

Joint tenancy ownership often does not work the way most people think it does. Joint tenancy, also referred to as “joint tenancy with right of survivorship,” is a form of holding title to property. The primary features of holding property in joint tenancy with one or more other persons are that (1) each owner has an undivided interest in the property until death or transfer; and (2) upon the death of a joint owner the decedent’s share passes to the remaining joint tenants until only one joint tenant survives. Thus, whichever joint owner is the last to survive becomes the sole owner of the property. It is a “survivor take all” form of ownership that is not controlled by a will or living trust.

Owning property in joint tenancy is easy to do, but it can be a trap for the unwary. Joint tenancy sounds nice – it implies “the two of us,” a partnership, a marriage of title as well as love. On the surface, at least, it appears to be the right way for people who care for each other to own property.

Unfortunately, joint tenancy has significant planning disadvantages.

First, your joint tenancy property can pass to unintended heirs. Joint tenancy is a survivor-take-all gamble that often has disastrous results. This is especially true in the case of a second marriage with children from a previous marriage. If it is your desire to leave your property to your spouse and then your children, joint tenancy is not for you.

Example: Harry and Beth’s Pitfall Story:

Harry and Beth wanted their property to go to their children. After Harry’s death, Beth remarried. She and her new husband, Fred, unwittingly put their property into both their names as joint owners. It seemed like the common sense, loving thing to do, and they didn’t give it a second thought. On Beth’s death, Beth’s children did not receive any of her property. Since Fred was the surviving joint owner, everything belonged to him as a matter of law.

Second, joint tenancy does not avoid probate – it only delays it. Many people believe that jointly owned property totally avoids probate. This is not correct. Joint ownership will not avoid probate upon the death of the surviving joint owner. There will be a probate at the surviving owner’s death or, if the surviving owner becomes incapacitated during life, a court conservatorship may be required to manage or sell the property.

Third, there may be unintended gift and income tax consequences if joint tenancy is used between non-spouses or with adult children. It is not uncommon for an older parent to designate an adult son or daughter as a joint owner of his or her property. This technique is meant to help the parent by involving the adult child in the parent's financial affairs. This simple change of ownership often, however, results in inadvertent gift tax and income tax problems.

Example: Deborah's Pitfall Story:

Deborah was an elderly woman in failing health who was partial to her daughter Christine. She added Christine's name to all of her investment accounts so that Christine could assist in handling her mother's financial affairs. Deborah's accounts were now held in joint tenancy with Christine.

What neither Deborah nor Christine counted on was the federal gift tax consequences of their innocent and convenient arrangement. The minute Christine's name was placed on her mother's stock certificates, it was presumed by law that she had received a gift of one-half of that property. This resulted in significant gift and income tax problems. In addition, Christine later experienced financial problems and her creditors attempted to reach Deborah's assets to satisfy her daughter's debts.

In summary, the use of joint tenancy as the cornerstone of an estate plan does not meet our criteria for "lives and legacies well planned." It does not allow you to maintain complete control of your property during life; it does not necessarily provide for distribution to your chosen beneficiaries upon your death; it can create significant unforeseen gift and income tax consequences; and the surviving owner will not avoid probate absent additional planning.