

## Chapter 15.

### Sole and Joint Ownership Considerations

#### SOLE OWNERSHIP

Ownership of property in one name is normally the simplest method and gives the holder the most complete ownership possible. Transfers are relatively easy because the holder of title to the property has the absolute right to dispose of it under most circumstances. In some cases, a spouse may have to consent to the transfer of real property owned solely by the other spouse because of the dower right available under the laws of some States. At death, solely owned property passes under provisions of the will or, if the decedent died intestate, according to the provisions of State law. Federal estate and State death taxes generally apply to the total value of the property held in sole ownership. Outright ownership of property is referred to as "fee simple," the nearest thing to absolute and complete ownership.

#### JOINT OWNERSHIP BETWEEN SPOUSES

A key estate planning element for family-owned timberland is the manner in which the property is held by husband and wife. Typically, the spouses have worked together to accumulate and manage the woodland. The result is a feeling of commonality of ownership, and the intent that the property be controlled by and applied to the use of the survivor as long as he or she lives.

It is beyond the scope of this book to provide a detailed discussion of the various methods of interspousal property holding among the 50 States. A basic analysis of the application of estate and gift taxes to property transfers within the marital community will, however, be presented.

#### Legal Development

The traditional English concept of jurisprudence was that as long as both spouses lived, they represented a single unit of ownership, with this ownership being represented by the surviving spouse after the death of the other. A blending of this common law concept of the legal unit of husband and wife with the common law theory of joint ownership of property led to the development of tenancy by the

entirety. The distinguishing feature of tenancy by the entirety is that no partition or severance of the ownership of real property or destruction of the survivorship feature can be achieved by the unilateral action of either spouse. Many States have abolished this concept as a form of property holding; others have continued it, some-times with modifications.

Where tenancy by the entirety has been abolished, common law joint tenancy may generally be utilized to create property holdings between husband and wife that have the survivorship feature. Joint tenancy resembles tenancy by the entirety in that both entail a right of survivorship. A joint tenancy, in addition, may be created among nonspouses. Joint tenancy also permits partition of the property at the will of any of the cotenants, unlike tenancy by the entirety.

#### Community Property

Nine states--Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin--derive their concepts of property holding between husband and wife from the civil law rather than from common law. These are the so-called "community property States." The basic community property concept is that all property acquired by the spouses from the efforts of either during the marriage belongs in common to both. Separate property is generally that received by either spouse by inheritance or gift and that owned prior to the marriage. Generally, in community property States, the surviving spouse is protected to a greater degree in the succession to community property than in succession to separate property. The profits and earnings from community property, and in some cases from separate property, are considered community as well.

#### Advantages of Joint Ownership

In many States, the probate procedure is perceived to be so cumbersome, time consuming, and expensive that joint tenancies are common. Joint property holding tends to express the common feeling of joint endeavor and mutual accomplishment enjoyed by owners of farm, forest, and other rural properties. It has been commonly utilized as a

substitute for more complex business organization arrangements. Survivorship property ownership arrangements can offer each the emotional and financial security of knowing that the mutually acquired property cannot be lost by the survivor, in whole or in part, upon the death of the other. Additional advantages include the ease of understanding and implementing the concept; and the uncomplicated and inexpensive transfer process.

### **Disadvantages of Joint Ownership**

*Basis Limitations.*--Despite the valuable uses of joint property holding arrangements between spouses, there are potential problems--particularly with respect to those estates that have values greater than the unified credit exemption equivalent. When spouses are exclusively joint tenants in property, regardless of which spouse provided the consideration for the jointly held property, one-half of the value of the property is included in the gross estate of the first spouse to die. Although no Federal estate tax is paid on property passing to the surviving spouse because of the unlimited marital deduction, the surviving spouse in noncommunity property States will receive a stepped-up basis only in that property included in the gross estate of the decedent spouse. If the first spouse to die had owned all of the property, a full step-up would be obtained.

