal fee involved would not be worth it.

Put the money in escrow and know in the back of your mind that you probably will never get any of it back.

However, you should insist that the buyer has a walk-through of the house the morning of settlement, to determine the condition of the house. You or your real estate agent should be present to observe.

DEAR BENNY: I understand that a couple is allowed up to $500,000 free from taxes on any profit made in their residence when it is sold. My situation is this: I sold one investment condo and bought another one under the 1031 exchange, and later sold the house I lived in and made the 1031-exchanged condo my home. Do I have to pay the delayed taxes on the 1031 exchange when I sell this condo property? Since it is now my home, and has been for more than five years, if we sell it shouldn't we get the benefit of the full allowable appreciation of up to $500,000? –Gene

DEAR GENE: Because you have owned and lived in the house for five years, if you are married and file a joint income tax return with your spouse, you are eligible to claim the up-to-$500,000 exclusion of gain.

A couple of years ago, all you had to do was move into the replacement home, which was involved in a 1031 Starker exchange, live there for two years, and then take advantage of this gain exclusion. However, Congress plugged this loophole in 2004. Now, if the home was

acquired in connection with a 1031 exchange, and you ultimately opt to treat it as your principal residence, you can take advantage of this exclusion only after you have owned it for a full five years. Section 641 of the American Jobs Creation Act of 2004 has imposed a five-year restriction on this loophole. The new law states: "If a taxpayer acquired property in an exchange in which section 1031 applied, (section 121(d)) shall not apply to the sale or exchange of such property if it occurs during the 5-year period beginning with the date of the acquisition of such property."

It's still a good way to avoid having to pay any capital gains tax, so long as you have owned the property for a full five years. You only have to use it as your principal home, however, for two out of the five years before it is sold.

DEAR BENNY: My partner and I have a very serious decision to make quite soon. We hope you can help us with your knowledge and resources or at least direct us to where we need to continue searching. Can unmarried, co-titled adults on a property, having fulfilled the 24-out-of-60-month occupancy requirement each be eligible for the $250,000 exemption? –Pamela

DEAR PAMELA: The answer is yes. So long as both of your are on title, and have owned and lived in the property for two out of the five years before the property is sold, each of you is entitled to take the up-to-$250,000 exclusion of gain.

For more general information, I suggest that you go to www.irs.gov, click on Publications, and access and print Publication 523, entitled "Selling Your Home." In fact, the Internal Revenue Service has a number of publications on many aspects of real estate, and all are free and worth reading.

Benny L. Kass is a practicing attorney in Washington, D.C., and Maryland.

Foreclosures drying up flow of HOA fees

By Benny Kass

DEAR BENNY: I live in a 12-unit condominium complex. We self-manage. One of the units will probably be going into foreclosure in the very near future. What does the complex need to do to collect the monthly dues and yearly assessments once the unit is in foreclosure? –Sara

DEAR SARA: Unfortunately, this is a very common problem that many condominium associations throughout the country are facing. It has a downhill spiraling effect: When a unit owner is delinquent on his/her mortgage payments, that owner doesn't pay the condominium fees either.

The first thing you should do is to consult an attorney in your area who understands community association law. There are to my knowledge some 12 states in the country that make the condominium assessment a priority lien. For example, in the District of Columbia where I practice, when a lender forecloses on a unit, up to six months of back condominium fees must be paid when either the bank or a third-party buyer at the foreclosure sale takes title.

If you are in one of those "super-priority" states, you or your attorney should put the foreclosing lender on notice of this law.

And regardless of whether this law exists in your state, you have to carefully monitor the status of the foreclosure sale. Just as soon as title passes -- either to the bank or to a third party -- the new owner becomes a unit owner, and is legally obligated to pay all future condominium fees.

Actually, as harsh as it may sound, if a unit owner is in deep trouble and facing foreclosure, you want the sale to take place as quickly as possible. The longer the process takes, the more money your association will be losing if the delinquent owner is not paying the monthly condo fees.

DEAR BENNY: In April 2005 we bought a lot in Missouri and received a general warranty deed a month later. The deed described the lot and its conveyance to us as husband and wife. Shortly thereafter, we began construction of a house. The house was completed in February 2006 and we began residing there at that time. We own the lot and house with no mortgage.

The deed has not been changed to include the improvements, and there is no wording such as "joint tenants" or "right to survivorship."

Your recent Mailbag article regarding the importance of this kind of wording has made me question whether we have what is necessary to describe ownership of both lot and house as well as protection of the surviving spouse's rights. –Ed

DEAR ED: You raise a two-part question. First, the 2005 deed that you received conveyed the property to you and your wife. The fact that you constructed a house on the vacant lot does not change the fact that both of you own the property. I would not worry about that. I don't know Missouri law. You have to confer with a local attorney to make sure that your deed is properly worded. In many states, husband and wife take title as "tenants by the entirety," which is a form of title reserved exclusively for married people. Such a deed has the same

effect as a deed that is held as "joint tenants," but actually gives the husband and wife more protections.

But your state may take the position that the mere words "husband and wife" is sufficient. Not all states use the concept of tenants by the entireties.

DEAR BENNY: Can you please define "capital gain"? You mentioned the term in one of your previous articles, but I did not quite understand how it would benefit me. My husband passed away five years ago and I am ready to sell our home and downsize to a smaller one. The house is 30 years old and the mortgage was paid off two years ago. I would appreciate any information you could give me on the subject. –Linnie

DEAR LINNIE: Capital gain is the profit you have made on your house. You take your original purchase price, add to it the cost of any improvements you may have made, and you add certain expenses that you paid when you first went to closing (escrow). These expenses can be found in IRS Publication 523, entitled "Selling Your Home," which can be downloaded from www.irs.gov, and click on Publications. This is called the "tax basis" of your house.

Then you take the selling price of your house, and deduct any real estate commission you may have paid, as well as other expenses such as advertising, legal fees associated solely with the selling of the house, and any loan charges you may have paid for your buyer. This is the adjusted selling cost.

To get your gain you subtract your tax basis from the adjusted selling cost.

This is a very oversimplified explanation. I have not discussed your situation about where your husband died, because you will get a stepped-up basis that will differ depending on where you live.

Furthermore, I have not discussed the up-to-$500,000 exclusion of gain (up to $250,000 in your case because you cannot file a joint tax return) that you can take if you have owned and used the house for two out of the five years prior to its sale.

