

JOINT TENANCY

What is Joint Tenancy?

Joint tenancy is a way of owning real or personal property by two or more individuals. When property is owned in joint tenancy, there are two or more owners and each owns an undivided share in the same interest. If property is not owned in joint tenancy it is owned as “tenants in common” and each owner owns a particular percentage.

In order to own property in joint tenancy, the deed or title must have the words “as joint tenants” or in “in joint tenancy,” otherwise it will be assumed that the co-owners own the property as tenants in common. In a joint tenancy situation, when one of the joint tenants dies, his or her interest automatically passes to the surviving joint tenant(s), allowing the surviving joint tenant(s) to avoid probate.

Advantages vs. Disadvantages of Joint Tenancy

Advantages:

- Owning property in joint tenancy allows the surviving tenants to avoid filing a probate action with the Court, because title transfers by operation of law.
- For Medicaid recipients, if property is owned in joint tenancy it never becomes part of the recipient’s probate estate, and is therefore not subject to estate recovery claims by the Colorado Department of Health Care Policy and Financing.

Disadvantages:

- Property owned in joint tenancy is subject to the liabilities and creditors of all of the joint tenants. For example, if one of the joint tenants is held liable in a civil law suit, the plaintiff or creditor may force the sale of the entire property. Similarly, if a

bank account is owned in joint tenancy, any of the joint tenants has the right to make withdrawal at any time.

- Tilting or transferring property into joint tenancy or making major improvements to property already held in joint tenancy, may cause gift tax liability (unless the joint tenants are married).
- Owning property in joint tenancy may cause unintended consequences, such as disinheriting a child or loved one because provisions were made for them in the will, but the joint tenancy property is not subject to the terms of the will.
- Property owned in joint tenancy may be subject to the claims of a surviving spouse and children when a decedent’s probate estate assets are insufficient to pay such claims.

What is the process for transferring title when one joint tenant dies?

The most common assets owned in joint tenancy are real property and bank accounts. In order to transfer the deceased joint tenant’s interest to the surviving joint tenant(s), all that is usually required is the recording of the death certificate and an affidavit in the Clerk and Records Office in the county where the property is owned or by presenting an original death certificate to the bank.

How are taxes affected by joint tenancy?

The laws of estate and gift taxes are considered to be very complicated. You should consult with an attorney or Certified Public Accountant. Estate and gift taxes are being evaluated for changes effective Jan. 1, 2013.

Estate tax—Owning property in joint tenancy does not avoid estate taxes, but simply allows for the passing of title to the surviving joint tenants without having to go through the

probate process. If the joint tenants are not spouses, the property value must be included in the decedent’s estate value, which, depending on the total value, may be subject to estate tax liability.

Income tax—All joint tenants are ordinarily expected to show their share of any income derived from property owned in joint tenancy, and declare their respective share on their income tax return and to prorate taxes and other deductions.

Gift tax—Depending on who the joint tenants are, there may be gift tax implications for transferring or tilting property in joint tenancy. A person may make up to \$13,000 per person in 2011 (and subject to a lifetime cap). A person may make a gift of up to \$13,000 per individual without being required to file a gift tax return. However, gifts above that amount made to anyone other than a spouse require the filing of a gift tax return and may subject the estate to gift tax liability.

Does a Will affect property held in joint tenancy?

There are certain types of assets that are not governed or distributed per the terms of a will. A will only governs property that was owned by you in your individual name that does not have a beneficiary designation. Since joint tenancy property passes immediately to the surviving joint tenant(s) and does not go through the probate process, it is not controlled by the terms of the will. Therefore, it is important to understand how your property is titled and how the different ownership types work in conjunction with your will.

Do you need a Will if everything you own is in joint tenancy?

While assets owned in joint tenancy are not subject to the instructions in a will and do not have to go through the probate process, having a will as a safety net is a wise decision. Some property cannot be owned in joint tenancy, and if the joint tenants die at the same time, the property will then be subject to the joint tenants' Wills or the intestacy laws.

Can joint tenancy property be converted to individually owned property?

Any of the joint tenants can change how the property is titled by mutual agreement or by conveying the property to a third party. However, it is important to note that if there are only two joint tenants and one relinquishes their right, there may be gift tax implications. Consult with an accountant to determine any tax implications



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