*Unintentional Termination.*--In some States, joint tenancy ownership may be severed by a contract to sell to third parties or even by the placing of a mortgage on the property. As a result, the parties may fail to achieve their purpose through an unintentional termination of the survivorship feature.

*Limitation on Using a Disclaimer.*--The role of disclaimers (see chapter 7) as a post mortem estate planning tool is extremely limited. Only a few States permit a disclaimer of the interest in property that has been perfected in the survivor. Thus, this highly desirable method of post mortem tailoring of property descent is not available if not provided for by State statute, and the resultant afterdeath tax planning is generally denied to the surviving joint tenant.

Additionally, the Internal Revenue Service (IRS) has taken the position that a disclaimer of a joint tenancy interest is not effective for estate tax purposes, even though it may be valid under State law, on the ground that the donee accepted the property when the joint tenancy was created (Letter Rulings 7829008, 7911005, and 7912049). The reasoning set out in the rulings is that property transferred to a joint

tenant who may become the survivor is accepted by that joint tenant when the joint tenancy is created and, thus, must be disclaimed within the statutorily required period of 9 months from the date of creation of the joint tenancy. It is the position of the ruling that by the time of the death of the first tenant to die, acceptance has been completed, and the statutory period for the disclaimer has expired.

### **Postdeath Income Tax Considerations**

Another disadvantage of joint tenancy involves postdeath income tax considerations. There are a great many advantageous income tax options available to the estate of a decedent. Because survivorship property passes to the survivor immediately upon the death of the deceased, there is no intervening estate to act as a taxable entity. Thus, the surviving joint tenant cannot take advantage of the post mortem tax options generally available to estates.

### **Creation of Joint Tenancies in Real Estate**

Most States with joint tenancy statutes now permit the creation of joint tenancies in real property by a conveyance to the joint tenants(s) that sets forth the existence of the survivorship feature. In those States that recognize tenancies by the entirety, State statutes and sometimes case law provide various methods of creation. Once such ownerships have been established, the ownership of income resulting therefrom sometimes becomes an issue. The status of the income is critical to the tax consequences associated with it, particularly with respect to proof regarding contributions by a nonspousal donee or surviving joint owner. Profits and proceeds generally, including those from the sale of standing timber, that are derived from entirety property are themselves treated as entirety property. Similarly, property purchased with the proceeds from selling entirety property is also entirety property. Income realized from joint tenancy property, on the other hand, is treated in most States as the separate property of the joint tenants in proportion to their ownership interests.

### **Federal Estate Tax Aspects of Joint Tenancies**

The estate tax consequences of the death of an individual who has an interest in a joint tenancy are governed by Internal Revenue Code (IRC) Section

2040. Section 2040(b) establishes the concept of a "qualified joint interest." This concept is defined as "any interest in property held by the decedent and the decedent's spouse as (1) tenants by the entirety or (2) joint tenants with right of survivorship, but only if the decedent and his (her) spouse are the only joint tenants." For such an interest in property, the value to be included in the decedent's gross estate is one-half of the value of the interest.

*Nonspousal Joint Interests.*--Section 2040(a) applies to all situations involving nonspousal joint interests. The value of any such joint interest held by the decedent at death is to be included in his (her) gross estate to the extent of the decedent's fractional share of the property, in cases

where the property was acquired by gift, bequest, devise, or inheritance; or to the extent that it cannot be demonstrated that the surviving tenant(s) provided consideration for the acquisition of the property in those cases in which the property was acquired by other means. Thus, if a personal representative is unable to show that the property was acquired by gift, bequest, devise, or inheritance--or that the surviving tenant(s) provided consideration for acquisition of the property--the value of all of the jointly held property will be included in the decedent's gross estate. Because determination of the amount of consideration provided by each tenant can sometimes be difficult, it is very important that accurate records be kept when using nonspousal joint property-holding arrangements.