You should carefully review the IRS publication, and if you still have specific questions, talk with your own tax and legal advisors.

DEAR BENNY: I want to buy my brother's home (essentially for the amount of the mortgage), which I would allow my brother to continue to live in, and which I would use as a second (vacation) home. When my brother leaves the house (death, nursing home, etc.), I plan to sell the house and use the IRS $250,000 capital gain exclusion (assuming at least two years of ownership). Are there any potential problems with this plan? Would it be wise to place the house in a trust? –Frank

DEAR FRANK: You have to talk with your attorney as to whether to put the house in trust. There are many variables, which are individual and possibly unique to your situation, so I don't believe it would be appropriate to give you advice on this issue.

I see no real problems with your proposed plan. However, you should know that the new Housing and Economic Recovery Act of 2008, signed into law by President Bush on July 30, 2008, puts some restrictions on your ability to claim the full $250,000 exclusion of gain.

This is complicated, but suffice it to say, if you sell a second home (whether it be a rental property, a vacation home or the type you are describing) the exclusion will be allocated between the time you owned the property and the time that you actually lived in it. In simple terms, the period of time you used the property as your principal residence will be eligible for the gain exclusion; the time that it was not your principal residence may be taxed.

There is a formula to determine your taxable situation: The numerator is the amount of time (after Jan. 1, 2009) that the property was not your principal residence, and the denominator is the total amount of time of ownership from when you first bought the property.

DEAR BENNY: My wife and I are considering renting our current primary residence for a short time after we build a new house with the idea of letting the housing market stabilize before we sell our current home. What are the tax rules regarding renting a primary residence and still counting it as a primary residence when sold? –Michael

DEAR MICHAEL: Good suggestion, and hopefully that stabilization will occur quickly.

In order to be eligible for the up-to-$500,000 exclusion of gain ($250,000 if you are single or do not file a joint tax return), you have to own and use (live in) the property for two out of the previous five years before the house is sold. In your example, if you already have owned and lived in the house for at least two years, you can rent it out for one day less than three more years.

Be careful, however. If you rent out your house, will potential buyers be interested in buying when there are tenants? Will you be able to get the tenants out of the property in time to sell before the three years are up? Perhaps an investor can be found to buy and let the tenants stay in the house, but you cannot count on finding such a buyer.

If you decide to rent, my suggestion is to make sure that the lease completely expires in two years. This will give you one full year in which to find a buyer. Otherwise, you will have to pay

capital gains tax on any profit you make, unless you either hang on to the house as a long-term investment or do a 1031 (Starker) exchange.

Benny L. Kass is a practicing attorney in Washington, D.C., and Maryland. No legal relationship is created by this column.

Three ways to reduce capital gains tax

By Benny Kass

DEAR BENNY: *I was told by a prominent accountant that there is a loophole in the law that states that you can be exempt from paying capital gains (if you are in a home less than the two-year period) if there are "unforeseen circumstances" involved. Are you aware of this? Can you doublecheck to make sure? This accountant is well trusted by a lot of businesspeople! At the time I was going through an "unforeseen" divorce. –Patricia*

DEAR PATRICIA: In general, in order to take advantage of the up-to-$500,000 exclusion of gain ($250,000 if you file a separate tax return), you have to own and live in the house for two out of the five years before it is sold. However, the law does allow a partial exclusion under certain circumstances. There are three "safe harbors" (meaning that if you meet these tests the IRS will not challenge you): (1) change in employment; (2) health; and (3) unforeseen circumstances. In this third category, if you could not have anticipated an event before you purchased your house, you may also be able to claim a partial exclusion. While this is fact-specific -- and in many cases you will have to get a special ruling from the IRS -- there also are some safe harbors that the IRS will recognize. These include: an involuntary conversion of your house; natural or manmade disasters resulting in a casualty to your home; divorce or legal separation; and multiple births resulting from the same pregnancy.

It would appear that you may qualify based on your divorce. The exclusion is equal to the number of days of use times the quotient of $500,000 divided by 730 days. Note that 730 days is two full years. If you are single -- or do not file a joint tax return -- change the $500,000 to $250,000.

Your accountant knows what he is talking about so you should ask him to do the calculations. However, I do not think he said that you can escape all capital gains tax.

DEAR BENNY: *What happens to any additional money in a foreclosure action if the highest bidder pays more for the house than the amount that the bank is owed? Is the money given to the person who was foreclosed upon, or does it go to the county or state? –Monique*

DEAR MONIQUE: It is a rare case that there is any money left over after a foreclosure sale. The lender, their attorneys and the auctioneer (including advertising costs) will get paid out of the price that the property is sold at the sale. The professionals who buy at foreclosure sales will generally want a good deal and will not bid much higher than the initial bid price set by the lender.

And in many cases, there is no buyer, and the lender ends up owning the property.

However, if there is a surplus, the money goes back to the person whose home has been foreclosed upon.

DEAR BENNY: *Do you know of any books or brochures that help explain the responsibilities of a condominium developer/owner? We live in an unfinished condo development in St. Louis. There are construction and maintenance issues that the current residents believe are the responsibility of the owner/developer, not the condo association. The items/issues are not covered in the bylaws. –Natalie*

DEAR NATALIE: There is an organization in Virginia known as the Community Associations Institute. You can find them on the Web at caionline.org [1]. This group has a number of valuable resources that may be helpful to you, including books and publications on a number of community association subjects as well as suggested names of attorneys who may be of assistance in helping you learn your rights.

DEAR BENNY: I *recently purchased a home and directly next to it is a piece of railroad property that separates it and two other properties. All properties have access to the streets. The railroad took the land by eminent domain many years ago, and the prior owners are now long gone. When I contacted the railroad about purchasing the land they said because they took it they cannot sell it but would be willing to abandon it for a small fee. If I pay this fee how do I get title to this land? It does appear that they took a portion of the lot I already purchased and they said so to me. How do I keep someone else from getting it once abandoned? Also, the portion they took (of my lot) was already being used as a driveway by my lot for at least the last 30 years that I know of, and the other lots appear to also have been abandoned years ago. –Robert*

DEAR ROBERT: This is a complicated legal issue and you should retain an attorney versed in real estate to assist you. I do not know why they can't just sell you the land, and you should ask them for an explanation.

