

THE GOOD, THE BAD, AND  
THE UGLY OF  
**COMMUNITY PROPERTY,  
TENANTS IN COMMON  
AND JOINT TENANTS**

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ESTATE PLANNING, TRUST & PROBATE



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Community Property, Tenants in Common and Joint Tenants are ways people can own property: usually real estate. Anyone can purchase property as joint tenants or tenants in common, but only married couples can hold community property.

Community property is recognized in nine (9) states. Married couples own everything (real property, personal property, financial accounts and debt) equally: 50%/50%. There are distinct tax advantages with community property ownership when a death occurs. Typically, a community property agreement only ends when assets are divided during a divorce. Inherited assets and property, if not comingled into joint or community accounts, are considered separate and not community property.

Tenants in Common is a way people (two or more) own real property. If two (or more) people (married couple, non-married couple, relatives, friends, business associates) own a home (real estate = real property) as tenants in common this means each own a specified (can be unequal e.g. 60%-40%) portion of the home. When one dies, the survivor(s) maintains their interest and the interest of the decedent stays in their estate and can go to designated heirs...it does not automatically transfer to the survivor(s).



03



Joint Tenants is another way to own real property each person with equal rights and obligations. As joint tenants, if two (or more) people own real property and one dies, the interest of the decedent automatically passes to the other(s). This type of ownership creates a right of survivorship which allows the transfer to occur without having to go through probate. A joint tenancy agreement can be broken if one owner sells or transfers their share of ownership to another person.





- With joint tenants, at the moment of death, the deceased joint tenant's interest vests in the survivors without probate administration and is not subject to disposition by the deceased joint tenant's will.
- With tenants in common, the individual interest of the deceased tenant remains in their estate and is preserved for their heirs.
- With community property, each spouse's interest is equal during their marriage. When one spouse dies, the one-half community property interest is subject to disposition by the deceased spouse's will. Interest will pass to the surviving spouse if no disposition is indicated. Like joint tenancy, if the deceased spouse's interest passes outright to the surviving spouse, no probate administration is required. In most cases, however, a summary and relatively inexpensive court confirmation procedure may be required.
- Assets acquired from a decedent as a result of death receive a new stepped-up (or stepped-down) tax basis equal to the property's fair market value at date of death. Property acquired from a decedent that is sold shortly after death will generally result in no gain or loss to be recognized. When a property has substantially appreciated, the benefit of this basis step-up is dramatic by avoiding all gain and the income tax attributable thereto.





# THE GOOD

## CONTINUED

- In community property, both half interests in the property are considered acquired from a decedent and entitled to the fair market value basis adjustment and so the surviving spouse would pay no tax. The tax savings of the community property form can be considerable.
- Alternately, if the property has lost value, joint tenancy yields the better tax result. This better result is because the property receives a one-half step-down in basis on death, as opposed to a full step-down in basis with community property.

NOTE: Under a new form of ownership, “community property with right of survivorship,” the property passes on death to the surviving spouse and is not subject to disposition by the deceased spouse’s will.

# THE BAD



**FOR  
SALE**

- If one joint tenant files bankruptcy, goes through a divorce or is sued, a sale may be forced to satisfy creditors, leaving the other joint tenants exposed.
- Even if a person's will states otherwise, joint tenants do not have the right to transfer their ownership interest to their heirs at the time of death since they cease owning the property.
- The interest of a tenant in common, upon death, reverts to their estate and may be subject to probate. The heirs, either designated or determined by the state, may create a situation forcing the sale of the property by petitioning a court to partition the property when the remaining tenant would choose otherwise.
- Each tenant in common has an equal right to possession thus making the interest an asset of each co-owner that is subject to each tenant's creditors.
- Generally, as there are some exceptions, community property is liable for debts of either spouse. On the other hand, the separate property of the non-debtor spouse, or the one-half joint tenancy interest of the non-debtor spouse, is not liable for debts of the other spouse.

# THE BAD

## CONTINUED

07

**FOR  
SALE**

- With divorce, the disposition of joint property acquired with community property funds will not be affected by whether that property is held in community property or joint tenancy. The spouse who has contributed separate property to the acquisition of property held in either joint tenancy or community property form, has the right to be reimbursed for that spouse's separate property contribution.
- NOTE: The laws governing the property are complex, consequently, a spouse considering making a substantial separate property contribution to an asset held in joint tenancy or community property, or converting a separate property asset to joint tenancy or community, should seek legal advice.



- If a married couple titles their property as community property or joint tenants, the transfer to the surviving spouse is simple and immediate. However, upon the death of the surviving spouse, the property will end up going through the probate system before it passes to heirs. Probate can be an expensive and lengthy procedure depending on state law and individual circumstances. In addition, everything is public record available for anyone to find and see.
- If a surviving spouse decides to add a person(s) to their title so to pass their property without going through probate, then the property becomes subject to the creditors of the person(s) in the event of law suits or claims of spouses during a divorce. In addition, “adding” a person to title is a form of “gifting” and is subject to tax law and the added person will not receive full advantage of a “stepped up” basis. This could result in significantly more tax.
- In the case of joint tenancy property, only the deceased spouse’s one-half interest in the property is considered acquired from a decedent and entitled to the fair market value basis adjustment. Thus, if the surviving spouse were to sell an appreciated property shortly after death, he or she would have to pay tax on the gain attributable to his or her one-half interest.

# CONCLUSION

There are many ways to own property. Each form of title has its pros and cons. Community Property and Joint Tenants designations allow for the immediate transfer to a survivor with some differences in tax treatment. Tenants in Common preserve the interest of each tenant for their control and estate rather than directly transferring to another.

The major problem comes when property has one, single (perhaps surviving) owner. Passing property then, even with a well prepared will identifying who the deceased desires to inherit, requires going through the costly and time-consuming probate process.

The complexities of life, family circumstances and situations often require expertise in examining and exploring options. Personalized solutions can usually be obtained at reasonable cost without sacrificing desires and wishes.

The Oak Crest Law Group is ready to assist you and wants you to have genuine peace of mind knowing your wishes are understood and respected and will be honored.

For additional information, contact: [trusts@oakcrestlaw.com](mailto:trusts@oakcrestlaw.com)