Understanding Tenancy – Co-Owning Property

When two or more individuals own property – whether it's a condominium, a home, or a piece of land – the relationship between the owners is very important. The form of ownership of the property affects how property is transferred to someone else. It is important to make sure you have the right form of ownership for your property.

Tenancy in common allows an owner the greatest flexibility to transfer the property as he or she wants. Each co-tenant in a tenancy in common has an interest in the property and is free to transfer this interest during life or through a will. The co-tenants can have different ownership interests; for example, three owners could own 5 percent, 35 percent and 60 percent of the property, respectively, as tenants in common. Each tenant can sever their relationship with the other tenants by conveying their interest to another party. This third party then becomes a tenant in common with the other owners.

Joint tenants, on the other hand, must have equal ownership interests in the property. So, three owners would each have a one-third interest in the property. If one of the joint tenants dies, his or her interest immediately ceases to exist and the remaining joint tenants own the entire property. The advantage to joint tenancy is that it avoids having an owner's interest probated upon his death.

A disadvantage to both joint tenancy and tenancy in common, however, is that creditors can attach the tenant's property to satisfy a debt. So, for example, if a co-tenant defaults on debts, his creditors can sue in a "partition proceeding" to have the property interests divided and the property sold, even over the other owners' objections.

A third form of tenancy that is allowed in several states, including Maryland and D.C., **tenancy by the entirety**, avoids this problem, but it is available only to married couples. Tenancy by the entirety is based on the societal value of protecting the family. One tenant cannot convey her interest on her own, unlike with the other tenancies. Upon the death of one spouse, his or her interest automatically passes to the other spouse, as with joint tenancy, and the creditors of one spouse cannot attach the property or force its sale to recover debts unless both spouses consent.

Creditors may place a lien on property held in tenancy by the entirety, but they are out of luck if the debtor dies before the other spouse, who will take ownership of the property free and clear of the debt. This is why both husband and wife are required to sign the mortgage on their property for the mortgage to be valid. Unmarried couples who buy property and subsequently marry each other should re-title the deed as tenants by the entirety to avail themselves of the greater protections this form of tenancy offers.

In most states, if the form of tenancy that the tenants intended is ambiguous, the tenancy will be assumed to be a tenancy in common.

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Do You Need a Lawyer to Write a Will?

While you aren’t technically required to hire a lawyer to draft a will, failing to do so can lead to costly problems for

your family and other heirs.

A will is a legal document that directs who will receive your property when you die. The legal requirements are pretty simple. In order for your will to be valid, you must know what property you have and what it means to leave it to someone, then sign the document and have it witnessed according to the laws of your state. Some states allow you to make a handwritten will, called a "holographic" will. This will does not need to be witnessed, but it is much more likely to be challenged after you die.

Many services have popped up that offer do-it-yourself will software or documents. These might work fine if you have little or no property, small savings or investments, and a traditional family tree, but the rest of the population should not use these programs. When it tested three leading online legal document preparation services, *Consumer Reports* concluded that none of the will-writing products was likely to entirely meet a person's needs unless those needs are extremely simple.

And likely you'll need a lawyer to definitively determine whether or not your needs are indeed simple. Do you have an estate that is taxable under state or federal law? Do you own significant amounts of tax-deferred retirement plans? Do you know how to fund the revocable trust provided on the computer program? Is there anything about your estate that is unusual, such as having children from a previous marriage or a disabled child? If you have any questions about your estate plan, you need to see a lawyer.

Not hiring a lawyer can lead to problems that drag out your estate administration and cost money and create headaches for your heirs. For examples of what can go wrong if you fail to use a lawyer, click here and here.

Decisions to Make For Your Power of Attorney

A power of attorney may seem like a simple document, but there are several important decisions that need to be made when creating one. From whom to appoint to what powers to grant, care and consideration should be put into each choice.

A power of attorney is one of the most important estate planning documents you can have. It allows a person you appoint – your "attorney-in-fact" or agent – to act in your place for financial or other purposes when and if you ever become incapacitated or if you can't act on your own behalf. It can permit the agent to pay your bills, make investment decisions, take planning steps, and take care of your family when you can't do so yourself. In theory, all the power of attorney should need to say is the following:

I, Joe Blow, hereby appoint Janet Planet to step in for me in the event of my incapacity to handle my financial and legal matters.

Here are some of the decisions you will need to make on your power of attorney:

Whom to appoint. Of course, you need to appoint someone you trust to have your best interests in mind. The person also needs to be organized and responsible and have the time available (or be able to make the time available) to carry out the functions of paying bills, guiding investments and handling any legal matters that may arise. Generally, people appoint family members to this role, but sometimes none of their relatives are appropriate, in which case they may appoint a friend or even an accountant, attorney or clergy

person. If there's no one to appoint, despite the benefits of the power of attorney, you may need to resort to a court-appointed conservator in the event of incapacity.
How many agents to appoint. You may appoint one or more agents on your power of attorney. Having multiple agents allows more than one person to share the responsibility and permits them to divvy up tasks, but at the risk of disputes between your agents. If you apoint more than one, make sure that the document permits each agent to act on his or her own. Requiring them to act together could become very cumbersome if all of your agents have to sign every check or other document. Also, if you appoint more than one agent, make sure they get along and communicate. If not, misunderstandings can arise. It is generally better not to name more than two agents, but parents of three children may not want one to be left out.