If the property has been abandoned, you may have the right to file a lawsuit claiming adverse possession. This means that you (or your predecessor) have, for the period of years authorized by your state statute, openly, notoriously and hostilely used the property. As I

stated, these are technical legal issues, which must be reviewed by your attorney.

If, in fact, the railroad company is willing to state in writing that they have abandoned the property, you may also be able to file what is known as a "quiet title" action, asking a judge to review the facts and determine who owns the property.

DEAR BENNY: *I have just found out that my neighbor's septic tank leach line and leach pit is on my property. I was going to buy the property when it was recently up for sale, but I was not given the chance. I did file a lawsuit against the seller. The contract purchaser has not yet taken title to the property. Do I have a legal claim against not just the seller but the buyer if he does indeed go to closing and take possession of the property? I am hoping that after the buyer learns that there is a lawsuit on the property, he will back off and not buy it. What happens in a case like this? –Leo*

DEAR LEO: You have filed a lawsuit that should put the title (escrow) company on notice. You or your attorney should contact both the title company as well as the buyer and advise them of the lawsuit. There is a concept in law called "lis pendens," meaning that litigation is pending. Ask your attorney if he is able to file this lis pendens document in your case and have it recorded among the land records on your neighbor's property. Clearly, the title (escrow) company will see that there is a pending lawsuit when it searches the title for the buyer.

The buyer would be foolish to buy the property until your lawsuit is resolved. I would also try to reach an amicable arrangement with the buyer. After all, if he does buy the property, he will be your next-door neighbor.

DEAR BENNY: *How can I get a title company to release funds being held in an escrow account for a unreleased deed of trust for a loan 20 years ago from a bank that no longer exists? --C.R.*

DEAR C.R.: State law differs on how old a deed of trust (mortgage) has to be before it will no longer have any force and effect. Are you sure that the title company still holds the funds in escrow and is still in existence?

If you are sure that the money is still there, you can file a suit for quiet title, asking the judge to cancel the note and deed of trust and order the release of the escrowed funds. However, the judge will carefully review the facts to make a decision as to who is the rightful owner of these escrowed funds.

Benny L. Kass is a practicing attorney in Washington, D.C., and Maryland.

Condo owners disagree on dry rot repair

By Benny Kass

DEAR BENNY: I own a condo in a two-unit building. We always have split all common expenses 50/50 per our legal documents. Recently we discovered a leak in the common garage, and have established the cause and are embarking on repairs. This leak also caused dry rot in some of the hardwood floors in my unit. I considered this to be a common expense and expected the entire cost of the repairs to be divided 50/50. The other owner disagrees and claims that because the damage is in the interior of my unit I must bear the cost of those repairs myself. Your advice will be most helpful. –Sherry

DEAR SHERRY: This is perhaps one of the most controversial issues in community association law. My first question: Have you filed a claim with the association's insurance carrier (called the "master policy")? If not, you should do so immediately, although many policies require that if claims are not filed within 30 days from the date of discovery, the insurance company will reject the claim.

Although state laws may differ, in most situations these laws have been interpreted to mean that associations obtain what is known as "single-entity" property insurance. This means that the insurance coverage for an association would include not only the common elements, but also the individual units.

My second question: Are the hardwood floors in your unit the original flooring, or did you (or someone who owned before you) add the hardwood? I ask this because typically the master insurance policy is responsible for covering all common elements as well as damage within units -- except for "betterments," which are those items that owners made to their unit, such as new kitchen appliances, parquet floors or wallpaper.

My third question: Do you have your own insurance to cover any damage to your unit that is not covered by the master policy? This is known as an HO-6 policy and is insurance coverage that I believe every condominium unit owner should obtain.

You -- or an attorney for your two-unit association -- should review your legal documents carefully. I suspect that the answers to your question will be found in those documents. I further suspect that if it can be determined that the dry rot is the direct result of the common element garage leak, this is an association problem, which hopefully your insurance policy will cover.

DEAR BENNY: We read with interest your article on home titles. When my husband and I bought our house in Nevada, the title papers listed us as tenants-in-common. Are we able to

change that to joint tenants or tenants by entireties? –Lorette

DEAR LORETTE: It is a very easy and inexpensive process to change your title. But there are tax, estate and other legal ramifications involved, so before you do this I suggest that you consult a local real estate lawyer in your area who can give you the pros and cons.

You also should understand that in community property states, there are different tax considerations, and that's why it is important for you to discuss this with an attorney.

DEAR BENNY: I bought a house at an auction a few days ago. The house was sold "as is." I am a first-time home buyer. After I won the bidding, they took a $5,000 deposit (cashier's check) and $2,500 extra after the auction was done. They had me sign papers I did not know was a contract. It happened very quickly. They just said sign here and here, and I did.

The next day I went to the office and got my copy of the contract and when I took my friend to see the house, we found out it has a lot of termites. We did not go to a title company yet.

Can I back out and get my deposit back? Or can I ask them to fix the property because they did not disclose about the termites? –Said

DEAR SAID: Why did you sign a document that you did not understand? Why did you buy a house without at least looking at it? I am not sure that you will be able to get your deposit back. The auction made it clear that you were buying the property "as is," which means that the seller was not agreeing to make any repairs or to deal with any termite issues.

You should consult a local attorney to determine if there is any hope of getting your deposited refunded, but I seriously doubt that this will be possible.

DEAR BENNY: Is there a certain age at which one is allowed to sell a home and avoid having to claim the profit made on the sale? –Patricia

DEAR PATRICIA: No. Regardless of how old you are, if you have made a profit by selling real estate, you have to pay the applicable capital gains tax. If you have owned and lived in the house for two out of the five years before it is sold, you can exclude up to $250,000 of any profit you have made (or up to $500,000 if you file a joint income tax return).

If your income is low, there are reduced tax breaks, and you should discuss these with your tax advisors.

DEAR BENNY: We recently refinanced our home loan with the XX company. Within weeks, we received a letter from the ZZ company saying that our October payment was due to them. An October payment invoice was included. I contacted XX, and was told that the loan was not sold. They said if and when that happens, we would receive a "goodbye letter" -- which has not arrived. We now have October payment invoices from both mortgage companies, and only two weeks to go until the first payment is due. We contacted ZZ, which insists they own the loan now. In fact, both companies say they have our loan. What do you suggest we do? –Linda

DEAR LINDA: Mortgage lenders often sell their loans to other lending institutions, and unfortunately it is confusing to the homeowner as to where the payments are to be made. However, several years ago, Congress attempted to solve this problem. If a loan is sold, the homeowner must receive a letter from both the old and the new lender, advising that the loan has been sold and where the new monthly payments are to be sent. This is the "goodbye" letter mentioned by your lender. The law further makes it clear that once you get those letters (or often one joint letter from both lenders), you cannot be penalized if within the first 60 days you send your mortgage payment to the wrong lender.

