

## JOINT TENANCY & TENANCY IN COMMON

### DISCLAIMER

*This article is intended for informational purposes, only. It does not constitute legal advice. Nor is it a substitute for legal advice.*

People who work in estate planning find it useful to speak of the ownership of property as being *concurrent* or *successive*. Concurrent ownership means that two or more people own a piece of property together at the same time. Successive ownership describes ownership through time, with one person succeeding to (following in) ownership after another.

There are in Nebraska essentially two ways to own property concurrently with another person: *joint tenancy* or *tenancy in common*.<sup>1</sup> In joint tenancy each of the concurrent owners owns all of the property. For example, spouses own a bank account jointly; either one of them may withdraw all the funds in the account. In tenancy in common, each owner owns an undivided portion of the property. Three siblings, for example, own a parcel of land as tenants in common; each of them owns an undivided one-third interest.<sup>2</sup>

Joint tenancy is characterized by something called the *right of survivorship*, or survivorship, for short. It is also sometimes less formally known as “last one standing gets it all.” Let’s say two sisters, Jill and Connie, own a parcel of land as joint tenants with right of survivorship. Jill has a will. Her will devises (leaves) her property to her children. Jill dies before Connie. Do Jill’s children inherit her interest in the parcel that she owned jointly with Connie? No. At Jill’s death, Connie automatically comes to own the whole parcel in her own name. Jill’s interest in the property, her property rights, ended with her life. Clearly, it is Connie who will decide succession of ownership, that is, who will own the property after her.

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<sup>1</sup> This article will not discuss the law of community property jurisdictions. Nor will it discuss the doctrine of entreties. In a nutshell, community property is a form of ownership between spouses that applies in several jurisdictions in the United States, such as Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington, and which can affect a spouse’s rights to property in a divorce and with respect to dispositions of property during life or at the time of death. In general, property acquired during the marriage becomes community property and is owned by the spouses in equal undivided shares, not subject to any survivorship rights.

<sup>2</sup> For those who are interested, both joint tenancy and tenancy in common came to depend in the law on something called *unities*. Tenancy in common depends upon a single unity, that of possession – the right to possess common property. Joint tenancy, however, depends upon the existence of four unities: a unity of possession (same rights of possession), a unity of interest (identical quality of interests), a unity of time (acquired interests at same time), and a unity of title (acquired interests by same instrument/document). Any act by one of the joint tenants that does anything to destroy one or more of the necessary unities severs the joint tenancy and extinguishes the right of survivorship. For example, if one of the joint tenants of a bank account withdraws all the money and uses those funds to purchase a car, the car is not owned jointly by the owners of the account. The withdrawal of all the funds by one of the joint owners severed the joint tenancy with respect to those funds and destroyed the right of survivorship.

Let's assume that Jill and Connie owned the parcel as tenants in common. They each had an undivided half-interest. Upon Jill's death, her half-interest will go to her children, as provided in her will. Those children will now own that half-interest as tenants in common with their aunt, Connie.

The law sometimes speaks of tenants in common as being able to devise, alienate or bequeath their property interests, that is, to transfer those interests by some kind of testamentary disposition, whether it is a will or a trust or a transfer on death deed. Survivorship, on the other hand, means that the last living owner succeeds to the entire property at the time of the other concurrent owners' deaths.

Joint tenancy with right of survivorship, as a form of ownership, is most common among spouses, and, secondly, among parents and children. It is far less common a form of concurrent ownership among siblings or unrelated parties.

Joint tenancy with right of survivorship has sometimes been referred to as a poor person's will. If a parent and child, for example, own property as joint tenants, then upon the parent's death the child receives the property without the need and cost of a probate. Joint tenancy is part of what are sometimes called nonprobate transfers on death.<sup>3</sup>

