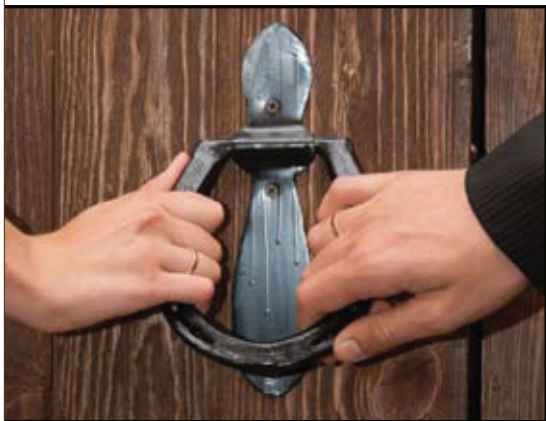


Joint Tenancy: *Who Really Survives?*



Any accountant, real estate agent or attorney who is reviewing a married couple's household documents can tell you that one thing pops up on the deeds to homes more than any other phrase: Joint Tenants with Rights of Survival. It means that if one of the people on the deed (usually the husband or the wife) dies, the other automatically owns the property without going through probate administration.

Too bad that one good idea carries so many bad consequences in the same case. Consider the downside of this survivorship concept:

- Joint Tenancy causes married couples to likely lose favorable stepped up basis tax treatment at the first death. This often means higher taxes to pay for the surviving spouse later on when it's time to sell the house.
- Couples who own their property in joint tenancy forfeit the control that a trust provides when one or the other spouse becomes incapacitated. In other words, it is harder to manage the property when either of the spouses gets sick.
- When one spouse dies and the other spouse receives the house by right of survivorship due to the joint tenancy, the wishes of the deceased spouse have no control over how that property is managed after their death. The survivor can then favor one child over other children, or one set of beneficiaries over the ones their deceased spouse may have wanted.
- If the surviving spouse remarries and causes the house to be held in joint tenancy, children of the first marriage may be unintentionally disinherited when the new spouse outlives the surviving spouse and takes the home by survivorship.
- When surviving spouses receive the home by survivorship right, they sometimes name a family member as joint tenant on a property. They do this to make it easy for the grandchild or the child or niece or nephew to receive the property after the grandparent dies. Sadly, they are exposing

their property to any claims against their children or grandchildren. This has caused many elderly people to lose their homes when creditors foreclose on their property for debts which were never theirs.

- One client recently had a father who named his roommate as a joint tenant so that if the father died, the roommate would have a place to live. Unfortunately, the roommate died first, but not before having moved into a long term care facility. Because her stay at the facility involved Medical payments, the state filed a claim against the client's dad based on the roommate's joint tenancy interest in the property. California has a specific statute allowing this to happen: joint tenancy is truly a trap for the unprepared!

No other term hits the homeowners' headlines with such regularity. Go ahead and take a moment to check your own deed. Look at it now. Odds are that it says "joint tenants" on it, and probably "rights of survival" too. Now ask yourself a question: did you tell anyone to put that phrase on the deed?

Most likely you didn't. Putting that term on the deed is just a bad habit that paper handlers in real estate and lending transactions have gotten into over the years. Joint tenancy terminology has been like smoking: for years it was just an irritating habit, but the more we learned about it, the more insistent we became that people stop using it. Unfortunately, today the term "joint tenants" still prevails in many real property transactions.

There is no good reason for using "joint tenant" on your deeds, and there is in fact a much easier method to accomplish the survivorship goal that people are after. That easier method is by owning the property in a trust, which gives the property owners a much easier method for accomplishing the same ease of survivorship, along with a number of other desirable results:

- The use of a trust between married people does not forfeit the tax benefits of a stepped up basis the way a survivorship aspect of a joint tenancy does. The extra taxes from survivorships do not haunt the couples who put their real property in a trust instead of in joint tenancy.
- Husbands and wives who own their homes in trust have an easier time managing the property when either of the spouses gets sick, or otherwise incapacitated, because they do not need to seek a conservatorship in order to manage the family home without their spouse's input.
- With a trust, the death of one spouse need not allow the surviving spouse the ability to change how that property is distributed when the second spouse dies. Husbands and wives can easily arrange in advance to keep their equal distribution in

place following their deaths.

- Homes owned in trust can avoid unintentional disinheritances by providing for their assets to be tied to the trust distribution which will completely avoid any interference by a surviving spouse's new partner. The surviving spouse would not have the power to make the new husband or wife a joint tenant, because the ownership of the house would be determined in advance by the trust instrument.
- When property owners hold their homes in trust, there is no need to name a family member as a joint tenant: the house will pass outside of probate under the terms of the trust.
- The desire to name a friend or family member as a joint tenant to assure that person a place to live disappears when a trust owns the home. This is because the trust can easily include instructions for the trustee to allow that person the right to live in the property for their lifetime, after which the home would then go to the children of the original spouses, clearly what everyone originally intended.

Most people have no idea of the negative consequences of joint tenancy ownership of their homes. Furthermore, most of them never selected the joint tenancy option: a clerk in a loan processing office put the term on their deed without asking how they wanted the property titled. The wisest approach to how one's home should be owned is not by casting the issue to the discretion of people in the back room of the mortgage company; the wisest approach is to share your information with an attorney who can provide you with the information you need to make the best choices possible for your family and your future.



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