I suggest that you immediately contact the consumer division of the Federal Reserve Board as well as your state Attorney General and Consumer Protection offices. Send copies of your complaints to both lenders. I suspect that your problem will be resolved promptly.

But in the meantime, because you did not get the "goodbye letter" make sure that you send your check to the XX company -- your original lender.

Benny L. Kass is a practicing attorney in Washington, D.C., and Maryland.

Facing foreclosure: When must I move out?

By Benny Kass

DEAR BENNY: I am one of the unfortunate who has to deal with eventual foreclosure. Can you tell me how long I can remain in my home until legally having to vacate? –Constance

DEAR CONSTANCE: Before the foreclose takes place, please talk to your lender -- and not just a low-level loan officer but someone high in the company. With all the foreclosures taking place throughout the country, lenders (at least the legitimate ones) do not want yet another foreclosure on their books. If no one buys at the foreclosure sale, the lender will be stuck with the house and will have to pay real estate taxes and insurance.

Also, check with your county and state governments. Many governments now have programs to assist borrowers who are in trouble, so you may be able to save your house. How long do

you have to stay in the house if it is foreclosed? Technically, you have to move out when the house is sold. But again, talk with your lender. They may be willing to let you stay for a period of time, if you can pay some rent. Lenders do not want houses to be vacant.

If the home is scheduled for foreclosure, I would attend that sale. Find out who bought it -- it may be the lender itself if no one bids. Then discuss your situation with the buyer; once again, you may be able to strike a deal with that buyer.

To my knowledge, although you have to move out, it has been my experience that many homeowners whose property has been foreclosed upon just stay in the house until eviction proceedings are brought, and then they move out.

DEAR BENNY: I live in North Carolina and my neighbor recently planted trees, two of which are on my property. Where do I stand? –Brian

DEAR BRIAN: I can't give you advice about North Carolina law because I don't practice law in that state. However, I suggest that you arrange to have a survey made of your property so that you will know exactly where your property line is. If your neighbor's trees are even one inch on your property, I would try to meet with your neighbor and discuss the situation with him or her. Be friendly; perhaps you can invite the neighbor over for coffee.

If the trees are on your property, you have the absolute right to demand that they be removed. If you do not object to those trees, then perhaps you can reach an agreement that the neighbor will maintain the trees. And while it may be a very small amount of money, you may want to ask your neighbor to pay the percentage of your real estate tax on which the trees stand on your property.

Finally, depending on your own state law, so long as you will not injure anyone or cause any property damage, you should have the right to cut down the trees if they are on your property.

DEAR BENNY: I'm a 66-year-old female living in California. I'm divorced and own three homes -- two rentals and one primary residence. I plan to leave my children an equal interest in my real estate holdings upon my demise. I do not have any other investments, savings, IRAs or holdings worth mentioning.

I need to generate a living trust, but keep postponing it due to the cost. I ran a search online and saw that one can order the necessary paperwork for the price of $149. I am a REALTOR® (retired) and would be able to obtain prelims on my properties myself.

What do you think? Would it be binding? –Marianne

DEAR MARIANNE: I cannot recommend that you use what is generally referred to as "off the shelf" legal documents that you can get on the Internet. These documents are general in nature, and may not be specific for your needs. Since you have the ability to assist a lawyer, I am sure that you can negotiate the attorney's fee. But I strongly recommend that you consult a local attorney who understands real estate and living trusts.

DEAR BENNY: I presently have a Starker (Section 1031) exchange with my brothers invested in a rental property. We had this set up for about five years. If we sell the whole property, can it be divided into three shares with each one of us owning one share for another exchange? It is hard to work with three owners when we live in different areas of the country. –Marilyn

DEAR MARILYN: If the property is in the name of a partnership -- instead of in your three individual names -- then when the property is sold, you either have to pay the appropriate capital gains tax or do another exchange. The new property (called the replacement property) must be in the name of the partnership.

If, on the other hand, the property is titled in your individual names, then when it is sold, each of you has the right to enter into another exchange on your own (or pay the tax and keep the balance of one-third of the sales proceeds).

If the property is in the name of a partnership, here's a tip: In the year before the property is sold, formally dissolve the partnership and put the property in the name of the three of you. Then, next year, you each have the right to do with your one-third as you so desire.

DEAR BENNY: I purchased a townhouse in my brother's name until I resolved my financial difficulties. He already owns several properties. I am not really benefitting from this transaction. My intent is to have him transfer ownership to me this summer.

How do I get my name on the deed and the mortgage? –Janet

DEAR JANET: Your brother will have to deed the property to you. You and your brother will have to explain the situation with the current mortgage lender. They may be willing to allow you to assume the obligations of that mortgage, and they may also release your brother from his obligations.

Much depends on the lender and the kind of loan currently on the house. If it was an ARM (adjustable-rate mortgage), the lender may be willing to cooperate with you. On the other hand, if the existing mortgage contains a lower rate of interest than is currently available, the lender will probably not allow you to take it over.

If you have cleared up your credit, and can qualify for a mortgage on your own, then it may all work out alright. If you are unable to qualify, ask your brother if he will guarantee the loan. This may convince the lender to allow the transaction to take place.

But your brother should consult a tax accountant to determine any tax consequences he may have when he transfers the property to you.

DEAR BENNY: My tenants are divorcing. I received a 30-day notice from the husband. His spouse was not part of the 30-day notice. She would like to continue renting the property. My concern is that she does not have a job, and will be able to afford the rent only from monies received from spousal or child support. Her mother (who lives out of state) has offered to cover the rent if this becomes necessary. What should I do: create a new month-to-month tenancy? Who would be named? What precautions should I take? –Monica

DEAR MONICA: I would recommend that you enter into a new lease with both the current tenant and the mother named as the tenants. Make sure that the lease states that the tenants are "jointly and severally" responsible for paying the rent. This means that each tenant is legally obligated to pay the full monthly rent.