Alternates. In addition or instead of naming multiple attorneys-in-fact, you can name one or more alternates in case the first person or people you appoint cannot serve. For instance, you may name your spouse as your agent and your children as alternates. If you do name alternates, make sure the document is very clear about when the alternate takes over and what evidence he or she will need to present when using the power of attorney. Otherwise, a bank or other financial institutions might deny access to an account if it's not certain that the alternate has indeed taken over.

"Springing" or "durable." The idea behind a power of attorney is that it will be used only when the person who creates it (the "principal" in legal speak) becomes incapacitated. Interestingly, traditionally powers of attorney expired when the principal became incompetent, the theory being that the attorney-in-fact stands in the principal's shoes and can only do what the principal can do; if the principal is incompetent, then so is the agent. Every state has passed laws providing for "durable" powers of attorney that survive the incapacity of the principal. But when should

it take effect? A “springing” power of attorney only takes affect when the principal becomes incapacitated. The problem is that springing powers of attorney create a hurdle for the agent to get over to use the document. When presented with a springing power of attorney, a financial institution will require proof that the incapacity has occurred, often in the form of a letter from a doctor. Obtaining that letter will be one more task the attorney-in-fact will have to carry out, often when already overwhelmed dealing with a parent’s illness while still trying to stay employed and care for children. It can also mean a delay in access to funds needed to pay for care or to maintain a home. In most cases, if you trust someone enough to name him or her as your agent, you also trust him or her not to use the document until the appropriate time. And if this trust is misplaced, then you can always revoke the appointment. A final argument for executing a durable, rather than a springing, power of attorney is that it may be needed when the principal is competent, but unavailable. For instance, a financial or legal matter may come up while the principal is vacationing in Europe. It could be important that the attorney-in-fact can step in and act while the principal is out of the country.

Gifting. Powers of attorney usually go on for several pages listing the various powers the attorney-in-fact may carry out. This is because financial institutions and tax authorities often look for and demand specific authorization for the tasks the agent is seeking to perform. One of the most important powers is the power to gift. While strictly speaking allowing your agent to make gifts may not always be in your best interest – it is usually better to have more money than less – it may well be what you would want to do if you were competent to act on your own. You may want to support children and grandchildren or to take steps to reduce taxes or qualify for public benefits.

Trust powers. Similar to the power to make gifts, it can

be important to authorize the attorney-in-fact to make, amend, and fund trusts on behalf of the principal. Power of attorney forms often permit the funding of preexisting trusts but not their modification or the creation of new trusts. These powers can be extremely important in the context of long-term care planning, asset protection planning or special needs planning for spouses, children, and grandchildren.

Copies and Storage. Once the agents and wording of the power of attorney have been determined, how many originals should you have and where should they go? Most powers of attorney include language saying that a copy should be treated like an original, but this is not always honored by third parties. In addition, an original may be inaccessible for some periods of time. For instance, in transactions involving real estate, an original power of attorney must be recorded with the deed. The power of attorney will be returned, but perhaps not for several months. You have the option to keep originals yourself or give them to your agents. Usually people keep the originals and tell their agents where the documents are located in case they are needed.

One other important consideration is to see if any of the financial institutions with which you have accounts have their own power of attorney forms. If so, make sure you execute their forms as well as a general durable power of attorney because banks and investment houses have been known to reject powers of attorney that are not their own for spurious reasons.

Executing a power of attorney is not as simple as it first seems. It is important to have a qualified attorney help you.

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Redo Your Estate Plan When You Remarry

 If you are getting remarried, you obviously want to celebrate, but it is also important to focus on less exciting matters like redoing your estate plan. You may have created an estate plan during your first marriage, but this time it will probably be more complicated—especially if you have children from your first marriage or more assets. The following are some pointers for ensuring your interests are taken care of when you remarry:

- **Take an inventory**. The first thing you and your partner should do is each take an inventory of your assets and debts and share it with the other person. Don't forget to include life insurance policies and retirement plans in your inventories. It is important to be open and honest about money if you want to prevent bad feelings in the future.
- **Decide how you want to handle finances**. Once you know what you are dealing with, then you need to decide if you want to combine (or not combine) assets when you are married. For example, if one partner is selling a house and moving in with the other partner, will he or she contribute to the cost of the house? If one partner has significant debt, you may not want to combine finances or make any joint purchases. These decisions need to be made upfront so everyone is clear on what to expect.
- **Decide what you want to happen when you die**. You and your future spouse need to figure out where each of you

wants your assets to go when you die. If you have children from a previous marriage, this can be a complicated discussion. There is no guarantee that if you leave your assets to your new spouse, he or she will provide for your children after you are gone. There are a number of options to ensure your children are provided for, including creating a trust for your children, making your children beneficiaries of life insurance policies, or giving your children joint ownership of property. Even if you don't have children, there may be family heirlooms or mementos that you want to keep in your family. Again, open discussions can prevent problems in the future.

