

## An Overview of Titling of Real and Personal Property

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One crucial part of assessing your resources for farm and forest transfer planning is understanding who has ownership rights in the property -- both real and personal -- that you have at your disposal for personal and business use. Ownership interests impact how property is passed to heirs, what their rights in it will be, and what decision-making authority you and other potential owners have in the property.

Property is divided into two classes: real property and personal property. **Real property** consists of land and certain kinds of interests in land. Real property includes structures erected on the land, such as a house, fences or barns. **Personal property** is everything that is not real property, such as cash, farm equipment, livestock, nurserystock, harvested timber, and household items like cars, jewelry, bank accounts, stocks and bonds.

### Evidence of Ownership: Real Property

Ownership or title to real property is normally shown on the deed to that property. However, there are times where you may own an interest in real property where no deed exists, such as when you inherit land through an estate and no deed is drawn up. For real property, the document of title (warranty or other deed) or interest (e.g. easement deed) must be registered according to the state recording act, which determines in what form and where interests in land must be recorded. The state recording act also dictates priorities in land ownership. Deeds to real property must always be recorded in the county where the land is located.

Title to the same parcel of land can be held by one or several people, and in different percentages of ownership depending on how and when the land was transferred. If your name is the only name on the document of title, you are the sole owner of the property. If your name and someone else's name appear on the document of title, your ownership rights are likely limited by the rights of the other owner.

The document of title may create *consecutive* interests in the same property, in other words, when one person's title ends, the other begins as a matter of law. The most common example of this is a life estate deed, where one owner, often a surviving spouse, has the ownership of property so long as he or she lives, and when he or she dies the ownership is immediately transferred to another person or persons, usually the children of the life tenant. A document of title may create *concurrent* interests, where the rights of each owner occur at the same time. Both consecutive interests and concurrent interests can take various forms, giving different property rights to the owners.

### **Evidence of Ownership: Personal Property**

Ownership of personal property may be shown by automobile titles, receipts, contracts, bills of sale, bank records, stock certificates, etc. Without these documents, ownership of personal property may be difficult to prove. In many cases, particularly for tangible items, possession of personal property may count as proof of ownership, or at least making ownership harder to disprove by another claiming that property.

Personal property can be either tangible or intangible. Tangible personal property is something physical, such as a tractor, a cow, a car, or a gold bar. Cash in dollar bills tucked away in a dresser drawer is tangible personal property, whereas money in a bank account is intangible personal property. Intangible property is something that requires a piece of paper to describe what it is and in what quantity it exists.

### **Sole ownership**

Sole ownership is the simplest form of property ownership, where one person has all present and future power to use, control, sell or otherwise dispose of the property. If you are the sole owner, you may transfer the entire property under the terms of your will, or place your entire interest in a trust. If you do not have a will, your property will be transferred under the state intestacy act.

### **Consecutive interests**

If you are the sole owner of real property, you record a deed that creates consecutive interests in the property. A life estate deed that transfers your interest to another upon your death is the most common example of consecutive interests. If you create a life estate, you are called the life tenant. You have the right to possess and use the property for the life of a specified person. Usually, a life estate is measured by the life of the life tenant, but it may be measured by the life of someone else. If so, the life tenant's interest ends upon the death of that person. Upon your death (or the death of a specified person), ownership passes to the person or persons who own the remainder. They are called *remaindermen*.

Usually, the life tenant has the following rights and duties, unless the document creating the life estate shows a contrary intent.

- The life tenant may only sell his or her interest in the property. The purchaser buys only the right to use and possess the property for the lifetime of the seller, or other life tenant specified in the original deed.
- The life tenant has the right to plant, harvest and sell annual crops. The life tenant does not have the right to open new mines or quarries, but can receive their incomes and profits.
- The life tenant is entitled to cut and use a reasonable amount of timber needed for fuel or to repair buildings or fences and the like. However, the life tenant may not cut timber from the land merely for his own profit is limited, and often will require agreement of the remaindermen. Timber disputes on life-estate property are not uncommon, whereby the parents may want to cut timber for income, but the children want it preserved for their own income needs later.