Joint tenancy with right of survivorship may be the simplest and most efficient way for spouses to own property. If all the marital property is owned as joint tenants, then at the time of the first spouse's death, nothing needs to happen to transfer property. The survivor automatically owns everything in his or her own name, i.e. succeeds to the entire estate. Thus, joint tenancy between spouses can eliminate the need for either probate or the use of trusts at the time of the first death, and save the administrative costs and time of probate. The surviving spouse as sole owner of the property will, of course, have power to decide who will receive that property upon his or her death. There may be numerous reasons beyond the scope of this article for not choosing to rely on joint tenancy as the primary tool for estate transfer between spouses, such as protecting the interests of children from remarriage by the surviving spouse, sheltering appreciation, and basis adjustment planning. The most important reason, however, for not using joint tenancy between spouses no longer applies for most people: not to squander a unified credit. In the recent past, before the permanent enactment of the "portability rule" (which now enables spouses to combine their unified credits at the time of the first death without the need for advance planning), spousal joint tenancy could lead to some very serious and unfortunate estate tax problems. (See articles on *Transfer Taxes* and on *Spousal Unified Credit Planning & The Portability Rule*.)

### Estate Taxes

Let's look at some of the estate tax implications of joint tenancy and tenancy in common. If property is owned by spouses as joint tenants, then for estate tax purposes the value of

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<sup>3</sup> Probate is the court proceeding that occurs when property is being transferred at the time of death through the deceased person's will. Nonprobate transfers include such estate planning tools as transfer on death deeds, payment on death and other beneficiary designations, trusts and joint tenancy with right of survivorship. See separate articles on *Probate*, on *Transfer on Death Deeds*, and on *Trusts*.

half of the property is included in the taxable estate of the first to die.<sup>4</sup> It is essentially splitting the ownership for estate tax purposes. This means that the survivor receives a *basis adjustment* equal to one-half the value of the joint property. For example, Bob and Patty own a quarter section (160 acres) of farm land as joint tenants. They paid \$1000 per acre for that land. They therefore have a basis equal to \$160,000 in the land. At the time of Bob's death, the land is worth \$5000 per acre. Patty will receive a step up in basis at the time of Bob's death in half the value of the property. She will therefore have a basis in an undivided half of the parcel equal to \$5000 per acre and in the other half her basis will remain \$1000. The total basis of the property in Patty's hands is therefore equal to \$480,000. (This same basis adjustment would occur if Bob and Patty had owned the quarter as tenants in common.) If Patty were to sell the quarter for \$5000 per acre, she would pay capital gain tax on approximately \$320,000.

If we assume that Bob owned all of the quarter of land in his name, and that he left it to Patty at the time of his death, which, of course, means that they did not own it jointly, then Patty would receive a step-up in basis for the entire property, and her basis in the quarter would be \$800,000. If Patty were then to sell the quarter for \$5000 per acre, she would pay no capital gain tax.

The rules are different for basis adjustment in joint tenancy property where the owners are not spouses. There is no splitting of the property for estate tax purposes. In this case, the starting point in the law is that the value of the entire property is included in the estate of the first owner to die. This is true except to the extent that the surviving owner(s) can demonstrate that he or she contributed to the purchase or improvement of the property.

The basis which the surviving owner receives in the property at the time of death of the other joint owner depends on how much of the value of that property is included in the deceased owner's estate. For example, if a parent holds property in joint tenancy with an adult child, and the parent paid for that property, the entire value of the property is included in the parent's taxable estate upon death. This means that the child, at the time of the parent's death, receives a basis in the property equal to the value of the property at the time of that parent's death. By way of another example, if the parent and the child bought the property together, or if the child improved the property after the parent purchased it, then the value included in the parent's taxable estate is the full value of the property less the amount the child contributed to the purchase or the amount the child's improvements added to the value of the property.

### Other Taxation

In addition to possible estate and income tax consequences of joint tenancy, there can also be gift tax concerns. Analysis of the gift tax implications of creating and terminating joint tenancy property becomes complicated, quickly. Questions arise as to the whether

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<sup>4</sup> Inclusion in the taxable estate does not mean that a federal estate tax will have to be paid. Between spouses, transfers are not subject to transfer taxes. In addition, in most estates, the unified credit will be used to exempt such property from estate tax. The unified credit exemption amount, as of 2013, was "permanently" fixed at \$5 million per person, indexed to inflation. See articles on *Transfer Taxes* and on *Spousal Unified Credit Planning*.

or not a gift has actually occurred for tax purposes, and depending on the answer to this question, and on the time the gift was completed, different methods of valuing the gift arise. Additional questions arise as to whether the recipients of the gift can unilaterally terminate the joint tenancy.