- **Consult an elder law or estate planning attorney**. Even if you don't have a lot of assets, you should consult an attorney, especially if you have children. You will definitely need to update your will. You may also need to update or create other estate planning documents such as a durable power of attorney and a health care proxy. If you have significant assets, a prenuptial agreement may be appropriate. In addition, the attorney can help you decide if a trust is necessary to protect your children's interests.

- **Change your beneficiaries**. You may want to change the beneficiaries on your life insurance policy, annuity, and/or retirement plan. If you are divorced, however, you may not be able to change some of the beneficiaries. Bring your divorce decree with you to the attorney so he or she can make sure you do not violate the decree. If you can't change your beneficiaries, you may want to buy additional life insurance or retirement plans that will include your new spouse.

- **Consider a prenuptial agreement**. While you are intending to stay married, things happen. Unlike a first marriage, you may be bringing property to this marriage that you

spent decades accumulating and you may be merging two families. You need to decide together what your intentions are for the use of funds while you are living together, if you get divorced and when one of you dies before the other. Failure to think and plan ahead can mean severe heartache and financial costs for you and your family.

- **Consider purchasing long-term care insurance**.The physical, emotional and financial cost of long-term care can deplete the savings of all but the most wealthy. While you may be willing to spend your lifetime of savings on the care of a spouse with whom you raised a family and accumulated the funds, you may not want to lose this to the care of a relatively new spouse. Long-term care insurance, while expensive, can permit you and your new spouse to get the care you need without impoverishing the other.

The most important thing to remember is to be open and honest with your future spouse and your family members about your wishes.

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Kinds of Trusts

Trusts fall into two basic categories: testamentary and inter vivos.

A testamentary trust is one created by your will, and it does not come into existence until you die. In contrast, an inter vivos trust, starts during your lifetime. You create it now

and it exists during your life.

There are two kinds of inter vivos trusts: revocable and irrevocable.

Revocable Trusts

Revocable trusts are often referred to as “living” trusts. With a revocable trust, the person who created the trust, called the “grantor” or “donor,” maintains complete control over the trust and may amend, revoke or terminate the trust at any time. This means that you, the donor, can take back the funds you put in the trust or change the trust’s terms. Thus, the donor is able to reap the benefits of the trust arrangement while maintaining the ability to change the trust at any time prior to death. **need to give some real-world examples of trusts*

Revocable trusts are generally used for the following purposes:

1. *Asset management.* They permit the named trustee to administer and invest the trust property for the benefit of one or more beneficiaries.
2. *Probate avoidance.* At the death of the trust grantor, the trust property passes to whoever is named in the trust. It does not come under the jurisdiction of the probate court and its distribution need not be held up by the probate process. However, the property of a revocable trust will be included in the grantor’s estate for tax purposes.
3. *Tax planning.* While the assets of a revocable trust will be included in the grantor’s taxable estate, the trust can be drafted so that the assets will not be included in the estates of the beneficiaries, thus avoiding taxes when the beneficiaries die.

Irrevocable Trusts

An irrevocable trust cannot be changed or amended by the grantor. Any property placed into the trust may only be distributed by the trustee as provided for in the trust document itself. For instance, the grantor may set up a trust under which he or she will receive income earned on the trust property, but that bars access to the trust principal. This type of irrevocable trust is a popular tool for Medicaid planning.

Testamentary Trusts

As noted above, a testamentary trust is a trust created by a will. Such a trust has no power or effect until the will of the grantor is probated. Although a testamentary trust will not avoid the need for probate and will become a public document as it is a part of the will, it can be useful in accomplishing other estate planning goals. For instance, the testamentary trust can be used to reduce estate taxes on the death of a spouse or to provide for the care of a disabled child.

Supplemental Needs Trusts

The purpose of a supplemental needs trust is to enable the donor to provide for the continuing care of a disabled spouse, child, relative or friend. The beneficiary of a well-drafted supplemental needs trust will have access to the trust assets for purposes other than those provided by public benefits programs. In this way, the beneficiary will not lose eligibility for benefits such as Supplemental Security Income, Medicaid and low-income housing. A supplemental needs trust can be created by the grantor during life or be part of a will.

Credit Shelter Trusts

Credit shelter trusts are a way to take full advantage of state and federal estate tax exemptions.

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