How long a term should you have? That really depends on you. If you think that the tenant will take good care of the house -- and that with the assistance of her mother, the rent will be paid timely -- then why not consider a year's lease? The mother may be concerned that a month-to-month is too short a period of time.

DEAR BENNY: Are title examination and loan origination fees legitimate or just junk fees? –Lee

DEAR LEE: There are some consumers who believe that most, if not all, of the lender's charges are "junk" fees, which means that they are not necessary for the settlement (escrow) process, but are primarily used to increase the lender's profits.

For years, lenders would charge between $50 and $75 for a credit search. As a result of litigation on this matter -- and the fact that everyone can get a free credit report at least once a year -- lenders now charge a lot less for the credit search.

Loan origination fees are, in my opinion, junk fees. But in most cases, if you want to get a loan, you will have to pay this to the lender. You should try to negotiate this fee as well as all other charges when you begin the loan application process.

The title examination, on the other hand, is legitimate. The mortgage lender is going to give you a large sum of money and wants to make sure that your house will serve as good collateral to secure the loan. You will sign a deed of trust (the mortgage document), which will be recorded among the land records in the county where the house is located. This document gives the lender the right to foreclose on the house if you cannot make the monthly payments. But if there are other lenders -- or other clouds such as tax liens or mechanic's liens -- on title, the new lender will not have the security that it needs. So a title search must be obtained to satisfy the new lender that it will be in first position against your house.

Benny L. Kass is a practicing attorney in Washington, D.C., and Maryland. No legal relationship is created by this column.

Features

Is escrow account for taxes, insurance necessary?

By Benny Kass

DEAR BENNY: Why does one have to pay monthly insurance payments in escrow to the lender? Also, after having paid this payment in escrow for five to six years, why can't this be cancelled? –Marcelle

DEAR MARCELLE: First, let me express my personal view. I dislike the concept that homeowners have to pay money into a lender's escrow account, on a monthly basis, so that lenders can pay the real estate tax and the yearly insurance premium. While lenders claim this is to protect their security, the reality is that lenders make a lot of money on these escrow accounts. At the very least, lenders should be required to pay interest on the moneys they are holding.

I have had a number of clients who have complained that despite the fact that the lender is escrowing, the real estate tax was not paid. I don't think this is deliberate, but with lenders selling their loans all over the country, many lenders just do not know where to send in the tax payments -- or even when such payments are due.

Having said this, however, I want to respond to your question. The lender has a mortgage loan on your property, and even if you have 95 percent equity, should your house burn down, the lender's 5 percent equity will be jeopardized. That's the reason lenders give when they require escrows for insurance.

My suggestion: Talk to your lender and see if it will be willing to release you from the escrow obligation (for both the real estate tax as well as insurance) so that you can pay your own insurance premium and your own real estate tax. Some lenders will go along with this, on two

conditions: (1) that you send the lender annual proof of payment, and (2) should you not send in that proof, it can reinstate the escrow.

DEAR BENNY: My husband and I are purchasing a house from the estate of his uncle. The house is assessed at $300,000, but they have agreed to sell it to us for $150,000. Why is it necessary for us to pay PMI if the LTV ratio is at 50 percent? I almost feel like the mortgage companies are just trying to get extra money from us by having us refinance soon. Even in this economy this house would sell for higher than the loan amount. –Hollie

DEAR HOLLIE: Generally, lenders require that home buyers obtain private mortgage insurance (PMI) when they do not put down at least 20 percent of the purchase price. This is referred to as the "loan to value" (LTV). In your situation, although the house is worth $300,000, the purchase price (which is what lenders look at) is only $150,000. Thus, unless you put down $30,000 and get a loan of not more than $120,000, I can understand why a lender may be insisting on PMI.

I agree with you, however, that it makes no sense.

Here are some suggestions. First, talk with several lenders and see if they can be convinced to waive the PMI requirement. Second, see if you can get what is known as a "piggyback" loan; you would get a first trust of $120,000 and a second trust of $10,000-$15,000. You will need to put down at least $5,000 in my example.

This kind of loan is part of the cause of our current "mortgage meltdown," and piggybacks are now very difficult to get. However, you may be able to convince a lender that because the property is worth so much more, they will have plenty of equity -- i.e. security -- and thus should make the loan.

If all else fails, get the lowest adjustable-rate loan that you can get, and consider refinancing shortly thereafter. It will cost you a little more for the second settlement (called escrow in the West), but should be much less expensive than having to pay monthly PMI payments.

However, you have to make sure that you will be able to refinance quickly, and that there will be no prepayment penalty.

Discuss all these options with a number of lenders. Mortgage lenders want more business, and I suspect that some lender will be willing to cooperate.

DEAR BENNY: My sister and I own a house together. She is getting married and wants to give me full ownership of the house. What would be the best way to handle the paperwork without having to refinance? –Rosie

DEAR ROSIE: You have a very nice sister; you should be proud. Your sister can deed her interest in the property to you, and because this is a transfer between children, your lender cannot try to call the existing loan. I suspect that there is a "due on sale" clause in your mortgage loan documents, but federal law makes it clear that lenders cannot use that clause under certain circumstances, and your situation appears to be one of the exclusions.

However, your sister may have gift tax consequences, and before she transfers the property, she should consult a tax attorney for specific advice.

DEAR BENNY: My wife and I are gifting our son $15,000 for a down payment on a condominium in our community. This is his first venture in home ownership, and the property was purchased from HUD. The mortgage company is asking for a letter stating that we gave him the money as a gift and do not expect to be repaid. The form letter provided by the mortgage company requests our account numbers from the accounts where the funds originated. I feel uncomfortable providing this information. Is this request mandatory in order to secure the mortgage? –Frank

DEAR FRANK: Unfortunately, if your son wants a loan from that lender, you will probably have to comply with its requests. I appreciate your concern, but also understand why you are being asked to provide that information. There are too many situations where false gift letters are provided, and the lender -- especially in today's uncertain market -- is merely attempting to protect itself.

You should talk with the lender and see if it will accept a written, sworn affidavit from you that this is a true gift. Otherwise, I think you will have to comply with the lender's demands.

Benny L. Kass is a practicing attorney in Washington, D.C., and Maryland.

Will plan to avoid capital gains tax work?

