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# Evaluating Your Estate Plan: Forms of Property Ownership

One of the major goals of any estate plan is to distribute or dispose of property after death. To make decisions in this regard, it is important to understand classifications of property as well as the various ways that property can be owned. How property is transferred upon death may be dictated by the method of ownership. In particular, when property is co-owned by two or more people, the method of co-ownership may determine who eventually owns the property.

## Two Classifications of Property

**Real property** includes land as well as whatever is built upon the land or attached to the land. This may include buildings, fences, and subsurface tiling. Mineral rights may also be a consideration in regard to real property.

**Personal property** may be either tangible or intangible. **Tangible personal property** includes anything that can be touched – from household goods, jewelry and clothing, to livestock, machinery, stored grain, vehicles, and inventory items. **Intangible personal property** includes assets such as bank or brokerage accounts, stocks, bonds, and insurance policies. These intangible properties may be represented by a piece of paper, but the actual property is intangible.

## Methods of Property Ownership

While property is commonly owned by individuals, it is important in estate planning to be familiar with forms of property co-ownership. Two widely used types of co-ownership are tenancy in common and joint tenancy.

## *Fee Simple Ownership of Real Property*

If an individual owns property with total control over it, this could be called absolute ownership. However, this total control over property does not really exist in the United States. Under U.S. law, several interests in property are reserved to state or local government. These include the rights of eminent domain, condemnation, taxation, and zoning. Eminent domain allows a government to take property if needed for public use (such as a highway) with compensation to the owner through a process known as condemnation. Taxation of property is allowed to raise funds for government services. Zoning and other land use controls are also allowed by local governments. Beyond these powers retained by governments, the closest thing to absolute property ownership is known as **fee simple** title to property. When property is held in **fee simple**, the owner has the right to sell the property, mortgage the property, lease it to another, or pass it to other persons at the owner's death.

## *Tenancy in Common*

Tenancy in common (sometimes abbreviated as TIC) is a form of property co-ownership where two or more owners have a separate but undivided interest in the property. Each owner has the right to possess the entire property, but may not exclude the other tenants in common. For example, if four siblings (John, Mary, Sue, and Bill) inherit a quarter of land, they each have a one-quarter interest in the entire 160 acres. They cannot decide among themselves that John owns the northwest forty acres, Mary owns the southwest forty acres, and so on. Such a division of the 160 acres

would require a partition action in court to identify and divide the property into separately owned parcels. Under tenancy in common, it is also possible that the owners have unequal rights to the land. For example, if there are three siblings (John, Mary, and Sue), John could own a half interest in the property, while Mary and Sue each owns a quarter interest in the property. Interest in the property may be separately transferred by each owner either during lifetime or by will. So in the above example, John could bequeath by will his half interest to his children Tom and Teresa, in equal shares. Then Tom, Teresa, Mary, and Sue would each have a quarter interest in the property. The type of co-ownership is determined by an examination of the language on a title, deed, or stock certificate. Most commonly, the words “and” and “or” creates a tenancy in common, as in “John and Mary and Sue and Bill” or language such as “Tom Smith or Teresa Jones.” Tenancy in common does not have the right of survivorship as found in joint tenancy.

As a group or pair of property owners, tenants in common can sell the entire property, as well as lease, mortgage, or divide the income from it. An individual tenant in common can borrow against (or mortgage) the tenant’s share of ownership if the lender will accept that ownership share as collateral. However, the lender will be aware that if the borrower defaults on the loan and the lender needs to foreclose on the mortgage, the lender would only acquire the tenant’s proportionate interest in the property. To sell the share of the property, the lender would need to seek a partition action from the court.

### **Joint Tenancy**

With joint tenancy (JT), sometimes also referred to as joint tenancy with right of survivorship (JTWROS), two or more people own property together, in equal shares. As with tenancy in common ownership, each joint tenant has an undivided interest in the property, and each joint tenant may request a court order for partition and sale if that owner wants to terminate the joint tenancy. The major difference between joint tenancy and tenancy in common becomes obvious at the death of one of the owners. Joint tenancy carries a **right of survivorship** that controls what happens to the property ownership at the death of a joint tenant. When a joint tenant dies, the property goes to the other joint tenant(s). Even if a joint tenant has a will that attempts to pass that joint tenant’s ownership to others, the law of joint tenancy takes precedence.

In Iowa, as in most states, the creation of joint tenancy as a form of property co-ownership requires specific language. The words typically creating joint tenancy for real property and are “John Smith and Mary Smith as joint tenants with right of survivorship and not as tenants in common.” More specific guidance can be found in Iowa Code §557.15. For intangible personal property such as bank accounts, the ownership language may read “John Smith and Mary Smith or the survivor of them.” Joint tenancy gives the surviving owner immediate access to the property without any further action. So, if a bank account or similar financial asset is held in joint tenancy, the surviving joint tenant can immediately continue to use the account after the death of one owner. While a joint tenant may sell or mortgage an ownership interest in property, permission of the other joint tenants must be obtained.

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In regard to estate planning, joint tenants should be aware of the possible value of the estate as it may impact federal estate tax implications. If a couple's estate is approaching a value where federal estate taxes could be due upon death, it may be preferable for spouses to own property as individuals rather than as joint tenants. Additionally, joint tenants should be willing to accept any order of death. We usually expect older persons to die first; however, if a parent and child own property as joint tenants, and the child unexpectedly dies first, the parent becomes the sole owner. This may leave a child's surviving spouse and children in a difficult and unanticipated situation and should be taken into account in estate planning.

Two other forms of property ownership or possession are tenancy by the entirety and life estates.

### *Tenancy by the Entirety*

The state of Iowa does not recognize **tenancy by the entirety** as a form of real property ownership. However, it is mentioned here because some neighboring states (such as Illinois) may recognize it as a form of real property ownership. Tenancy by the entirety is similar to joint tenancy where a husband and wife each own the undivided whole of the property with the right of survivorship, so that upon the death of one spouse, the survivor is entitled to the entire property. However, with tenancy by the entirety, the creditors of an individual spouse cannot attach and sell the interest of the debtor. This protects the non-debtor spouse in the event that the other spouse is in debt or files bankruptcy. Where it is recognized, this form of ownership is limited to married couples. Again, tenancy by the entirety is not recognized under Iowa law.

### *Life Estates*

A life estate is not a true form of property ownership, but rather a way to possess property. The recipient of a life estate (known as the "life tenant") has full possession of the property for the duration of the tenant's life. However, the life tenant cannot transfer the property upon the tenant's death because it has already been deeded to another person who is known as a "remainderman." Property held in life estate may avoid probate because the life tenant has no right to transfer the property on death; however, because the life tenant had full use and enjoyment of the property during life, it will be included in the life tenant's taxable estate. The remainderman acquires legal interest in the property after the death of the life tenant. The remainderman's "remainder interest" can be pledged, transferred, or attached. Also, the remainderman acquires a stepped-up basis on the death of the life tenant.

There are many forms of life estates, sometimes referred to as the law of future interests. For example, a life estate is created when a property owner deeds property to another person but grants a life estate to a third party. This might occur upon the death of a spouse who passes land to children, but grants a life estate to a surviving spouse. Upon the death of the second spouse, the property passes completely to the children. Another example of a life estate may occur when a living person gifts asset to heirs -- but retains a life estate (lifetime use) of the property until death whereupon the property passes completely to the heirs. Life estates may be formed by a deed, a will, or within a trust instrument. As with all real property transactions, legal advice should be obtained from an attorney regarding the proper use of life estates.

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