

# JOINT TENANCY

## **What is a Joint Tenancy?**

Joint tenancy is a form of ownership by two or more individuals together. It differs from other types of co-ownership in that the surviving joint tenant immediately becomes the owner of the whole property upon the death of the other joint tenant. This is called a “right of survivorship.”

A joint tenancy between a husband and wife is generally known as a tenancy by the entirety. Tenancy by the entirety has some different characteristics than other joint tenancies, such as the inability of one joint tenant to sever the ownership.

## **What is a Tenancy in Common?**

A tenancy in common is another form of co-ownership. It is the ownership of an asset by two or more individuals together, but without the rights of survivorship that are found in a joint tenancy. Thus, on the death of one co-owner, his or her interest will not pass to the surviving owner or owners but will pass as an individual share according to his or her will or, if there is no will, by the law determining heirs.

## **How is a Joint Tenancy Created, and What Property Can Be So Held?**

State law controls the creation of a joint tenancy in both real and personal property (real property is land and attachments to the land, personal property is generally all other types of property). For transfers to two or more persons who are not husband and wife, the deed or conveyance must expressly state an intention to create a joint tenancy by noting that the property will be held not as tenants in common but as joint tenants with rights of survivorship. For transfers of personal property, such as stock certificates, the simple letters “JTWRS” may be used to designate a joint tenancy with right of survivorship.

A joint tenancy can be created in almost any type of property. Different types of jointly held property have different characteristics. Either joint tenant of a bank account usually may withdraw the whole amount on deposit, depending upon the account agreement. The signatures of all joint tenants are generally required in order to transfer or sell bonds and corporate stocks. All joint tenants, and their spouses, must sign deeds and contracts to transfer or sell real estate.

## **Is a Joint Tenancy an Adequate Substitute for a Will?**

No! Only with a will can a person be certain that his or her assets will pass as intended. A will, properly written and executed, applies to all of the property of the maker for which he or she has not otherwise provided. Almost everyone should have a will, even though he or she may have provided for property to pass by other methods.

A joint tenancy is not a comprehensive method of transfer and applies only to the specific property described in the instrument creating the joint tenancy. Furthermore, while a joint tenancy does provide for the surviving owner to own the property upon the death of one of the joint tenants, no provisions are included for the disposition of the property upon the death of the survivor. In addition, the joint tenant who is intended to be the survivor may die first, frustrating the intent of the parties. A properly structured will would address these and many other of life's uncertainties.

A joint tenancy is a present transfer of an actual interest in the property. Except for joint bank accounts, it cannot be revoked or reversed without the joint tenant's cooperation, and for real property the cooperation of the joint tenant's spouse is also required. Creating a joint tenancy with someone other than your spouse may result in a gift being subject to gift tax.

A will is revocable and may be changed as circumstances change. It is the cornerstone of an effective estate plan.

## **Will a Joint Tenancy Avoid Probate Expenses?**

Joint holdings may reduce probate involvement and expenses. However, while joint assets may avoid the formal estate administration that is required when property passes under a will, other costs may occur. Steps must be taken to reregister the assets in the survivor's name and to comply with the various state and federal tax requirements. The process can be time-consuming and expensive. In addition, placing assets in joint names with another, especially someone other than a spouse, creates uncertainties and exposes the assets to the disadvantages discussed below.

## **What Are Some Advantages of Joint Tenancy?**

Some of the advantages are:

- Property passes to the survivor without the need for probate administration. Generally, only a death certificate is needed to establish the survivor's ownership in the property.
- Where the first to die wishes all of his or her property to pass outright to a surviving spouse, joint ownership may afford a convenient and economical way to pass title to the particular property so owned. For example, it may be advantageous for a summer home located in another state to be owned in joint names with the right of survivorship. This way, upon the death of either joint tenant, the survivor will own the home

outright and the need for probate administration in the other state will be avoided.

- The family residence is often held in joint names, especially where the surviving spouse is likely to continue to use the property as his or her home. In that case, joint ownership may be an appropriate method of ensuring continuity of ownership.
- A joint household checking or savings account can offer a married couple both convenience and flexibility, as it makes funds immediately available in the event one spouse dies or becomes incapacitated.