In order for a gift to occur for tax purposes, and for the possible imposition of a gift tax, the transfer of property to another person by the donor (giver) has to be complete, i.e. the donor needs to transfer all of his or her interest in the *gifted property*. (This does not mean that the donor needs to transfer all of his or her interest in a property, only that the part which is transferred needs to be transferred in full.) So, for example, if a person transfers property outright to three people as joint tenants with rights of survivorship, a taxable gift has occurred.<sup>5</sup> Of course, there may be no gift tax payable either through use of the annual exclusion amount, the marital deduction or the unified credit. (See article on *Transfer Taxes*.) There is no gift tax consequence to the people who received the gift.

The value of the gift to each of the three people may make a difference, for example, if the donor is trying to make the gifts under the annual exclusion. When gifts are made in joint tenancy, valuation of the gift depends on whether or not each of the owners has a unilateral right to terminate the joint tenancy. If they do, then the valuation is based on each owner's pro rata share in the property. If they do not have such a unilateral right of termination, the value of each owner's share is based on actuarial probabilities, i.e. life expectancy, with the youngest joint owner's share being more valuable than the older owners' shares.

In general, in analyzing the tax consequences, it is important to know the following information: a) when the joint tenancy was created, and how it was created; b) when it was terminated and how; c) the value of each owner's contribution to the property, i.e. how much each owner contributed either toward acquiring the property or improving it.

It is important to point out that the requirement of a completed transfer before imposition of gift tax also means that certain transfers into joint tenancy may have no gift tax consequence. Such transfers are sometime referred to as being nominal. For example, if an aging parent places one of her children's names on an account as a joint owner merely for convenience sake, it is possible that no gift has occurred.

#### Creation of Joint Tenancy

There are a number of ways that joint tenancy may be created. For example, a person may transfer property that he or she owns into joint tenancy with another person, as when a parent retitles property in joint tenancy with a child. People may inherit property as joint tenants. Property may be purchased in joint tenancy. In Nebraska, the law assumes

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<sup>5</sup> However, if a person transfers property to three people but retains a life estate in the same property, in general no completed gift has occurred, because the donor has kept an income interest in the property. The same incompleteness of a gift may occur where the donor retains the legal right to decide who will come to own property in the future. Whether or not a gift is complete has tax implications not only for gift tax purposes, but for estate and income (basis adjustment) purposes. (See also article on *Life Estate Deeds and Future Interests*.)

that concurrent ownership is a tenancy in common unless the contract creating the tenancy expressly states that it is joint tenancy.<sup>6</sup> It is advisable for titling documents to be clear in the creation of joint tenancy, e.g. “joint tenancy with right of survivorship and not tenancy in common.” The law presumes tenancy in common because the law does not favor joint tenancy with right of survivorship. It does not like the lottery aspect of survivorship.

### Creditors

Let’s assume again that Jill and Connie are joint tenants with right of survivorship. Jill died in debt. Can her creditors seek payment of those debts out of the property she owned in joint tenancy with Connie? Not after Jill dies. Jill’s interest in the parcel of land ended with her life. In other words, creditors of a deceased joint tenant cannot typically reach the property that was held in joint tenancy. This is not true in the case of tenancy in common. Creditors of the deceased tenant in common can seek recovery of debts from the undivided interests of the deceased owner.

If a creditor were to seek recovery of a claim against Jill while she were alive, they could reach her interest in the joint property. In a nutshell, the creditor, if persistent, could destroy the joint tenancy, convert it into a tenancy in common, and thereafter seek to sell the property and apply the proceeds to the debt.

### Partition

Joint tenancy and tenancy in common are both subject to something called the right of partition, or the ability to divide property. The right of partition essentially enables any of the co-owners to force either the physical division of the property among the owners or the sale of the co-owned property. See separate article on *Partition*.

### Conclusion

The titling of property is an important aspect of estate planning. Titling has tax consequences. Joint tenancy with its right of survivorship may be the best, most efficient and least expensive tool for planning an estate, or it may be totally inadequate to accomplish the wishes of the owners. It is a critical part of planning an estate to know, first of all, how property is titled, and, secondly, to understand the advantages and the limits to use of titling in an estate plan.

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<sup>6</sup> In the distant past, there was a common law presumption in favor of joint tenancy. This presumption has been abolished in nearly every state.