Traps and Pitfalls of Joint Ownership

By Steve Cupples

If your goal is to bypass probate, techniques other than joint tenancy with rights of survivorship exist. There are dire consequences of adding a joint owner or owners with rights of survivorship to the title of your property. Naming a child as a joint owner to assist in the management of your property has several disadvantages.

Non-tax disadvantages

If a child's name is added to a parent's bank account as a joint owner, the following are some of the potential unintended consequences:

- The child may use the funds for the child's own benefit, thereby reducing or eliminating the parent's funds.

- If the child experiences financial difficulties, the funds in the joint account could be reached by the child's creditors.

- If there is more than one child and the parent does not add all of the children to the account as joint owners, upon the parent's death, all of the funds in that account will pass solely to those children named as joint owners of the account and the parent's other children will receive nothing from the account. If the parent wants to treat his/her children equally, other arrangements will need to be made with the parent's other assets to insure that all of the parent's assets will be divided equally among the children at the parent's death.

- If the parent has multiple children (who, in turn, have children of their own) and the parent adds all of the children to the account as joint owners, then upon the parent's death, all of the funds in that account will pass only to his/her surviving children, thereby unintentionally disinheriting his/her grandchildren who are the children of any child who may have predeceased the parent. If the parent wants a predeceased child's share to pass to that child's children (who are the parent's grandchildren), then other arrangements will need to be made with the parent's other assets to insure that all of the parent's assets will be divided equally among his/her children, with a predeceased child's share passing to that child's children.

If a parent retitles the family home or other real estate in joint names with all of his/her children, the following are some of the potential unintended consequences:

• The parent may not sell the property without all of the children and the children's spouses, if any, signing the deed conveying the property.

• The parent may not refinance an existing mortgage on the property or otherwise establish a home equity line of credit without all of the children and the children's spouses, if any, signing the mortgage or home equity line of credit.

• A child who wants to "cash in" on his share of the property has the right to do so and may bring a lawsuit to partition the property.

• If a child were to run into financial difficulties, that child's share of the property may be subject to the claims of that child's creditors.

Tax disadvantages

• If a person transfers property by retitling it in joint names, the transfer may result in a gift and then, depending on the value of the gift, it may be a reportable taxable gift. The rules for when a transfer of property in joint names is a gift are complicated. For example, a person who retitles real property by adding a joint owner as joint tenants with rights of survivorship has made a gift. Likewise, retitling a stock or bond by adding a joint owner as joint tenants with rights of survivorship is a gift. However, a person who adds a joint owner as joint tenants with rights of survivorship to a bank account has not made a gift. Instead, the gift occurs when the co-owner receives funds from that account during the original owner's lifetime.

• In addition, if a parent retitles the family home or other real estate in joint names with one or more of his/her children as joint tenants with rights of survivorship, there may be other unintended tax implications. For example, if the real estate is sold at a gain, that gain will be allocated equally among the parent and his/her children who are listed as joint owners. Moreover, the children may be liable for income tax on their share of the gain because the income tax exclusion for gain on the sale of a principal residence may not be available to the children.

You may think that retitling your property to create joint ownership is a simple and inexpensive solution, but there are other ways to avoid probate and unintended headaches rather than adding a joint owner to your property. The preferred method is establishing a revocable living trust. Transferring your property to your revocable trust will, upon your death, bypass all the potential traps, pitfalls and risks of joint ownership and be administered according to trust law

– saving you time, money and complications, keeping your affairs private, and avoiding probate altogether.

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Survivorship's time traps

Plans can be foiled if joint tenants die together. A revocable living trust can help offset the problem.

By ROBERT J. BRUSS
Inman News

Question: My wife and I hold title to our home as joint tenants with right of survivorship. We understand that the survivor will own the house after one of us dies. But what if we both die at the same time, such as in a plane or auto crash?

Answer: You ask an extremely important question. As you correctly explain, when one joint tenant dies, the survivor owns the entire property. The deceased's will has no effect on real estate held in joint tenancy with right of survivorship. However, if both joint tenants die at the same time, or about the same time, complications can develop.

A few years ago, a Berkeley couple were out for a walk one evening when they were hit in a drive-by shooting. The woman died shortly thereafter in a hospital, but the man was kept on life support for several hours because he was an organ donor. The result was that the woman's share of the joint tenancy property went to the man by survivorship. When he died, the property went to the man's heirs and the woman's heirs received nothing. If they had both died at the same moment, such as in a plane crash, their individual wills would determine who received their shares. In case of simultaneous death, you and your wife need individual wills.

As you can see, joint tenancy with right of survivorship is far from the ideal way to hold real estate joint title. A far better method is to hold title in a revocable living trust.