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**CONCURRENT OWNERSHIP OF PROPERTY IN SOUTH CAROLINA**

**JOINT TENANCY OR TENANCY IN COMMON ?**

Wealth may be owned individually or jointly. When two or more purchasers acquire real property, the question often arises as to how they should hold title. In South Carolina co-tenants often hold title to real property either as "joint tenants with the right of survivorship" or as "tenants in common." Additionally, concurrent ownership of real property may take the form of an artificial entity such as a corporation, partnership or limited partnership. One form of co-ownership called "tenancy by the entirety," through which a husband and wife each own undivided, full interests in real property, no longer exists in South Carolina.

**Joint Tenancy With Right of Survivorship**

Many people are familiar with the principals of joint tenancy through their experience with joint bank accounts. As with joint bank accounts, real property held in joint tenancy means that each co-tenant has an undivided interest in the property. Also, if the instrument creating their joint tenancy specifies, each co-tenant will have right of survivorship. Right of survivorship means that when one co-tenant dies, her interest in the property passes automatically to the surviving co-tenant.

Because the property passes to the surviving joint tenant outside any will, the surviving tenant becomes the sole owner of the property without the need of any probate proceedings. However, to document the passing of title with the death of a joint tenant, minimal filing requirements need to be fulfilled with the Probate Court of the county in which the real property is located. Also, the property may be subject to the rights of creditors holding unsatisfied debts of the deceased joint tenant. This includes those of state and federal taxing authorities which may attach to the property through estate tax liability.

A joint tenancy with survivorship rights can be a helpful form of estate planning, especially to small estates which do not incur estate taxes. It may also ease the administrative burdens of the death of a non-resident co-tenant by minimizing the need for South Carolina estate administration. However, individual estate tax consequences need to be considered in assessing the most beneficial means of holding title, especially with real estate.

To create a joint tenancy, the joint tenants must acquire their interests in the property at the same time. A joint tenancy can be destroyed or "severed" if a co-tenant acts in a manner which contradicts the undivided, common interests of the joint tenancy. For example, when one co-tenant sells his interest in the property, the joint tenancy is terminated along with the right of survivorship. The new co-tenants will own the property as tenants in common.

Until the land is divided or "partitioned," either by voluntary agreement of the co-tenants or by a court ordered division, none of the joint tenants are entitled to the exclusive possession of any part of the land. Additionally, no co-tenant may mortgage the entire property without the agreement of the other joint tenants. For this reason, most lenders will not accept mortgages on property owned by joint tenants unless both sign the mortgage. A divorce will not sever a joint tenancy without an agreement to do so in the settlement or decree.

After a partition, whether voluntary or court ordered, each individual will have exclusive title to a portion of the property. At this point, any unsatisfied mortgages or debts may be enforced against that portion of the property which belongs solely to the debtor.

#### Tenancy in Common

Tenants in common, like joint tenants, share undivided interests in property. However, when one tenant in common dies, his interest does not pass automatically to the surviving co-tenants, but rather according to the terms of his will or by the laws of intestate succession. With a tenancy in common, a will is very important in determining the distribution of the deceased co-tenant's interest in the property. The estate tax consequences will differ under each form of ownership for both a surviving co-tenant and the deceased co-tenant's estate.

Unlike a joint tenancy, a tenancy in common is not destroyed by a co-tenant's conveyance of his interest in the common property. A tenant in common who conveys his interest to a third party ceases to remain a co-tenant, and the one who purchases the co-tenant's property becomes a tenant in common with the remaining owner or owners.

#### Importance of Wills

As explained above, the existence of a valid will has no effect on real estate held under a joint tenancy with right of survivorship; the property automatically passes to the surviving co-tenants. A valid will is very important in the distribution of land held by tenants in common, however, and a will provides several advantages to its maker - the testator.

The most important is that it gives the testator control of the distribution and disposition of his possessions, as well as allowing her the opportunity to appoint an individual or entity to administer her estate. If the owner dies without a will, or "intestate," a court will appoint an administrator for the estate. The administrator then follows South Carolina's statute of descent and distribution, which provides a mechanical formula to the allocation and distribution of estate assets. A will permits the testator to determine who will distribute the possessions and to whom they will be distributed. Furthermore, a competent will incorporates tax planning to minimize estate taxes.

#### SUMMARY

This memorandum is not intended to imply any preferences for one form of ownership over the other. It is intended to stress the importance of estate planning and of choosing a form of ownership consistent with that plan. The attorneys of Bethea, Jordan & Griffin, P.A., will be happy to discuss the probate and tax ramifications of such a choice with you or your estate and/or tax advisor.