By Benny Kass

DEAR BENNY: My 42-year-old son will move home next month. I am 65 and thinking of downsizing. I would like to place him on the deed when he moves in and after two years, sell my home. Since he is on the deed, will up to $500,000 be tax exempt? I know that there could be problems with this arrangement. Is this possible and what are the drawbacks with this arrangement? –Richard

DEAR RICHARD: First, what do you mean that you will "place him on the deed"? Will you be

selling the house to him, or just adding his name to the deed? If the latter, there are potential tax complications. This would be treated as a gift. The law is quite clear that the tax basis of the person giving the gift (the giftor) becomes the tax basis of the person receiving the gift (giftee).

For example, let's say you bought the house many years ago for $100,000 and now it is worth $500,000. Your tax basis is $100,000, excluding any improvements that you may have made along the way. If you give half of the house to your son, his basis becomes $50,000. If you then immediately sell it for $500,000, your profit is $200,000 (half of $500,000 less your basis). If you have owned and lived in the house for at least two years, you can exclude the entire gain and pay no tax. But your son did not live in the house for two years. His profit is also $200,000, but he would have to pay the IRS $30,000 (based on the current 15 percent capital gains tax rate) plus any applicable state or local tax.

Now let's look at a sale after both you and your son have owned and lived in the house for two out of the five years before sale. You sell it for $600,000. The tax basis for each of you is $50,000. You have thus made a profit of $250,000 each. In this scenario, both of you can claim the $250,000 exclusion of gain and pay no tax.

You have raised an interesting plan, but do the numbers before taking any action.

Benny L. Kass is a practicing attorney in Washington, D.C., and Maryland. No legal relationship is created by this column.

Avoid tax when gifting down payment

By Benny Kass

DEAR BENNY: Our son is looking to buy a house and we promised to help him with the down payment, or part thereof, of approximately $100,000. What is the best way to do that to avoid any gift taxes? Can we give him the money as part of his future inheritance, which won't be taxable up to a certain amount? Or can we give him the money and ask for a promissory note, and then my husband and I both can "give" him $12,000 yearly until the note is paid off?

He also plans to get married in the very near future. If he does and then later gets divorced, how can he make sure that that portion of the house plus appreciation will be solely his? –Margareta

DEAR MARGARETA: As of Jan. 1, 2009, you can give up to $13,000 to your son (or anyone) and it will have absolutely no tax consequences for either party. In fact, you and your husband can give up to $26,000.

But that amount will not be enough to help him buy that house. I don't like the idea of calling the money his future inheritance. I suspect that the IRS would still call it a gift. For more information about gifts and the gift tax, go to the IRS Web site at www.irs.gov and type in "gift tax" in the search box.

I would recommend that you consider lending him the money. He will sign a promissory note as well as a deed of trust (the mortgage document), and the latter must be recorded among the land records where the property is located. If the trust is recorded, he will be able to deduct the interest that he pays you.

As for the amount of the interest, there is a concept called the "applicable federal rate," or AFR. Once again, you can get this information from the IRS Web site. These rates will tell you what the minimum rate should be.

However, your son will have to tell his lender that you plan to lend him some money. Many lenders may object, unless there will be sufficient equity in the property after adding in both the first loan and your loan.

If the lender objects, then you may just have to make him a gift of the full amount.

How does your son protect himself in the event of a divorce down the road? That's a difficult question to answer. He can take the house in his own name, but a divorce court may award the wife a portion of the house anyway -- depending on how long they were married. Your son can also enter into a prenuptial agreement with his future wife -- but that often is not easily accepted by young couples in love.

I suggest you discuss the matter with your financial advisors (and your attorney) before you commit yourself to giving/lending any money to your son.

DEAR BENNY: Nearing the age of 71, I am feeling the need to downsize from a large home to a more senior-friendly house. But not wanting to lose $100,000-$150,000 dollars has inspired me to come up with a plan (my cost basis is around $320,000). I would deed over my home to my grandson (he is 22 and still in college). He will move from home and assume ownership and complete responsibility for it. No sale, no loss. Here is the second part of the plan: I will build a small house on a lot directly across the street from my present home. My daughter owns that lot with no mortgage, and she will inherit that home to rent or sell in the future. How should that second home be deeded to protect both of us? She needs to be protected from unnecessary taxes, and I need to be assured of a home for as long as I need

it. –Barbara

DEAR BARBARA: Yes, the real estate market still has not perked up, and many people have lost a lot of value in their principal residence. I can understand why you are trying to devise a "win-win" plan.

First, let's talk about your grandson. You have not told me what the value of the house is. If your tax basis is $320,000, then when you give the house to him, that will be his basis. The basis of the gift giver becomes the basis of the recipient.

So unless he lives and owns the house for at least two out of the five years before it is sold, (in which case he can exclude up to $250,000 of gain or up to $500,000 if he is married and meets the IRS requirements) depending on the price he will get, he may have to pay a hefty capital gains tax. Currently, the federal rate is 15 percent, but that may increase in the future.

I suggest that you discuss your plan with a financial advisor, as I can provide you with only general information.

As for your granddaughter, I would suggest that she sell you the lot and that you build your house there. Prepare a last will and testament, giving the new house to your granddaughter. This way, you can live there as long as you like, and on your death she will get the stepped-up basis (i.e. the value of the house on the date of your death).

DEAR BENNY: My mother recently passed away and my father wants to move closer to his sisters and the rest of our family. He wants to give me his house. It is completely paid for so I plan on moving in and selling my current home. My question is this: Would it be best if he "gifted" the house to me or should we wait till I inherit? It's going to be my primary residence either way. –Kevin

DEAR KEVIN: I put your question here because it is similar to my earlier answer. If your father gifts you the house, his basis for tax purposes will be yours. I suspect his basis may be low, especially if he has owned the house for a long time. You have to determine his basis, and there is a difference in the way it is computed if you are in a community property state (the Western states).

Of course, if you own and live in the house for two out of the five years before it is sold, you can exclude up to $250,000 of any profit (or up to $500,000 if you are married).

My preference is for your father to leave the house to you in his last will and testament -- but of course that is his decision to make.

DEAR BENNY: Out of the blue one day, a company called me and stated that my house has faulty siding and that they can process my claim for money set aside to repair the siding. I haven't received any class-action lawsuit notification or even heard of one from anyone else. I asked the person calling what her company gets out of it. She said that they would get nothing unless I received a check from the fund administrator (a court official, I assume). When I received a settlement check, the company would then share it with me 60/40, with me getting the 60 percent. Aside from that moment, they wanted no money up front.

