

Co-owning Property with Your Spouse or Children – How To Chose the Right Type of Ownership

By Hyman G. Darling, Esquire

There are three principal types of ownership (tenancies) relative to real estate. The most familiar is what is known as joint tenants. This means that if one person dies, the other person automatically owns all of the interest in the property.

There is no requirement or limit as to how many people may be co-owners on a property. So, if a husband and wife add their two children to the deed, they are each then presumed to own a one-fourth undivided interest in the entire property. If any one of those individuals dies, then the remaining three owners will each own a one-third interest. This interest does not pass through probate since joint ownership is a means of avoiding it.

One disadvantage with joint tenancy however, is that if any one of the joint owners is sued, then his or her interest is attachable by creditors. In addition, any one of the co-owners, or possibly one of their creditors, may bring an action to divide the interest in the property and force the other owners to sell. This is called a petition to partition proceeding, which in most states is allowable even if there are owners holding the property as joint tenants with rights of survivorship.

Also, any one of the owners

may “break” the title by deeding his or her interest to another person in lifetime. This would cause the new owner to hold the property as a tenant in common with the other three owners.

A tenancy in common is where each owner of the property has an undivided interest in the whole of the property. However, upon the death of any owner, his or her share will pass as directed by the Will, or by intestacy if the decedent does not have a valid will.

Unlike joint ownership, where each must own an equal portion with all of the other owners, a tenancy in common does not require each owner to have equal ownership. For instance, in a tenancy in common, there could be four owners with one owning 50%, one owning 30%, one owning 15% and one owning 5%.

Some people have alluded to the potential that joint owners need not own equal interests in the real estate, but to date, it does not appear that this option is available, nor has it been tried and tested.

A special form of ownership allowed in several states is what is known as a tenancy by the entirety. Here, only a husband and wife may own the property. If either the husband or the wife is sued, a creditor

may place a lien against his or her interest, but unlike the joint tenancy or tenancy in common, the creditor is not permitted to file a petition to partition proceeding. Likewise, neither the husband nor the wife may divide or sever the ownership by deeding his or her interest to any other person. Also, in order to place a valid mortgage on the property, both the husband and the wife must sign the documentation.

In the event that an unmarried couple buys a parcel of property or house, they should consider retitling the property subsequent to the marriage in order to afford themselves of the protection of the tenancy by the entirety if it is available. There should be no presumption of property ownership, and each homeowner/landowner should recheck the deed to ensure that the proper tenancy is listed. If not, then it should be changed.

In some states, if there is no tenancy stated, there is a presumption of a tenancy in common; and if one person dies, then the interest in the property owned by the decedent has to be probated, even if the decedent anticipated that the property interest would pass to the other surviving co-owners, including the spouse. Therefore, tenancy should not be taken for granted. A careful

review of all deeds for a condominium, house, timeshare or other types of property will assure that the objectives of the ownership are accomplished.

Hyman G. Darling, Esquire, Chairman of Bacon & Wilson's Estate Planning and Elder Law Department, is recognized as the area's preeminent estate planner. His expertise includes all areas of estate planning, probate and elder law. He can be reached at 413-781-0560 or hdarling@bacon-wilson.com.