Jointly Held Property

Planning Issues for Non-Spousal Relationships

A common planning technique is for parents and children, non-married partners, and other non- married relationships to hold property as joint tenants. However, there is more to this type of planning than just who can sign the checkbook. Joint ownership can have significant effects on your amount of control of the joint asset, your potential liability to a judgment creditor, and your tax situation. If joint tenants are not married these issues are affected differently than a married couple holding property jointly. Here we will address some of the most common planning issues non-married joint tenants should consider.

Types of Joint Ownership

For non-married individuals, there are two primary ways to title jointly held property:

JTWROS: Joint Tenants With Rights Of Survivorship: Each joint owner has an equal undivided ownership interest in the asset. When one owner dies, his or her share immediately vests to the surviving owners without the involvement of probate.

TIC: Tenants in Common: Each joint owner has an undivided proportionate ownership interest in the asset. However, when one owner dies, their proportionate share passes to their probate estate, or through their trust if titled in trust, to be distributed per those processes. Another key difference between JTWROS compared to TIC is that the ownership in JTWROS must be equal among all joint owners (e.g. 2 people must be 50/50, 3 people must be 1/3 each, etc.). However, TIC ownership can be disproportionate among the joint owners. (e.g. 2 people could hold a 75%/25% share, etc.).

Benefits of Joint Ownership

There are some key benefits to joint ownership. First, it is relatively easy to create. Usually the way an asset is titled controls its treatment for joint tenancy. Therefore, if two or more people are looking to own an asset either as JTWROS or as TIC, they simply need to title the asset as such.

JTWROS also has probate avoidance benefits. Generally, a JTWROS asset can simply be transferred to the surviving joint owners by producing a death certificate to the bank, brokerage firm, etc. Typically, there is no need to involve a probate court to transition the title of JTWROS assets.

JTWROS also gives all joint owners access to the entire asset. For example, a mother may name a daughter as a joint owner so that the daughter can have access and control of the asset should the mother be unable or unwilling to manage the asset herself. This is often done as an incapacity protection technique should the older joint owner be concerned that they could become unable to manage their financial affairs.

TIC property is beneficial for any type of joint ownership that is disproportionate. Moreover, by allowing the joint owners to dispose of their portion of the asset in a manner other than automatic transfer to the surviving joint owners, it allows freedom to control your share of the assets at death.

TIC property can also limit the access to the entire asset. For example, a 75%/25% split of assets would only allow the 25% owner to dispose of 1/4 of the assets without the involvement of the majority owner.

Risks of Joint Ownership

There are also many risks and concerns that are often overlooked when entering into joint ownership. Just a few examples of these risks are:

Control

Whether the joint tenancy is created by agreement, by gift, or simply by adding someone's name to the title, joint tenancy shifts some control of the asset to the joint tenants. For JTWROS property, any transactions over the entire asset can be facilitated by any of the joint tenants. For example, a mother could name her daughter as JTWROS on a $50,000 account. Once named, the daughter could withdrawal the entire $50,000 from the joint account whether her mother wants her to do so or not. There is no requirement under the law that JTWROS must act in concert to make decisions regarding such assets.

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For TIC, the opposite effect would be true. A TIC could sell their proportionate share without any effect to the non-selling co-tenants share of the property. If our mother/daughter relationship was 75%/25% TIC, the daughter could sell or withdrawal her 25% of the account only but could do so at any time and without infringing upon the mother's 75% share.

If the asset is not easily divisible, however, control can be lost in a TIC relationship. Consider real estate as an example. If one TIC owner wants to sell and one or more other TIC owners refuse, the property cannot be sold. When selling an entire property all TIC owners must agree.

The selling TIC owner has limited options in this scenario. It may be possible for the selling TIC owner to sell only their proportionate interest to a buyer, but not many buyers are usually looking to purchase only a percentage of ownership in real estate.

The selling TIC owner could seek a partition of the property, which may not be something that could be agreed upon either. For example, a 25% owner could request a 25% portion of the land, but that can only occur upon agreement and would also assume the property could be partitioned. If the TIC property is bare land, perhaps a partition could be feasible. If the property is a house, though, such a partition would be impossible and/or impractical.

Another avenue may be for the selling TIC owner to seek a court ordered sale of the property, which is often called a partition sale. These sales are usually controlled by the courts, sometimes literally on the courthouse steps. Rarely do partition sales bring fair market value for the property, and usually a contentious and expensive litigation has predicated such a sale.

In short, a loss of control occurs anytime one owns property jointly. Consider whether such ownership, and the consequences related to it, fits in your situation.