## **What Are Some Disadvantages of Joint Tenancy?**

A few of the disadvantages are:

- The original owner of the property who subsequently placed it in a joint tenancy is no longer the sole owner.
- If the original owner later desires to dispose of the property, in many cases he or she cannot sell his or her partial interest unless the other joint tenants agree and cooperate.
- If both joint owners die in a common accident or disaster, and it cannot be determined who died first, the legal ownership of the property may be uncertain, resulting in additional legal costs.
- If a conservator is appointed for the original owner, the probate court's authority may be required to use the asset for that owner, increasing the cost of the conservatorship.
- If minors or legally disabled adults are involved, costly and cumbersome conservatorship proceedings may be necessary.
- An always present danger in joint tenancy arrangements is that the co-owners may disagree. If the co-owners do disagree, a costly and time consuming lawsuit may be required for the original owner to exercise his or her rights regarding the asset.
- If an asset is owned jointly prior to marriage, the original owner may lose part of the asset in a divorce.
- A jointly owned asset will be subject to judgments against every owner and may be lost in the bankruptcy of any owner.
- The financial management advantages of trusts are eliminated, especially where aged parents or minor children are involved, as are the possible tax savings available to trusts and estates.
- Assets may not be available to the executor of a deceased joint owner's estate. In such a situation, it may then be necessary to sell other assets in order to meet tax payments or other cash needs in order to settle the affairs of the decedent.

## **What Tax Consequences Could Result From the Creation of a Joint Tenancy?**

Serious tax disadvantages may result from the use of property held as a joint tenancy. If all the property owned at death – including joint property, life insurance and employee benefits – exceeds a certain exemption limit, the estate may be subject to federal and state estate taxes. Estate taxes are not avoided by joint tenancy. In many instances, all or part of jointly held property may be includable in the estate of the first joint tenant to die.

An asset owned jointly may retain part of its original cost basis. Upon the sale of the asset after the death of one owner, the capital gains taxes may be significantly increased.

Transferring property into joint tenancy may also result in a gift tax. While recent changes in federal tax laws have to a large extent minimized the gift tax consequences of joint ownership, especially between spouses, effective tax planning for large estates can be greatly complicated by the use of joint property arrangements.

## **May Safe Deposit Boxes Be Jointly Held?**

Under Missouri statutes, safe deposit boxes may be jointly rented. This type of registration must be specifically noted in the rental agreement with the bank or safe deposit box company. With a jointly rented safe deposit box, the surviving joint tenant will have immediate access to the box upon the death of the other joint tenant. However, even though a safe deposit box is rented in joint names, that alone does not mean that all of the assets contained in the box are also jointly owned. As a result, joint ownership of a safe deposit box may complicate matters rather than making them simpler.

## **Should I Use a Joint Account for Help in Writing Checks?**

No. Some people will place a child or someone else on a checking account as a joint tenant to help them write checks to assure that bills are paid in the event the original owner is unable to do so. Upon the original owner's death, the entire account will belong to the other person; other heirs will not share in it. Oral understandings about what is to be done with the account balance upon death are frequently misunderstood and often forgotten. Furthermore, the surviving joint tenant may be subject to gift tax liability if he or she attempts to share the funds in the account with other intended heirs after the original owner's death. Anyone with a concern or needing help in this area should see their lawyer about a durable power of attorney or place a trusted person on the account as "agent."

## **Alternatives to Joint Tenancy That Also Avoid Probate**

Missouri's Pay On Death ("POD"), Transfer On Death ("TOD") and Beneficiary Deed statutes provide for the disposition of many types of property at the time of

death without probate proceedings and without some of the disadvantages of joint tenancies. Under these statutes, the persons who are to receive the property on the death of the original owner may be designated as beneficiaries for accounts in financial institutions, securities, real estate and other instruments of title.

POD and TOD beneficiary designations and beneficiary deeds are revocable by the owner, the account or property passes outside of probate, and consent of the beneficiary to mortgage or sell the property is not required. As no present interest is transferred, no gift tax liability is incurred. The arrangement is preferable to joint tenancy in these respects. However, these designations are subject to some of the same disadvantages as jointly owned property; they are not intended to be an adequate substitute for a will or trust, since succession among intended beneficiaries usually cannot be adequately described in detail. A person should not open POD accounts or execute transfer on death instructions or beneficiary deeds without first consulting an estate planning attorney.

## **How Can I Tell Whether or Not a Joint Tenancy is Advisable for Me?**

Your lawyer can advise you after he or she has been made aware of all of the facts concerning both your property and your family situation. The cost of such advice is usually quite small compared to the savings that may result and the pitfalls that can be avoided. Due to continual changes in the tax laws, the need for legal counsel is essential in estate planning.

Your lawyer can help you determine what property should be owned as joint tenants or as tenants by the entireties, when POD or TOD beneficiary designations might be useful for specific gifts, when a trust might be an appropriate part of your estate plan, and what property should pass under a will and be administered in your estate. If a gift to a minor is involved, your lawyer also can tell you about the Missouri Transfers to Minors Law.

In 2011, the Missouri Legislature created a trust specifically for tenancy by the entirety property called a Qualified Spousal Trust. Please talk to your legal advisor about the benefits of such a trust.