My question is: If I truly have money coming because of faulty siding on my home, why can't I deal with the court administrator directed, thus keeping the full 100 percent? How would I know how to contact such a person? --J.H.

DEAR J.H.: I am always leery of people who suddenly appear and tell you that you have money coming to you. This may be legal, but neither of us knows this at the present time. Typically, in a class action, all prospective members of the class are notified -- usually by mail or sometimes in the local newspapers.

You do not need that company. I just went to my favorite search engine on the Internet and typed in "siding class action". You will find a number of such hits on the Web. Contact the plaintiff's attorney (not the court) and try to determine if you are (or can be) a part of the class action.

However, many class actions are settled where the attorneys get a large fee, but the class members get only a few dollars. Check references of the company that solicited you with your state's attorney general's office and the Better Business Bureau. If they check out, make sure that you have a written agreement with the company, but do not under any circumstances give out any personal information (such as Social Security number, credit-card number). You should also contact an attorney who may be able to track down the class action.

Benny L. Kass is a practicing attorney in Washington, D.C., and Maryland.

Mortgage is paid off -- now what?

By Benny Kass

DEAR BENNY: I paid my mortgage off in late May. What should I expect to see in the way of documents? How do I really know it is complete? --L.

DEAR L.: When you borrowed money to buy or refinance your home, you signed a mortgage document or a deed of trust. The latter is more commonly used throughout the country.

Your lender recorded that document among the land records in the county where your property is located. Now that you have paid off your loan, there has to be something filed to indicate that the mortgage (or deed of trust) has been paid and released from land records. Different states have different forms: Some use simple releases, while others use certificates of satisfaction.

Your lender will either arrange to file the release, or will send that release document to you for recording.

You should make sure that the release has been recorded, and a helpful employee in the local recorder of deeds should be able to confirm this for you.

Although not necessary, you should ask your lender to return the mortgage document and the promissory note back to you, marked "Paid and Cancelled."

Here are two more things you should do: First, if your lender has been escrowing money to pay your real estate tax and insurance, make the appropriate arrangements with the taxing authority and your insurance company so they start sending you their bills.

Next, if you have an automatic payment plan whereby the lender is sent the mortgage check each and every month, don't forget to cancel that arrangement.

DEAR BENNY: We bought our home in 1971 and somewhere along the way we have lost the HUD-1 settlement (escrow) statement. Where and how would I be able to get a copy of this? Isn't this something I would need in case we were to sell? –Carol

DEAR CAROL: You have raised a difficult question. The HUD-1 is the settlement statement currently in use for the great majority of residential real estate transactions. It lists all of the numbers (charges) involved when you first bought -- or refinanced -- your property.

Yes, it is always helpful to have your HUD-1 when you go to sell it, because the more legitimate expenses you can add to your home purchase, the higher your tax basis will be. And the higher your basis, the less tax you may have to pay.

But this may be academic since you have owned the property for all these many years. If you have also lived in the house for two years before it is sold, you can exclude up to $250,000 (or $500,000 if you are married and file a joint tax return) of the profit you make. Of course, any profit above those thresholds will be taxable.

However, I do not believe that HUD-1s were even in existence back in 1971. When the Real Estate Settlement Procedures Act (RESPA) became law in 1974, the law mandated that a universal settlement statement be used for all residential closings. The Department of Housing and Urban Development (HUD) created the form and thus the name HUD-1.

Back before there was a HUD-1, simple settlement statements were used -- often one for the buyer and one for the seller.

Do you remember where you went to closing (called escrow in some Western states)? If so, you should contact that company, but I suspect that they have long since retired their old files.

You also could check with your lender, but once again, I don't think this will be productive. If you live in a homeowner association or a condominium, the property manager may have a copy of your settlement statement.

Otherwise, you will have to recreate the settlement sheet from memory. The courts have often held that just because you don't have papers does not mean that you did not have expenses.

DEAR BENNY: When my ex-wife and I got divorced she signed a quitclaim deed. Do I need to do anything else to get her name off of the deed and will there be any tax implications? –Brad

DEAR BRAD: A quitclaim deed basically means that the grantor (your wife) is deeding you whatever interest she has in the property -- nothing more and nothing less. I often joke that I will be happy to give you a quitclaim deed to the Brooklyn Bridge.

A quitclaim deed is usually used when a divorcing spouse conveys his or her interest in the joint property to the other spouse who will end up owning the property. In order for it to be effective, however, it must be recorded among the land records where the property is located. An attorney or the local recorder of deeds should be able to assist you.

Once the deed is recorded, you will be the sole owner of the property.

As for the tax implications, no gain or loss is recognized when property is transferred from a spouse (or former spouse) if the transfer is "incident to a divorce." This means that there is either a court-ordered divorce or a property settlement agreement between the parties.

For tax purposes, the basis of the property of the person transferring the property becomes the tax basis of the person receiving the house. For further clarification, discuss your situation -- before you sign the deed -- with your tax advisors.

One tip: If you are going through a divorce, and one of you will end up owning the entire property, consider making the transfer while you are still married. Many jurisdictions waive any transfer and recordation fees for transfers between husband and wife. However, if you are no longer married, (depending on your state law) you may have to pay these fees.

DEAR BENNY: Three years ago, I had to file for bankruptcy. Since then, I've had a very good track record. I have no debts (only have a debit card). I have paid rent faithfully ($950 per month). My credit rating has risen to about 675. I have found a condo in an area where two units have sold for approximately $110,000. The unit I am looking at is listed for $69,900, because it needs some work. I wonder if in today's market I stand a chance of being able to find financing with my background. –Dick

DEAR DICK: Filing for bankruptcy can impact your credit standing for as much as 12 years. You should talk with a number of mortgage lenders and see what they say. Since the condo you are interested in buying will have a lot of equity, some lender may be willing to work with you -- although the interest rate may be higher than the current market rates.

As you know, the economy is sluggish, and many lenders who have been financially impacted by the mortgage "meltdown" are justifiably nervous of making loans to people who have bankruptcy in their history. Do you have any relative (or friend) who can guarantee the loan? Perhaps the seller may be willing to take back all of the financing, in which case you do not have to go to a commercial lender.

I would first talk with a financial counselor so that you can learn all of the options that may be available to you. Your state or local government may also have a mortgage loan program that will meet your needs.

