

How Do You Own Your Property?

Revised by Bryce Jorgensen¹

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Property can be owned or held in several ways. The method selected, particularly when the property is owned by both spouses, has a number of important consequences because it can affect, among other things, 1) the rights the person has to the property; 2) who gets the property when the owner dies; 3) estate planning and the use of estate planning tools such as wills, gifts, and trusts; 4) the size of the property owner's taxable estate; and 5) the size of both income and estate tax obligations.



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When a person acquires property, they acquire certain ownership rights along with certain benefits, privileges, and responsibilities they would not have if they did not own that property. The owner has possession, enjoyment, and the use of the property. The owner has the right to any income stream or flow of other benefits. The owner also is responsible for paying the property taxes—real, personal, or intangible—and for the principal and interest payments if the property is encumbered.

The property owner has one other right that is the core of estate planning: The owner holds the right or power to dispose of that property in the future. They can sell the property, give the property away, combine the two, or, in other words, make a gift of part of the value of the property and sell the remainder. These are lifetime transfers. Or, the property owner can keep the property, directing in their last will and testament how the property is to be disposed of—how it is to descend or be distributed—when they die.

OWNERSHIP AND CO-OWNERSHIP OF PROPERTY

There are two basic forms of ownership, sole ownership and co-ownership. Sole ownership is when only one person holds title to the property. It is the simplest, easiest, and most flexible ownership alternative. The sole owner holds almost, but not quite, unrestricted and unlimited rights to it. The owner can live on the property, rent it out, mortgage it, sell it, give it away,

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or keep it until they die. The owner can direct its eventual disposition by last will and testament, or the owner can ignore the problem and let state law determine the property's eventual descent and distribution. With exception, no one can tell the owner what to do with the property. No one has the right to influence the owner's decision. The exceptions are the rights in land that are reserved for society. These include certain controls on the right of use, the authority to tax, the power of eminent domain, and the reversion of property to the state when no legal heirs or claimants exist.

Co-ownership is when two or more persons hold title to property together. Neither has separate nor distinct rights, privileges, or responsibilities. Instead, each has an undivided or undesignated interest. Such property is often called jointly owned property or, sometimes where the interest is a business, a joint venture.

Much co-owned property is owned by married spouses. However, property can be co-owned by members of two or more generations, for example, a father and a son. Property can be co-owned by persons or parties who are not related. Whatever the relationship, the dominant characteristic is that each party's interest is subject to the good will of the other party. Owners of jointly owned property have to agree—they have to work together.

A will is often the best way to make sure property is distributed the way you want after your death, but some property may be predestined to go to certain individuals, no matter what the will says. It depends on how the property is owned. In New Mexico, property can be owned as separate property, community property, in joint tenancy, or as tenancy in common.

Separate Property. If property is held as separate property, an individual has exclusive title and legal rights to it. This includes property owned by either spouse before their marriage, property inherited by either spouse during the marriage, and property that is a gift to either spouse during the marriage. Earnings from separate property retain their separate characteristics. When the owner of separate property dies, it passes to whoever is specified in the owner's will. If the property is in New Mexico and the owner dies without leaving a will, one-fourth of the property passes to the surviving spouse and three-fourths to the children.

Community Property. New Mexico is one of eight states with a community property system. By law, community property is produced as a result of the work of either spouse during marriage and belongs equally to both, regardless of who performs the work. However, under New Mexico law, a couple can agree in writing that any separate property of one is community property. When the first spouse dies, half of the total com-

munity property passes to the surviving spouse. The tax basis of all the community property is stepped up to its fair market value at the time of the first spouse's death, which can be a significant tax advantage.

Joint Tenancy with the Right of Survivorship.

Joint tenancy comes into being, or is created, by a specific act of the parties involved. For example, real estate held in this fashion is typically the result of a property transfer by deed. Each joint tenant owns an equal share of co-owned property. When the first joint tenant dies, the title designation transfers the property immediately and automatically to the surviving joint tenant. This ownership arrangement is said to be a will substitute because it eliminates probate of this particular asset.

Avoiding probate does not mean the property will not be included in the taxable estate of the first co-owner to die, or that state and a federal gift and estate taxes will be avoided. Estate planning experts feel joint tenancy is a poor method of planning property transfer for two reasons. First, each co-owner has given up the right to leave the property to anyone other than the other co-owner. Circumstances may change, and either tenant may later want to leave the asset to someone else. Either party can usually dissolve a joint tenancy during life, but this may not always be possible or practical. Second, where taxes are an important consideration in planning an estate, holding assets in joint tenancy does not permit one joint tenant to leave their share of the assets in such a way as to save taxes. Upon the death of the first joint tenant, the asset goes outright to the survivor. This causes the survivor's taxable income and taxable estate to be increased.

Careful consideration should be given to the tax consequences of dissolving existing joint tenancies because additional gift and estate tax obligations may be created. Tax implications should be fully explored with tax experts before changes are made, and particularly before new joint tenancies are created.

Joint tenancy with the right of survivorship reflects the desire of many married spouses to hold title to property in a way that the survivorship characteristic prevails. When either dies, they each want the surviving spouse to acquire full ownership of the property and to do so with a minimum of time, trouble, and red tape. Thus, they take or hold title to property as "Joint Tenants and to the Survivor."

A 1985 revision of New Mexico statutes states "property acquired by [married spouses] by an instrument in writing, whether as tenants in common, as joint tenants or otherwise, will be presumed to be held as community property unless such property is separate property." This means property owned as joint tenants by married spouses is considered as community property by New Mexico law.

Tenancy in Common. Tenancy in common is another form of co-ownership of property that can exist between any two or more persons. Tenancy in common can be created by deed, will, or by law.

Tenants in common, like joint tenants, must act together to decide how they are going to enjoy and use the property. Problems about the management and improvement of the property, and how the income stream is to be divided, can exist.

A distinguishing characteristic is that there is no right of survivorship. Each tenant can dispose of their separate and distinct, yet undesignated, interest in the property in any way they choose. Each co-owner can sell it or give it away. They can direct its eventual disposition by last will and testament, or they can ignore the problem. Each co-owner's property will be distributed, when they die according to the law of property descent and distribution.

Several of the more important characteristics of a tenancy in common are:

1. Each tenant in common has the power to dispose of their separate and distinct, yet undesignated, interest in whatever property is involved, any way they choose.
2. When a co-owner dies, their interest does not pass to the surviving tenant in common. It passes to the surviving co-owner's spouse or to some other person or party, but only if the property owner so indicates their wishes in their last will and testament. Otherwise, the property passes according to the law of property descent and distribution.
3. When a co-owner dies, any property owned in this fashion becomes a part of the probate estate, and passes under the supervision of probate court.

4. Only the partial interest owned by the property owner is included in their estate. Hence, only the partial interest owned by them is subject to state and federal estate taxes.

The decision about which type of ownership of property to choose in estate planning depends upon the people involved, the amount and kinds of real and personal property involved, the estate planning goals, and laws of the state where the property is located. An attorney familiar with the legal aspects of estate planning can explain the advantages, disadvantages, and consequences of each of the alternatives. This will help the individuals decide which type of co-ownership best fits their particular situation. Basically, community property occurs by default for married individuals. If that is not advantageous, the necessary action must be taken to avoid it. For more information on estate planning and other personal finance topics, visit https://aces.nmsu.edu/pubs/_g/.

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