



PROS, CONS OF JOINT TENANCY REAL ESTATE OWNERSHIP July 2004

Will I avoid probate costs?

Last month our nation mourned the passing of President Ronald Reagan. But within a few days after his impressive funeral and burial, speculation began growing about the validity of his latest will, which might have been executed after he was diagnosed with Alzheimer's disease.

Reportedly, at the time he signed that latest will, he was not getting along with one of his children and might have disinherited that offspring. Although the will has not yet been presented for probate, the situation shows the weakness of testamentary wills, which are subject to potential will contests.

PROS AND CONS OF JOINT TENANCY REAL ESTATE OWNERSHIP

However, when two or more individuals hold title to real estate and other major assets as joint tenants with right of survivorship, their written "last will and testament" has no effect on such joint tenancy property.

The reason is joint tenancy assets pass, without probate court proceedings, to the surviving joint tenant(s). All that is usually required is for the surviving joint tenant to record (a) a certified copy of the deceased joint tenant's death certificate and (b) an affidavit of survivorship.

There is virtually no way for disappointed heirs to successfully contest joint tenancy property title passing to the surviving joint tenant co-owner(s).

HOW TENANCY BY THE ENTIRETIES IS DIFFERENT

Twenty-four states allow a special variation of joint tenancy between husband and wife. Tenancy by the entireties has the same automatic survivorship feature. But any lifetime

conveyances can only be made with the signatures of both spouses. This overcomes a major joint tenancy drawback discussed below.

Tenancy by the entireties is allowed between spouses only in Alaska, Arkansas, Delaware, Florida, Hawaii, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Vermont, Virginia, Wyoming, and the District of Columbia.

PROS AND CONS OF JOINT TENANCY WITH RIGHT OF SURVIVORSHIP

Most co-owners who take title as joint tenants (or husband and wife tenants by the entireties where allowed) usually don't consider the good and bad legal consequences. Here are the major considerations which should be evaluated:

1—YOUR WILL HAS NO EFFECT ON JOINT TENANCY PROPERTY. A personal will does not affect joint tenancy property. Especially in second marriages, this consideration can be very important if each co-owner wants their property share to pass by their will to one or more children from a first marriage. Holding title as tenants in common, or in a revocable living trust, might be wise in such a situation.

2—PROBATE COSTS AND DELAYS ARE AVOIDED. Considered a major advantage, joint tenancy property avoids probate costs and delays after one joint tenant (or tenant by the entirety) dies. Title automatically goes to the surviving joint tenant without probate.

3—JOINT TENANCY SHARES ARE ALWAYS EQUAL. No matter how many joint tenant co-owners of a property, they all own equal shares. To illustrate, two joint tenants each own 50 percent, three joint tenants each own 33 1/3 percent, and four joint tenants each own 25 percent.

Where the co-owners desire unequal ownership shares, another title method must be used, such as tenants in common or a partnership.

4—ALL JOINT TENANTS SHARE IN OCCUPANCY, MANAGEMENT, AND SALES DECISION. Each joint tenant has a right to occupy the property and participate in its management. This is normally not a problem.

However, this can become a drawback, especially with rental property, such as when one joint tenant refuses to participate in refinancing the mortgage or making major management decisions.

Another difficulty can develop if one or more joint tenants are not yet 18 but the other joint tenants want to sell the property. Because minors own real estate, but they cannot convey realty titles, they must be represented by a court-appointed guardian. Similar problems occur if one joint tenant is incompetent, perhaps due to a serious stroke or Alzheimer's disease.

5—ONE JOINT TENANT CAN FORCE A PROPERTY SALE. In most states, one joint tenant co-owner can force a property sale even if the other joint tenant(s) doesn't want to sell. It is called a "partition lawsuit." The same result applies to tenancy in common property.

6—A JOINT TENANT CAN SECRETLY TRANSFER THEIR TITLE. In most states, a joint tenant does not need approval of the other co-owner(s) to transfer title (except tenancy by the entirety which requires concurrence by both spouses).

The most famous court decision on this issue is the 1980 case of *Riddle v. Harmon* (162 Cal.Rptr. 530). The joint tenant wife secretly signed and recorded her quit claim deed from herself as a joint tenant to herself as a tenant in common. She died soon thereafter.

Her surviving husband presumed he owned the entire property after her death as the surviving joint tenant. But the court ruled he was not a surviving joint tenant and her 50 percent tenant in common interest passed to a third party by her will. The widower husband, of course, continued owning his 50 percent share, rather than the 100 percent he anticipated.

7—JOINT TENANTS STILL NEED INDIVIDUAL WILLS. For many possible reasons, joint tenants (and tenants by the entirety) need individual testamentary wills.

For example, suppose both joint tenant homeowners die in a plane crash at the same time. Because it can't be determined who survived, each joint tenant's home share then passes according to the terms of his or her wills.

Or, one joint tenant might survive the other just a short time. That happened in Berkeley, Calif., a few years ago. Joint tenancy real estate owners Larry and his girlfriend, Lana, went out for an evening walk. A drive-by shooter's bullet hit Larry. Another bullet hit Lana.

Both were rushed to a nearby hospital. Lana died at 2:58 a.m. Larry, unconscious and in a coma, was kept alive on a ventilator until 4:55 a.m. when he died.

Because Larry survived Lana by a few hours, he was the surviving joint tenant of their properties. His relatives inherited all the joint tenancy real estate under Larry's will. Lana's relatives received nothing because she was not the surviving joint tenant.

8—JOINT TENANCY MURDER LAWS REQUIRE INDIVIDUAL WILLS. Every state has a statute specifying that when a joint tenant murders a joint tenant co-owner, the murderer shall not receive the deceased joint tenant's share of the property. Under such circumstances, the joint tenancy share of the deceased's property passes according to their will, as if it were tenancy in common property, but not to the surviving murderer. If no will is found, the deceased joint tenant's share then passes to the closest relative according to the state law of intestate succession.

CONCLUSION: Joint tenancy with right of survivorship (or tenancy by the entireties between husband and wife in some states) is not always the perfect way for co-owners to hold real estate titles to avoid probate costs and delays.

For more information, please consult a local real estate attorney. More details are in my special report, "Insider Secrets of the Best Ways to Hold Title to Your Home and Investment Property," available for instant Internet download here.

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