

TYPES NOT MAPPED YET December 22, 2016 | TTR not mapped yet | Stephen E. Cupples

Traps and pitfalls of joint ownership

Many people believe that owning property jointly with rights of survivorship is an effective substitute for a will. The benefit of holding property as joint tenants with rights of survivorship is that such property passes to the surviving joint tenant on the death of the first joint tenant without going through probate. If you arrange your affairs to bypass probate, you may save time and money, as well as keep your affairs private.

However, if your goal is to bypass probate, techniques other than joint tenancy with rights of survivorship exist. For example, you may choose to use a transfer on death direction, in which case you retitle the property using either a transfer on death to (TOD) or pay on death to (POD) registration followed by a designation of the people you want to receive the property upon your death. Title to property that is registered using a transfer on death direction passes by operation of law and no probate is required. In addition, you may choose to establish a revocable trust and transfer your property during your lifetime to your revocable trust. Upon your death, the trust property will be administered pursuant to the terms of the trust and trust law, again without going through probate.

This article is not intended to evaluate the pros and cons of various probate avoidance techniques; instead, it will focus on some of the consequences of an unmarried individual adding a joint owner or owners with rights of survivorship to the title to his/her property.

Many times, a single person will consider having a child assist in the management of his/her property by naming such child as a joint owner of such property. Such an arrangement 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.

While creating joint ownership with respect to one's property is simple and inexpensive, it has potential traps, pitfalls and risks. Suffice it to say that a single person who wants to avoid probate should carefully consider the consequences of adding a joint owner to his/her property before doing so. There are other ways to avoid probate. You should discuss with your estate planning attorney these other options before proceeding to retitle your property in joint names with one or more people as joint tenants with rights of survivorship.

Steve Cupples is a practitioner in succession planning for family businesses, including the areas of estate planning, taxation, estate and trust administration, estate and trust litigation, tax controversies and general business. He can be reached at (314) 552-6027.

authorsTest

stephen

Stephen E. Cupples