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MATSUMURA LAW FIRM

Wills, Trusts, Probate
And Estate Planning

Michele Matsumura,
Attorney, LL.M. (tax)

5674 Stoneridge Drive
Suite 202
Pleasanton, CA 94588
(next to the courthouse)

Tel | 925.218.8984
Fax | 925.218.2372

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Joint Tenancy: A Solution That Causes Problems

Do You Know Joint Tenancy's Unpredictable Repercussions?

Joint tenancy is one available method to take title to assets. Although the title "joint tenancy" may be used quite casually, the legal consequences of joint tenancy can be serious and troublesome. Maybe individuals are comfortable with joint tenancy because it sounds understandable—after all, "joint tenancy" sounds like you own properly together, which may be true. However, joint tenancy is more complex than people realize, and

wishes to anyone else, and privacy is preserved.

Just Tenancy Gambles on Survivorship. Joint tenancy has a "right of survivorship" - i.e., the surviving joint tenant secedes to ownership. Therefore, placing property in joint tenancy is also an exercise in predicting the future. Assume the parent in the previous example intends for the home to pass 100% to the joint tenant child. The parent is betting that the child will outlive him/her. If the parent is wrong about the gamble, new plans will have to be made or else confusion or disaster will ensue.

Joint Tenancy Is Widely Used,
but the Adverse Tax and Legal
Implications are Poorly Understood.

oftentimes, the tax and legal implications are unwanted. Here are some aspects of joint tenancy that you should know before using this title:

Joint Tenancy Reduces Control.

The most obvious result of joint tenancy is a loss of control to the original owner of the asset. It is common for a parent to deed his/her home in joint tenancy with a child. Once the transfer into joint tenancy is accomplished, the child effectively holds power over the home. The child can "sever" the joint tenancy and transfer the child's interest to another without the consent of the parent. Furthermore, the parent can no longer sell the entire home without the consent of the child.

In contrast, with a revocable trust, the original owner can always amend the document at any time without the consent of any other person. Further, the original owner need not disclose distribution

For example, suppose a man places property in joint tenancy with his niece. He intends that the niece and her family receive the property upon his passing. However, the niece dies in a car accident a week before the man dies. Because the man had no will, the property passes via the laws of intestacy to the man's children. The niece's family gets nothing.

Again, this unpredictable solution can be avoided with a revocable trust.

Joint Tenancy Creates Creditor's Claims Exposure.

A parent who adds a child as joint owner to a home exposes the home to the child's debt. The child's creditor can force a sale of the whole property to satisfy the debt.

More Income Tax Paid. Adding a child on title as a joint tenant gives away half the property, and that half loses a "stepped-up" income tax basis that would have been available to

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Joint Tenancy: A Solution That Causes Problems (continued)

the whole property. The “stepped-up” income tax basis allows the property owned by a deceased person to receive a new cost basis equal to the value of the property on date of death. The “stepped-up” tax basis allows appreciation on inherited property to be eliminated and escape income taxation. But joint tenancy can remove this “stepped-up” benefit.

For example, a man purchased a home 50 years ago for \$50,000. The home appreciates to \$850,000 at the man’s death. The child inherits the home with a “stepped-up” income tax basis of \$850,000. When the child sells the home for \$850,000, no in-

file a gift tax return for this second transfer and bear gift tax consequences of his/her own.

Lost Opportunity. When the parent places property in joint tenancy with a child, the parent has lost the opportunity to have the property placed in a spendthrift trust for the benefit of the child (to provide asset protection), or to put the property in a grandchild’s trust (if the child dies before the parent but has minor kids his/herself). Joint tenancy does not allow the parent to protect the assets for his/her descendants, as is possible with a revocable trust.

Divorce of Joint Tenant. If a parent adds a married child as a joint tenant

The Loss of Control with Joint Tenancy Can Produce Unexpected or Unwanted Results



come taxes are due the on sale. However, if the home is in joint tenancy, the child must pay income tax on \$400,000 (one-half of \$850,000 value less \$50,000 basis) upon sale - a bad income tax result.

Gift Results are Irreversible. With most estate planning, the techniques are revocable—i.e., everything can be changed back to original status. However, the act of a parent adding a child as a joint tenant to real property is legally considered a gift. If the value of the gift is greater than the annual gift tax exclusion (\$12,000 for 2008), then a gift tax return must be filed and the gift has other gift tax consequences. If the parent changes his/her mind, the gift cannot be undone. If the parent wants the interest back, the child must “gift” his/her interest back to the parent. The child must likewise

and the child later divorces, that child’s spouse may have a claim to the child’s interest in the jointly held property with the parent.

Moral Obligation is Not Reliable. Many times, a parent will put a child’s name on a bank account with the belief that “my child will do the right thing” and share with siblings. Unfortunately, sometimes a child will believe the right thing is to keep the account to him/herself for serving as the parent’s primary caregiver. Even if the child wanted to “equalize” the account with siblings, the child will have gift tax issues and will need to file a gift tax return if the child must transfer over \$12,000 (in 2008) to siblings.

Conclusion. Make sure that you understand the implication of naming a joint owner who is not your spouse. Joint tenancy may not unfold in the manner which you intend. ∞

About Me & My Practice. I graduated cum laude from the University of the Pacific in Stockton, CA. I received my law degree from UC Davis and graduated from Golden Gate School of Law with a Masters in Taxation. For the last 10 years, I have practiced exclusively in the area of estate planning, probate and trust administration. In my off hours, I support Pacific and Cal athletics, the SF Giants (it’s going to be a tough year!), the Sacramento Kings, and play (and watch) tennis!