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JOINT TENANCY

Many misleading notions about joint tenancy exist. The information presented here is intended to clear up misunderstandings about joint tenancy.

What is joint tenancy?

Joint tenancy is a type of ownership in which two or more people share an interest in personal property or real estate. If the interest is as tenants in common, each person owns an undivided but individual interest which goes to his heirs at death. If the interest is "with right of survivorship", the interest goes to the surviving joint owner.

Is joint tenancy a substitute for a will?

Joint tenancy does not take the place of a will. It applies to a particular piece of property only. A properly drawn will disposes of all property not held in joint tenancy. A will can be changed as often as you choose. A joint tenancy agreement is difficult to change because one co-owner may simply refuse to do so.

What are some common problems with joint tenancy?

Some real problems can develop with a joint tenancy agreement because joint owners, even husband and wife, may disagree. It then becomes difficult to make necessary decisions about management of the property, repairs, division of income, and so forth.

It also affects who inherits your property on death. Even though your will leaves your property to named individuals, if the bank account or title to real estate is joint with right of survivorship, the joint property will go to the surviving joint owner, not as provided by the will.

Further, joint accounts on deposit in financial institutions are subject to claims to pay debts, taxes and expenses of administration, including statutory allowances to the surviving spouse, minor children and dependent children, if other assets of the estate are insufficient. Also, the financial institution has a lien against the account for any unpaid indebtedness owed by the deceased to it.

Does joint tenancy eliminate probate?

Joint tenancy may save probate expense. However, if the person who dies owns property in addition to that held in joint tenancy, the other property must still be probated. An affidavit and a certified copy of the death certificate must be recorded in order to vest the title to real property in the surviving owner or owners, which will require payment of a recording fee.

What taxes affect joint tenancy property?

At least four different kinds of taxes - Federal Income, Estate and Gift taxes and South Dakota Estate tax (and South Dakota Inheritance Tax in the case of persons dying prior to July 1, 2001) - may affect joint property.

In some cases, joint tenancy ownership may result in taxes which might not otherwise be required. Tax laws frequently change. The ramifications of the tax laws should be considered when making the decision concerning the use of joint tenancy.

Should I use joint tenancy?

There are circumstances in which joint tenancy may be advisable, but as in any decision involving your property, careful consideration should be given to the advantages and disadvantages. It should be remembered that when one owner of property held in joint tenancy dies, the surviving owner or owners receive all interest in the property. If the children of the deceased owner are not joint tenants, they have no rights to the property. This factor, among others, should be considered when deciding whether or not to place property in joint tenancy. Be careful, ask your attorney so that you accomplish what you intended.

This brochure is based on South Dakota law and is designed to inform, not to advise. No person should ever apply or interpret any law without the aid of a trained attorney who knows the facts and may be aware of any changes in the law.