

NEET Notes

Making Sense of Estate Planning

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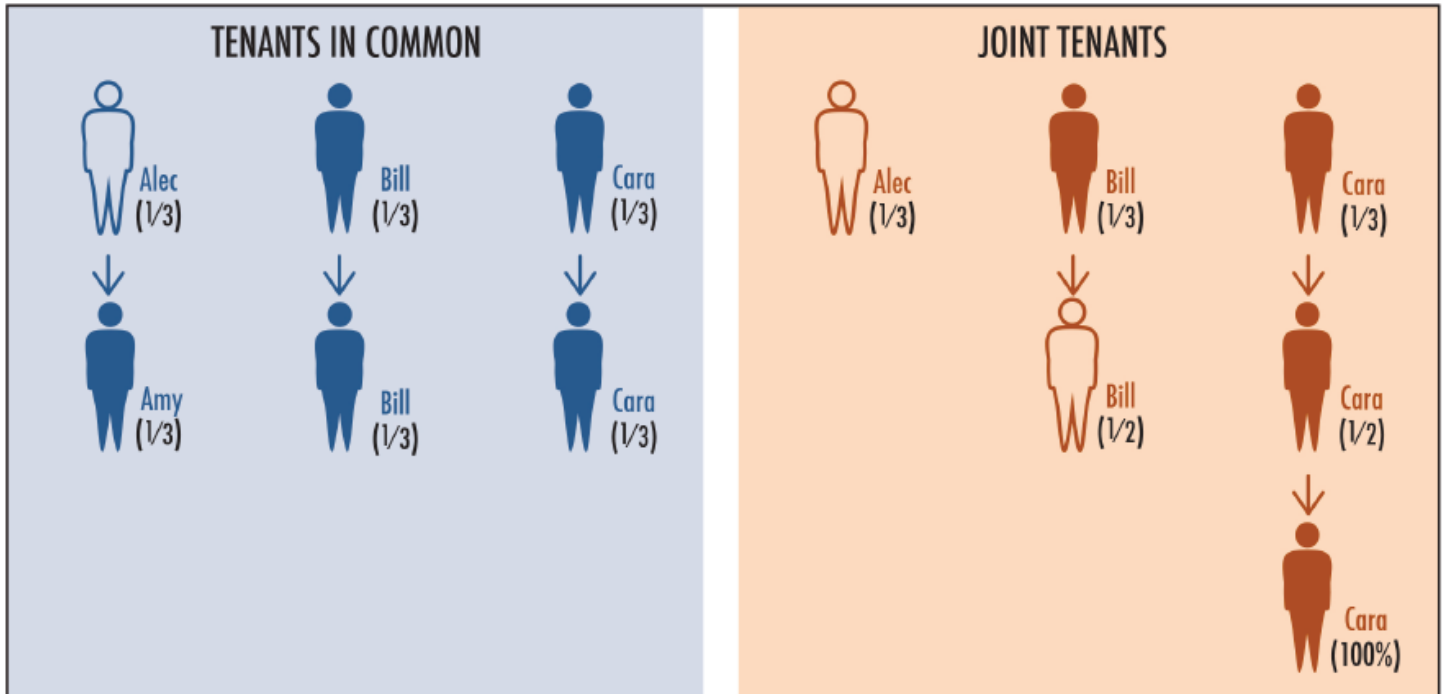


Co-Ownership of Property: How Title Affects Your Estate Plan

Two or more people may simultaneously own the same property, for instance a camp on the lake. But what happens to a person's share of co-owned property when they die? There are two alternatives: (1) the deceased person's share can remain part of their estate and pass to their heirs or beneficiaries, or (2) the share can pass to the surviving co-owners of the property. Who decides which course is followed? That is determined when the property is purchased by how the property is titled. There are two principal forms of title for co-owned property: "tenancy in common" and "joint tenancy." There's also a variant of joint tenancy called "tenancy by the entirety." Each of these ownership forms is reviewed in this NEET Notes, with a description of the implications each form of ownership has for your estate plan.

Tenancy in Common. The default form of co-ownership is tenancy in common. For instance, if a deed states, "to Alec, Bill and Cara," then the ownership is presumed to be tenancy in common in most states. The presumption of tenancy in common can be overridden if: (1) the deed is to a married couple; or (2) it appears from the remaining portions of the deed that a joint tenancy was clearly intended.

Where property is owned as tenants in common, and one co-owner dies, the deceased co-owner's share will become part of their estate and pass to their heirs or beneficiaries. For example, if Alec dies, his share of the lake camp would become part of his estate. If his will (or trust) calls for the share to pass to his daughter Amy, then Amy will become a co-owner of the property with Bill



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Referrals are an essential part of a successful law firm. If you hear of friends or colleagues in need of estate planning advice, please pass along my contact information or this newsletter. Thank you!

