

Recently, one of my clients asked about joint tenancy ownership, as they had put their children on the deed to their home in joint tenancy. It got me to thinking about the different forms of ownership and how to explain why you would want to consider holding your assets in a living trust instead of in joint tenancy.

There are different ways to hold title to properties if the property is not in a living trust. When two or more individuals own property together — whether it's a condominium, a home, or a piece of land — the relationship between the owners is known as “tenancy.”

Tenancy comes in three main forms: **joint tenancy**, **tenancy in common**, and **tenancy by the entirety**. Each has advantages and disadvantages.

Under the **joint tenancy** form of ownership, two or more individuals jointly own an asset. When one of the joint tenants dies, the ownership passes to the surviving joint tenant(s), and will eventually pass to the last surviving party. **Tenancy in common** has a decedent's share pass through probate to the heirs of the decedent.

Tenancy by the Entirety is essentially the same as joint tenancy, except that it is available only to a married couple and may only be terminated by joint action of both owners. Upon the death of one spouse, his/her interest automatically passes to the other spouse, as with joint tenancy, but the creditors of one spouse cannot attach the property or force its sale to recover debts unless both spouses consent.

There are several major **disadvantages** to both joint tenancy and tenancy in common. First, creditors can attach the tenant's property to satisfy a debt so if your child gets in a car wreck, the whole asset is subject to the claim. Another is that if a property is held in joint tenancy with a child or someone other than a spouse, the asset is deemed as a gift, and the portion of the gift does not get a step up in basis — as well as may be subject to gift taxes!

Though joint tenancy avoids probate upon the first death(s), it DOES NOT avoid probate on the death of the last tenant named. Also, the decedent's estate tax exclusion has literally been “thrown away” and can't be used. It also will not allow community property treatment in community property states, as joint tenancy will take precedence over community property rules, thereby receiving a step up in basis on only half the asset.

Holding assets in a good living trust with specific provisions to obtain full advantage is a preferable method of holding title. It's far better to keep the asset in the client's living trust and get a full step up in basis when they die, so the spouse (in community property states) and the children inherit at the market value as opposed to the original cost basis of the parent. This also will protect against creditor claims of the other “tenant” such as a child, allows each spouse to use their full federal estate tax exclusion, and transfers title to the assets without having to probate the asset.