JOINT TENANCY CONSIDERATIONS

By Darlynn C. Morgan, Esq.

Joint tenancy is nothing but a planning pitfall. Although joint tenancy has been assailed for years by many estate planning experts, it remains, unfortunately, a very popular form of property ownership.

How Joint Tenancy Works
In joint tenancy, each person owns the entire asset, not a part of the asset. Even if a joint tenant intends to have his or her share pass to loved ones, the property is not controlled by the instructions in the owner's will or trust. Property that is owned in joint tenancy automatically passes to its surviving owners by operation of law.

Misconceptions and the Truth
Joint tenancy can be a trap. On the surface, it appears to be the right way for people who care for each other to own property. However, for most people, the disadvantages of joint tenancy far exceed any advantages. Some of the more devastating pitfalls of joint tenancy are: (1) property passes to unintended heirs, (2) there are no planning opportunities, (3) probate is at best delayed, not totally avoided, and (4) for non-spousal owners, unintentional gift taxes and death taxes can be generated.

Unintended Heirs
If it is your intent to leave your property to your spouse and then to your children, joint tenancy is not for you. Joint tenancy provides no means of ensuring that your property will pass to whom you want. Joint tenancy property cannot be passed by the will of the joint tenant dying first; instead, the property passes to , and is subject to disposition by, the surviving tenant.

For example, if your spouse remarried, your children may inadvertently be disinherited. Or, against your wishes, your spouse may choose to disinherit some or all of your children after your death. If you and your spouse die together in an accident, significant questions may arise as to who is going to inherit your property.

No Planning Opportunities
If you become disabled, your joint tenancy property may be tied up in a guardianship or conservatorship proceeding while you desperately need it for your own or your loved one's care. If your spouse is disabled when you die, the probate court will "inherit" the joint tenancy property and determine how and when it is to be used for your spouse's benefit.

Furthermore, after you die, the estate may be deprived of liquid funds necessary to pay death costs, claims, and taxes. Also, if the joint tenancy property is subject to a mortgage, the property will pass to the surviving joint tenant, but the estate may be required to pay the mortgage out of the residue, thus frustrating the your family giving plan.

Probate Awaits

Joint tenancy passes outside all of your planning and avoids probate--but only on the death of the first spouse. When the second spouse dies, there will be a probate, which tends to be an expensive court proceeding. In situations where both spouses die together, there will be at least one probate, and maybe two. What's worse, if a joint owner becomes sick and is not able to take care of his financial affairs, it may be necessary for the probate court to conduct a guardianship or conservatorship proceeding so the joint asset can be sold. Joint tenancy does not avoid probate; at most it only delays it.

Unintended Gift Taxes

When a nonspouse creates joint tenancy, they often create a gift tax as well. Frequently, an older parent designates a son or daughter as a joint tenant on bank accounts and other property. The moment this is done, the transfer of property may very well be a gift that might have to be reported to the IRS. In some cases, a gift tax may have to be paid. For example, a parent with three children may make one child a joint tenant. When the parent dies, the child inherits the property, no matter what the parent's will or trust says. The primary consequences are (1) if the child is selfish, he or she may legally keep the entire property, or (2) if that child is generous and shares the inheritance, he or she may have to pay a gift tax.

Excellent for Creditors

Property that is owned in joint tenancy is subject to being attached by the creditors of either joint owner. Often a parent will name a child as a joint owner of a bank account or other property. This is usually done for convenience purposes and to avoid probate on the death of the parent. Unfortunately, most people do not realize that the child's creditors can attach any property or assets that the child owns jointly, regardless of whether the child contributed to any part of the joint property. If that son or daughter gets caught up in a divorce proceeding, their joint tenancy interest may be subjected to a claim by their divorcing spouse.

Income Tax Considerations

There are also better tax consequences that can be had for holding property as joint tenants versus other forms of ownership where a "step-up" in basis can be had.

When Discord Arises

Joint tenancy property may be caught up in discord between the joint tenants because of the inability to reach agreement on management of the property and the right of a noncontributing joint tenant to acquire one-half of the property through partition or severance. It is very easy to put someone <u>on</u> title to property as a joint tenant; it is often difficult to get them <u>off</u> of title.

Advantages of Joint Tenancy

So, you might ask, why would anyone ever hold their property as Joint Tenants? First, joint tenancies are easily understood, so there is a perceived advantage due to its simplicity. Also, joint tenancy can be used to avoid probate, because the property does pass by operation of law, without a court proceeding at the first joint tenants death. Next, joint tenancy property may be free from the claims of creditors of the deceased joint tenant if no prior lien was attached. Finally, joint tenancies often represent a relationship commitment.

The disadvantages of joint tenancy usually far outweigh any advantages, so careful consideration should be taken before holding title to property in joint tenancy.

Darlynn Morgan is an attorney, speaker and Personal Family Lawyer. Darlynn makes it easy for your family to talk about and plan for tough subjects like money, death and taxes. Visit www.MorganLawGroup.com for more resources on how to make sure your kids are totally protected if the unthinkable happens to you.