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WHAT ABOUT JOINT OWNERSHIP?

By: R. Leonard Davis, III, Esquire

Over the years we have responded to questions from many clients about the advisability of titling an asset in joint names with a child or children in order to avoid probate. While it is true that an asset held with a child as “joint tenants with right of survivorship” will avoid the probate process, there are substantial risks and hidden pitfalls associated with this approach.

Some of these risks are best illustrated by an example. Martha Barnes, a widow, has only one child, Julia Smith. Julia is married to Bob Smith. Martha has decided that, upon her death, Julia will inherit her house. She is also determined that Julia will not have to suffer through a probate in order to get her house. Accordingly, Martha puts Julia on the deed to her \$300,000 home, titling the real estate as “joint tenants with right of survivorship.”

As a result of this seemingly simple transaction, several troublesome “what ifs” are now in the picture:

1. **Consent of Joint Tenant.** What if Martha later wants to sell the property, and move to a retirement home in Florida? Martha cannot do that, unless she obtains the consent of Julia. If Julia has placed her one-half interest in joint tenancy with her husband, Bob, Martha will also need Bob's consent. This scenario has resulted in the breakup of families, and much heartache and grief.

2. **Creditors; Bankruptcy.** What if daughter Julia runs into debt problems, and either a judgment is entered against her which she is unable to pay, or she is forced to file bankruptcy? In these cases, creditors may force the sale of Martha's house, and one-half of the proceeds will be used to pay Julia's creditors.

3. **Divorce.** What if Julia and Bob divorce? Julia's one-half interest in the house will be a marital asset if Julia has placed her one-half interest in joint tenancy, and will be subject to equitable distribution in the divorce proceeding. This may also result in a forced sale of the house. Even if Julia has not placed her one-half interest in joint names with Bob, the appreciation of the house will be marital property.

4. **Predecease.** What if Julia dies before Martha? This seems unlikely to Martha, but if it happens (and accidents do happen) Martha will inherit half of her own house. As a result, she will pay an inheritance tax on the half she inherits from Julia, and she may be forced to go through a probate proceeding to get her own property back. Or, if Julia placed her one half interest in joint names with Bob, on Julia's death, Martha will own the house jointly with Bob.

5. **Gift Tax.** What about the gift tax implications of placing the house in joint tenancy? When she made Julia joint tenant on her house, Martha made a gift of one-half of the value of that house, or \$150,000.00. Since this amount exceeds the annual \$13,000 gift tax exclusion (as of 2009), Martha will now need to file a gift tax return. Part of her unified credit will have been used up, and either she or her estate may have to pay gift or estate taxes.

6. **Capital Gains Tax.** What if the house is subsequently sold? As a result of making a gift of one-half of her house during her lifetime, Martha may have unwittingly saddled Julia with a large capital gains tax when the house is ultimately sold. Especially if Martha's basis in the house is low, say \$100,000, one-half of the gain (i.e., one-half of \$200,000, or \$100,000) will be subject to income (capital gains) tax when Julia files her income tax returns. There are both federal and state income tax implications on the transaction.

The risks described above can become even more complicated when multiple joint tenants (such as two or more children) are involved.

In short, joint ownership is not a good way to avoid probate. We generally do not recommend its use, except by married couples in appropriate cases. We believe that trust ownership in a revocable living trust is a much better approach.

We welcome your questions on this and other estate planning matters. If you would like to discuss joint ownership or other estate planning issues, please email or call us.