



PITFALLS OF JOINTLY HELD PROPERTY

Many people think, “How simple. I will just put my child’s name on this property and avoid all the hassles of probate on my death. That way, I do not need to worry about a Will.” Sometimes, it is advisable to hold some or all of one’s property jointly with another. Frequently, however, it can cause an unexpected disaster. The manner in which you hold title to property needs to be carefully considered and designed as a part of your overall estate planning goals.

Risks or pitfalls that can arise through joint property ownership:

A. Joint Ownership With Spouse

1. **Avoidable Estate Tax.** Too much joint property between spouses when estates exceed \$11,400,000 (the 2019 exemption) can result in the waste of all or part of a potentially tax-free amount. A beautifully designed estate plan can be defeated through excessive joint property. Generally, such spouses should have their property ownership divided equally or with at least \$11,400,000 in each of the separate estates.

2. **Second Marriages.** In a second marriage, joint property can cause the unintended disinheritance of children of the first spouse to die. Joint property passes to the survivor regardless of the terms of a Will. The surviving spouse may omit the children of the first spouse from his or her Will, thus disinheriting them from their parent’s property.

B. Joint Ownership With Child or Others

1. **Exposure to Claims of Joint Owner’s Creditors.** When someone places property in joint tenancy, the property may be exposed to the claims of creditors of the joint owner. A parent may be shocked to find his or her assets embroiled in a divorce, bankruptcy, or other dispute involving their child.

2. **Unreported Taxable Gifts.** When an owner loses sole control over an asset by placing it in joint ownership, there is a gift to the joint owner, yet the property remains fully taxed in the original owner’s estate for federal estate tax purposes. The marital deduction will not apply to assets when spouses place a child as joint owner. In other words, the joint ownership receives harsh treatment under estate and gift tax laws.

3. **Unexpected Order of Death.** An unexpected order of deaths could exclude a family from participation in the estate plan. For example, P puts property in joint tenancy between himself and his children, A and B. A dies before P. Then, on P’s death, the entire property held in joint tenancy would go to B and B’s successors. A’s family is left out.

4. **Naming One Child as Joint Owner Can Disinherit Other Children or Cause Gift Tax Problems for the Child.** If a parent puts one child's name on property because that child is the responsible child who will "do what is right" in distributing property to his or her siblings, the intention of the parent may never be carried out. The child may not fully understand the parent's intentions and may not be willing or able to carry them out. Even if he or she is willing to carry out the intentions of the parent, there may not be time or capacity to do so. If the child dies or is incapacitated before he or she makes transfers to his or her siblings, the property would pass under the named child's own estate planning documents and would also be exposed to that child's creditors. Additionally, if the child makes transfers to his or her siblings, there can be gift tax consequences for gifts in excess of \$15,000 in value per year (2019 exclusion amount). Probate judges report that joint property is a source of frequent disputes that they must settle in their courts.

C. **Other Joint Ownership Issues**

1. **Loss of Control.** Joint ownership may require the signature of all joint owners in order to sell or otherwise deal with the property. Often, the owner has no intention of relinquishing absolute control of his or her property. The owner may desire to have the other person's name on the account or other property for convenience purposes or survivorship purposes, rather than true joint ownership. Normally, a Power of Attorney or Trust Agreement will better achieve the owner's objectives.

2. **Estate Tax Allocation Problem.** Joint property can cause significant tax allocation problems. An estate tax burden is allocated to an owner's assets at death by a Will. If the Will has the common direction to pay all taxes from the residue of the estate, then any joint property that passes to a surviving joint tenant will not bear its share of the estate tax. Careful planning is required to determine if estate taxes at death should be allocated to joint property or other assets that pass apart from the Will.

The Bottom Line

While there are many potential adverse impacts of joint property, jointly held property can also be a positive feature in an estate plan. To avoid the pitfalls, you should carefully consider the rationale for placing property in joint tenancy. Questions of joint ownership and available alternatives should be addressed with your attorney in connection with the regular review and update of your estate plan.