Creditor's Claims

An often-overlooked issue for joint tenancy is the risk to the assets from the creditors of any joint tenant. Creditors come in all shapes and sizes, but the most common creditors are divorcing spouses or someone that has been injured (car wreck, negligence claim, etc.). When creditors are looking to satisfy their claims, they can come after joint assets. For JTWROS, a creditor of any joint tenant could claim against the entire joint tenancy given that all joint tenants own an undivided interest in the entire asset. Using our mother/daughter example, should the daughter have a creditor, that creditor could seize upon the entire $50,000 account to satisfy their claim even if the daughter had not contributed a single penny to the account.

For TIC, the creditor can only attach up to the joint tenant's proportionate share, so the risk of total loss for those joint tenants not subject to the creditor is unlikely. However, if the asset is something that is difficult to divide, like real estate, the judgment creditor may seek to foreclose on the asset to satisfy their claim. This could potentially cause the property to be sold at a partition sale. For more information on this concern, see the "Control" section above.

Gift taxes

For those that create a joint tenancy by adding someone to the title (e.g. adding a child as a joint tenant to an account versus individuals buying an asset together as joint tenants), this can cause potential gift tax liabilities. When adding someone to the account as a TIC, you have made a gift to that person. In other words, if you had a $50,000 account and you named someone 50% joint TIC, you've just given them $25,000.

For any gifts above the annual federal gift tax exclusion (currently $16,000), a gift tax would be due or use of one's lifetime exclusion ($12.06 million in 2022) would be necessary, along with the requisite filing of a gift tax return (form 709).

For JTWROS accounts, the gift is delayed. Simply naming someone as a joint tenant does not cause immediate gift tax consequences. However, when the non-contributing joint tenant uses the asset, the gift occurs. Using our example, Mom titling the $50,000 account as JTWROS is not a gift, but when the non-contributing daughter withdrawals $25,000, the gift and the taxable event occurs.

Estate taxes

There can be several estate tax consequences to joint tenancy as well. For JTWROS, the deceased person's ownership for estate tax purposes is the proportionate share they contributed to the asset. Using our example again, if Mom funded the entire $50,000 of the account, all $50,000 would be included in Mom's estate for estate tax purposes and consequently eligible for cost basis step up. What can be difficult, though, is proving this matter. For example, the IRS may want to argue the daughter made contributions to the account to limit the amount of basis step up available upon Mom's death.

Another issue is that assets that transfer via JTWROS immediately vest to the joint owner. However, the deceased owner's estate is responsible for the payment of estate taxes. Consequently, the estate would not have access to the JTWROS assets to satisfy any estate tax liability. Potentially this could cause a disproportionate tax liability to those non-JTWROS assets "in" the estate or force the estate to pursue the surviving joint tenant for tax liabilities.

For TIC property, the estate and/or trust would have control of the asset at death, eliminating some of the concerns found with JTWROS. Moreover, step up in basis on the proportionate share is relatively easy to discern since the deceased person's percentage of ownership is the deciding factor for estate tax inclusion and the step-up calculation.

There are issues with TIC property as well, though. If the asset is not easily divisible, like real estate, this can cause problems. If the deceased tenant's estate/trust wants to sell their portion to generate liquidity for an estate tax liability, that desire to sell could be met with opposition from the other joint tenants. This could cause the estate to pursue partition. For more information see the "control" section above.

Estate planning

Estate planning issues can arise with joint tenancy as well, usually with JTWROS. A client may want JTWROS for incapacity assistance but may want the asset to pass per their trust or will for disposition after death. However, this is not the case as the asset passes per the JTWROS agreement. This may cause one beneficiary to receive a disproportionate amount of the estate due to the JTWROS agreement. The surviving joint tenant may simply keep their share to the detriment of the other beneficiaries. Even if the surviving tenant wants to "make things right" by giving back some of the assets to the other beneficiaries, these gifts are subject to potential gift tax liabilities as well. Consider these potential consequences when utilizing JTWROS.

Alternative Solutions

There are several alternative solutions to joint tenancy. For asset transfer purposes, titling assets in a trust, using a will, or potentially having a transfer on death agreement can achieve the asset transfer results desired compared to JTWROS. For TIC assets, consider trust ownership of the assets or transfer-on-death arrangements to avoid the need to probate the TIC share. These techniques can avoid the control, creditor and tax issues of joint tenancy.

For incapacity protection purposes, using a power of attorney can allow someone to control the asset for the incapacitated person without exposing the assets to the other risks discussed above. Moreover, trust planning can also allow for incapacity protection wherein the successor trustee could assume control over the assets should that be necessary.

For tax management, simply gifting assets, utilizing a will and/or trust planning can be used to address concerns. While none of these vehicles will eliminate a taxable event, they clearly stipulate your intent versus the potential inadvertent gifts and tax consequences that may arise with joint tenancy.

There isn't a "one size fits all" planning solution. Joint tenancy may help resolve your planning issues, and some of the alternative solutions may be better to help achieve your planning goals. To help find the right balance for you, work with your financial advisor, and your legal and tax professionals to create and implement a plan that meets your legacy goals. ■

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