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Family, Youth and 4-H Education

Ownership of Property

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How is your property held? Are you the sole owner or is there more than one owner? If there is more than one owner, are you a tenant in common or a joint owner or (if married) a tenant by the entirety? Do you need the consent of another individual to sell the property?

The form of ownership that you have in a piece of property determines what you can do with it, how the property will be taxed and what will happen when you die – whether the property will be transferred to your spouse, children, a joint owner and/or other heirs at law.

Types of Property

There are two types of property: *real property* and *personal property*. **Real property is immovable**. It includes land and things that are attached to it such as buildings, fences, minerals, etc.

Personal property is movable. It is not attached to land. Personal property can be separated into two categories: *tangible* and *intangible*.

Tangible personal property is property that you can see, feel or touch like clothing, household goods, jewelry, cars, livestock and farm machinery.

Intangible personal property includes paper that represents ownership, such as stocks, bonds, insurance policies, contracts and bank accounts.

Ways to Transfer Property

Your property can be either transferred during your lifetime or at your death. There are several ways to transfer your property: by gift giving, by will and by joint ownership. It can also be transferred by contract (i.e., life insurance and annuities), by selling and by state laws of inheritance if you do not have a will.

If you plan to give or will property to a minor, contact a legal adviser. It may be necessary to appoint a guardian or custodian to represent the interests of a minor or to create a trust. A minor does not have the legal capacity to enter into contracts.

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Forms of Property Ownership

There are several ways real and personal property can be held. **The state of Arkansas recognizes four forms of property ownership: sole or individual ownership, tenancy in common, joint tenancy and tenancy by the entirety**. The last three are referred to as forms of co-ownership. **Arkansas is not a community property state, although the divorce laws involve some community property concepts.**

Sole Ownership

Sole ownership means that you are the only person who owns *all* the interest in a piece of property. It is the simplest form of ownership and gives you the greatest control of any form of ownership. You can give away, sell, mortgage, or will your property to another person. If you are married, however, your spouse would have to consent to the transfer of *real property* to others and to give up certain rights such as the dower or curtesy rights.

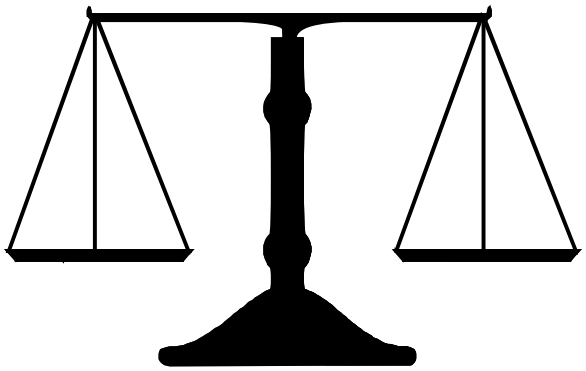
Sole ownership does not usually create any unique estate planning problems. If your property has a beneficiary clause and names living beneficiary(ies), the property will be distributed according to the contract. Life insurance, annuities, retirement accounts, payable on death (POD) or transfer on death (TOD) accounts are examples of sole ownership property with beneficiary clauses.

If you have a will and do not have named beneficiaries, your property will be distributed according to the directives in your will. If you do not have a will and do not have named beneficiaries, your property will be distributed according to the inheritance laws of Arkansas. The value of your property will be included in your gross estate as well as in your probate estate.

Co-Ownership

Co-ownership means you and one or more persons have legal title to a piece of property. If you own property with another person, you lose a degree of control over it. **Co-ownership is not a substitute for a will.**

The form of co-ownership determines who eventually will inherit your property – your spouse, a joint tenant or one of your other heirs. It influences the amount of estate tax that has to be paid. The three forms of co-ownership are tenancy in common, joint tenancy and tenancy by the entirety. There are advantages and disadvantages to each form of co-ownership.



Tenancy in Common – Tenancy in common exists when you and one or more persons hold an undivided interest in a piece of property *without right of survivorship*. If a deed or title does not state the form of co-ownership, the court usually assumes it is tenancy in common.

If you are a tenant in common, you have the right to give away, sell or will your interest in the property to another person. Upon your death, your interest in the property will be transferred to the persons named in your will. If you do not have a will, your interest in the property will be distributed according to the inheritance laws of Arkansas.

Two disadvantages of tenancy in common are that the value of your property will be included in your gross estate and the property will pass through probate. The amount of estate tax depends upon whether the tax due exceeds the *unified tax credit*. For 1998, for most individual estates, the *unified tax credit* is $202,050 which is equivalent to a *total exemption* of $625,000. If your lifetime gifts (exclusive of annual exemptions of $10,000 per donee) plus your gross estate exceeds $625,000, your estate would be subject to estate tax except for transfer to your spouse. There is an unlimited marital deduction for property passing to a spouse.

The present-law total estate and gift tax exemption will continue to increase each year to $650,000 in 1999; $675,000 in 2000 and 2001; $700,000 in 2002 and 2003; $850,000 in 2004; $950,000 in 2005; and $1 million in 2006 and thereafter. These amounts are not indexed for inflation.