Shelburne Creamery Bldg., Ste 22-E
5138 Shelburne Road
P.O. Box 928
Shelburne, VT 05482

Phone: 802-985-8811
E-mail: abartsch@neetlaw.com
www.neetlaw.com

Co-Ownership (Cont.)

and Cara. Alec's share does not pass to the co-owners Bill and Cara. In this instance, Bill and Cara each own a one-third undivided share of the entire property with Amy. An undivided share means that even though each owner owns only a percentage of the whole, they have rights to enjoy the entire property. If Amy died, her share would become part of her estate and pass to her beneficiaries.

One concern with tenancy in common is that the co-owners have no control over who the future co-owners might be. Of course, if you don't like the new co-owners you can sell your share, but that might be easier said than done (if the new co-owner is really disliked), and besides, the property might be something you would otherwise prefer to keep.

A second concern with tenancy in common is that a decedent's share usually goes through probate (unless a trust is used). This is not necessarily bad, but the alternative, joint tenancy, avoids probate since the decedent co-owner's share passes automatically to the surviving co-owners, sidestepping probate. Nonetheless, if a co-owner wants their children to inherit their share of the property, then co-owning as a tenant in common makes sense.

Sometimes, though, people use co-ownership as a means of probate avoidance, which is where joint tenancy can play a role.

Joint Tenancy. The other form of co-ownership, where each owner is a joint tenant with rights of survivorship, avoids probate because the property automatically passes to the surviving co-owner(s) upon the death of one co-owner. If Alec, Bill and Cara co-own the lake camp as joint tenants, and Alec dies, then Bill and Cara are the only remaining owners, and at that point each owns a 50 percent share of the camp. The camp does not pass to Alec's estate, and furthermore does not pass to Alec's children. Suppose then that Bill dies. In this case, Cara becomes the sole owner of the camp.

Because the presumption is that most people would want their share to pass to their descendants, joint tenancy only exists when the co-owners clearly intended that result. For example, a deed might state, "to Alec, Bill and Cara, as joint tenants with rights of survivorship." Additionally, joint tenancy historically has existed only if four requirements are satisfied when the joint tenancy is formed. The requirements are known as the "four unities," namely the unity of time, title, interest and possession.

The *unity of time* requires that the term of ownership for each co-owner runs concurrently and for the same length of time. The *unity of title* requires that the co-owners take ownership at the same time, i.e. through a single transaction. The *unity of interest* requires that all co-owners hold the same size or percentage share of the

property. For example, if there are three owners, each owner has a one-third interest in the property. Lastly, the *unity of possession* requires that each co-owner holds undivided possession of the whole property and enjoys the same rights in the property as the other co-owners. In some states, one or more of the four unities have been relaxed. For example, the unity of interest has been eliminated in Vermont, such that joint tenants may have different percentage interests in a property.

Upon the death of a joint tenant, their share passes directly to the surviving co-owners. Joint tenancy is thus a technique for avoiding probate that can be used by family members to pass property from one generation to the next, without dealing with probate. There are some serious risks to using this approach, but because of its prevalence, joint tenancy is sometimes referred to as the "poor man's estate plan." Keep in mind, probate is avoided by all co-owners except the last surviving co-owner, because upon the last owner's death, there is no one to pass the property to and probate becomes necessary.

Tenancy by the Entirety.

A special type of joint tenancy can be formed when a fifth unity is present, the *unity of marriage*. Like joint tenancy, if one spouse dies the property passes directly to the surviving spouse. In some states, including Vermont, tenancy by the entirety offers an additional

benefit: a creditor making a claim on the property to satisfy a court judgment must have a valid claim against both spouses, not just one spouse. If the claim is against only one spouse, the co-owned property is off limits to the creditor. Tenancy by the entirety is thus a form of asset protection for a married couple's residence, the one asset where tenancy by the entirety is common.

Incidentally, this points out where mere joint tenancy as a surrogate estate plan poses serious risks. Suppose you add a child as a joint tenant to your house deed figuring you will avoid probate because the house will pass directly to the child upon your death. Your plan might work, but it might backfire in one of several ways. First, you might decide to sell the house, but your child might disagree. In order to sell, you will have to convince the child to sell or take them to court. Second, you might want to keep the house but your child wants to sell because he needs cash. If you refuse to sell, the child can go to court to have the property partitioned, the end result being that the house is sold and the proceeds split evenly between you. Third, the child might cause a car accident. If the injured party wins a lawsuit, they might seek to have a judgment satisfied by requiring the house be sold and collecting the child's half of the proceeds.

Co-ownership of property is common but the forms of co-ownership are sometimes misunderstood. It's important when purchasing property to understand how the title will affect your share during your lifetime, and after you die.



"Ob, well, this is going to be awkward."

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