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Not married? Buy home as tenants in common

By Benny Kass

DEAR BENNY: My daughter and her boyfriend are thinking about buying a house and she is putting more of a down payment than he. Is this a good idea? –Doug

DEAR DOUG: I don't see any real problem with this arrangement, so long as your daughter and her friend enter into a written agreement spelling out their rights and responsibilities.

Specifically, the agreement should contain at least the following: (1) how the mortgage payments and other house expenses will be made; (2) what will happen if one party cannot make those payments; and (3) what if one party wants out of the house -- will they sell?

Finally, your daughter should consult an attorney without her boyfriend so that she can be advised as to the correct way that title will be held. I would recommend a tenant-in-common arrangement, with your daughter owning a greater percentage of the house based on the amount of the down payment that each party will pay.

DEAR BENNY: Once a contract has been signed by both the seller and buyer of a house, does either party have an option to cancel the deal prior to the closing date? I am the buyer and my loan has been approved. An inspection has been conducted and there are several corrections and/or repairs we have submitted to the seller. I am, however, having second thoughts about the house and would like to know if I can legally back out at this time. –Alan

DEAR ALAN: There is no "cooling-off" period in real estate as there is in other areas, such as buying a car.

You signed a contract, which is a legal, binding document on both buyer and seller. Unless you have contingencies written into that contract -- such as financing, selling your own home, or getting a favorable inspection from a home inspector -- you will not be able to back out of the deal.

You state that you submitted a number of repairs items to the seller. Do you have an inspection contingency? Does it give you the right to cancel the contract if the seller refuses to make those repairs?

If you try to back out of the contract, the seller generally has three remedies. He can (1) keep your earnest money deposit; (2) sue you for any damages incurred as a result of your breach -- such as the house later sells at a lower price than your contract price; or (3) sue for specific performance. This means that the seller can take you to court and a judge can force you to buy the house.

If you have second thoughts, you should have considered this before you signed the contract.

DEAR BENNY: It seems that $2,500 to refinance a mortgage is too much. Do you agree? We have a 7-year adjustable-rate mortgage (ARM) with three years remaining; we have good credit and a very good payment history. The loan is with Chase and they want $2,500 to refinance to a fixed loan. Bank of America wants $3,000 to close on a new fixed loan plus $2,000 for escrow.

The original loan was for $195,000 principal with $85,000 down, and our current principal is $188,000. Your opinion and any advice you can provide would be appreciated. We always read and enjoy your helpful articles on real estate. –John

DEAR JOHN: Thanks for your kind comments about my column.

Regardless of cost, you should seriously consider getting a fixed-rate mortgage as soon as possible. No one knows what rates will be three years from now when your ARM will require a change from your present rate.

I can't comment on the closing costs, because there are differences in these fees in different parts of the country. You should shop around; discuss your situation with a number of lenders before you make your decision.

I would also talk directly to Chase -- your current lender -- and try to go to the highest person in that company as possible. Explain that you want to refinance, and would prefer to stay with Chase, but that they should give you a discount on the closing costs. Some banks will do that just to keep a good customer.

DEAR BENNY: Our mortgage payment is due on the first of the month with a 15-day grace period. All payments have always been made within the grace period. My wife feels that by not paying the mortgage on the first of the month we are paying more in interest when I make the payment later in the grace period. It is my point that as long as we make payments within the grace period it makes no difference as to the amount of interest we pay on our mortgage. Who is right? Please respond. –Eugene

DEAR EUGENE: I did not know the answer so I submitted your question to Jack Guttentag, the "Mortgage Professor." Here's his response: "Only so-called 'simple-interest mortgages' accrue interest daily; most mortgages accrue monthly; and it does not matter when during the grace period you pay. But if they have a simple-interest loan, the wife is right."

If you do not know what kind of mortgage you have (it should be spelled out in your promissory note), I suggest that you contact your mortgage lender and demand a response.

DEAR BENNY: I am thinking about buying a couple of condos in a high-rise as rental properties. I have a solid background in rentals over the past 20 years, but my experience is all with duplexes and houses. The condos are extremely affordable, and in an area that rents well. So, I'm not concerned about cash-flow issues. The building has mainly been rental over the years. I am going in knowing that most of the occupants won't be owners, which usually is not a good thing, but in this case seems to work.

I am concerned, however, about the security of my overall investment. Since the building is not selling very well at the moment, I have questions such as: (1) what happens if the building's developers go bankrupt? and (2) what recourse do I have if they fail to maintain the property before a condo board (not dominated by the developer) takes control of the building? Are there other pitfalls that I am neglecting to mention? –Allen

DEAR ALLEN: You obviously are in decent financial shape, and are raising good questions in advance of committing yourself to the purchase. The first thing I would suggest is for you to consider whether it makes sense to own two condominium units in the same building. What's the old expression about putting all your eggs in one basket?

In some states, the seller of a condominium unit is required to provide what is known as a "resale package," which contains the legal documents (declaration and bylaws) as well as current financial information, including the amount of any reserves that association has. If you are buying from a developer, you have the right to review the public offering statement, which contains this same information.

If the developer goes bankrupt, its lender will take over the project. Again, state laws differ on whether the lender will become the successor developer and be bound by the same obligations as the original developer. You should discuss this with your personal attorney.

You should also ask about what happens if the developer fails to maintain the property before an elected board of directors takes over control. Unfortunately, in today's economy, even those boards are struggling in many parts of the country. If a number of owners are unable or unwilling to pay their monthly assessments, the association will be in trouble. With all of the foreclosures happening around the country, many owners take the position, "I will lose my unit so why pay my association fees?"

You have a lot of homework to do before you decide to buy. Make sure you read everything about the project, especially the financials, before you plunge into more investments.

DEAR BENNY: My mom passed away two months ago and my father passed away eight years ago. She lived in her house for 30 years until the day she died. The house is still under my parent's name. She did not have a living trust or a will, and my parents have four children. The house is worth about $1 million. Is the city in which the property is located going to put my mom's house in probate? If so, do I have to hire a probate lawyer? Can the children just put the house on the market and sell it? –Mae

DEAR MAE: I will give you a very short answer. The city does not take any action, but you

need to retain a lawyer immediately. You and your siblings have a very valuable asset, and you don't want to lose it. Your family will have to start probate proceedings, and inheritance and estate taxes may be owed. Please consult with a lawyer who understands the probate laws in your state.

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