After 1998, the $10,000 annual exclusion for gifts, the $750,000 ceiling on special use valuation, the $1 million generation-skipping transfer tax exemption and the $1 million ceiling on the value of a closely-held business eligible for the special low interest rate are indexed annually for inflation. If you think any of these apply to your situation, consult your attorney and tax advisor.

Joint Tenancy With Right of Survivorship – A joint tenancy exists when you and one or more persons hold an undivided interest in the same property with *right of survivorship*. Your joint tenant may or may not be your spouse.

Several examples of joint tenancy are a bank account in your name and your spouse's or sister's name, a certificate of deposit with your name and the name of one of your children and a government bond with your name and the name of a non-relative. It is indicated by adding the words "joint tenants with right of survivorship."

As a joint tenant, you may give away or sell your interest in the property unless there is a restriction by title or by contract. Upon the death of a joint tenant, the property would automatically be transferred to the surviving joint tenant(s). The property *cannot* be transferred by a will.

There are several advantages to joint tenancy.

- ▲ Convenience. Property, real or personal, is immediately available to the surviving joint tenant(s).
- ▲ Reduction of probate costs. Jointly owned property bypasses probate.
- ▲ Property will not be subject to public scrutiny or publicity.
- ▲ Surviving joint tenant is protected from the deceased joint tenant's creditors.

Some of the disadvantages to joint tenancy are:

- ▼ It does not offer the flexibility to adjust to changing circumstances such as a divorce or remarriage.
- ▼ One of the joint tenants could liquidate a *savings or mutual fund account* without notifying the other tenant(s).
- ▼ Problems could be created if one joint tenant sells a piece of property and the other tenant(s) did not want it sold.
- ▼ If a joint tenant is not your spouse, the entire value of the property would be included in the taxable estate of the first tenant to die unless the other tenants could prove that they contributed to its purchase.
- ▼ A surviving spouse does not have the right to property held jointly by the deceased spouse and another family or non-family joint tenant.

Tenancy by the Entirety – Tenancy by the entirety is limited to married couples. You and your spouse would have an undivided interest in *real property* with the right of survivorship except by the action of either one.

If you are a tenant by the entirety, you *cannot* dispose of your interest in real property without the consent of your spouse or the purchaser will take subject to the rights of the spouse. When a tenant dies, the deceased's share is automatically transferred to the surviving spouse.

Special Situations

Recently three of us purchased a piece of land. We are joint tenants. What would happen if one of us sells his/her interest?

If one of the joint tenants sells his/her interest in the land, the joint tenancy would be terminated as to the purchaser. The individual who purchased the interest would become a tenant in common. However, the remaining two would still continue to be joint tenants.

What does "fee simple absolute" mean?

Fee simple absolute means that a person owns the property outright. In other words, the person has the right to give away, sell, mortgage or will the property to others.

My deceased uncle gave my aunt a "life estate" in a house. What does that mean?

It means that your aunt has the right to use the house and to receive income from it as long as she lives. She does not, however, have the right to dispose of it. At her death the house will be transferred to the individuals who were given the "remainder interest" in the house.

How do you indicate "tenancy by the entirety"?

Tenancy by the entirety is indicated by adding the phrase "husband and wife" after the names of a married couple. However, any conveyance to a married couple creates a tenancy by the entirety.

My husband and I own a house as joint tenants. If my husband dies first, what amount will be included in his gross estate? The house was recently appraised at $85,000.

$42,500. If one of the spouses dies, only one-half of the property is included in the estate of the deceased spouse. Because the $42,500 passes to the surviving spouse, it will qualify for the unlimited marital deduction.

If I die, will the proceeds from my insurance policy be included in my estate for tax purposes?

It depends upon who is the beneficiary and the owner of the policy. If you are the owner of the policy or if your estate is the beneficiary of the policy, the value of proceeds will be included in your estate. However, if you have named another individual as the beneficiary and you retain no incidents of ownership in the policy, the proceeds will not be included in your estate.

Should my husband and I have our family car in joint tenancy?

There are advantages as well as disadvantages to a joint tenancy involving a family car. It does permit the surviving spouse to use the car immediately. The disadvantages are that either one could sell the car without the consent of the other and both of your assets would be vulnerable to a lawsuit if a spouse was found to be negligent in a car accident.

My wife and I own a piece of real estate in Illinois. If one of us should die, would the property laws of Arkansas apply?

No. The property laws of the state where the land is situated always govern as to real estate.

What is community property?

Community property means that each spouse legally owns one-half of the property acquired by either spouse after marriage. Property acquired before marriage does not qualify.

If a couple moves from Texas to Arkansas, does that change the Texas community property laws that applied in Texas to that property?

No. Community property assets retain their character even after a husband and wife move to a non-community property state. The community property laws of Texas will apply unless you have co-mingled your assets.

You may want to discuss this with a lawyer as the community property laws vary from state to state. The states having community property are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin.

This material should not be considered an authoritative basis for interpreting the laws of the state of Arkansas on matters of property ownership or in estate planning. It is intended to help a person better understand property ownership and be prepared to use the professional services of an attorney.

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