- Absent an agreement to the contrary, if the property produces income, rents or profits, such as a farm or an apartment building, the life tenant may collect the rents and profits from the property.

- The life tenant is responsible for taking care of the property and for making ordinary repairs, and must pay property taxes and local assessments. If the property is mortgaged when it comes to the life tenant, the life tenant is responsible for paying the annual interest on the debt, but not the principal.

- Transferring fee title to the land itself - complete ownership of the interests in the land - requires both the life tenant and all the remaindermen to sign the deed.

- The life tenant cannot bequeath the property under the terms of a will.

An example of words in a will or deed that create a life estate can be “to my wife for so long as she lives, remainder to my nephew, James.” The wife has the right to possess and use the property for her lifetime, and upon her death, the property passes to Jane as the sole owner.

Although it is easy to create a life estate, it cannot be undone absent the consent (by new deed) of the remaindermen. Furthermore, it is still part of your taxable estate for federal estate tax purposes.

### **Concurrent interests**

If you have inherited property (ie. land) along with your siblings or others, you own a concurrent interest in the property along with the others. Concurrent ownership means your rights and the rights of other owners occur at the same time. Your rights in the property depend upon the form of joint ownership, and often how it was acquired. Concurrent joint ownership of property takes one of three general forms: tenancy in common, joint tenancy with a right of survivorship, or tenancy by the entireties. Only tenancy in common permits your interest in the property to pass under the terms of your will.

***Tenancy in common:*** A tenancy in common means that two or more people own an undivided fractional interest in the same piece of property. This is probably the most form of land ownership for inherited land in families with more than one child. For example, if three children inherited property from a parent “to share and share alike,” they own the property equally as tenants in common, each owns an undivided one-third interest in the entire property, not a specific portion of it. Each co-owner has the right to use and possess the whole property, but each co-owner cannot exclude another co-owner.

None of the owners in co-tenancy may take any action with respect to the whole property without the written permission of the others. The agreement of all three is required to sell, lease, gift, or mortgage. Absent an agreement to the contrary, all co-tenants share equally in the income and rents produced by the property. For example, a deed signed by one owner does not transfer interest in the entire property, only their percentage ownership (and again, not to a specific part of the property). The new owner owns it along side the other tenants. Likewise, a lease to the entire property signed by one owner is likely unenforceable if the other owners do not also sign it.

Any co-tenant can ask a court to order a partition to the property. The court may be able to divide the property and give each co-owner a proportionate interest. On the otherhand, if the property is not easily partitioned - usually the case with land of varying attributes such as crop land, water, woodlands and road frontage - the court can order a sale of the whole property. The proceeds of the sale are divided according to each co-tenant's interest.

Ownership shares in a tenancy in common can be unequal. This can happen when one of the co-owners dies and his or her heirs inherit their interest.

**Example:** *Brothers, Richard and James, inherited a tract of forest land from their mother who owned it as sole owner. Each owns a fifty percent undivided interest. Richard dies with a will that leaves his property to his five children to "share and share alike" whereupon his share is bequeathed equally to his five children. James still owns a fifty percent undivided interest, but now his nieces and nephews are his new co-owners, who each own a ten percent undivided interest in the property.*

*Then James dies, leaving his undivided interest to his two children. Each of his children owns a twenty-five percent undivided interest, but there are now seven owners to the land. To sell the entire tract, or even lease it or timber it (absent an agreement otherwise) the seven cousins must agree to the transaction. James' children have no greater authority simply because they own a larger interest. Further, any cousin may choose to sell his or her individual interest to a willing purchaser. If any one of the cousins dies, his or her interest will continue to pass to his or her heirs, and there may be more co-owners, now of differing generations.*

The value of a co-owner's undivided interest is included in his or her gross estate for federal estate tax purposes and may be subject to federal and state estate taxes. The value of the interest is measured by the fair market value of the property multiplied by their percentage interest, although a discount may be allowed if there are more than a few owners.

**Joint tenancy with right of survivorship:** Two or more persons may own property as joint tenants with right of survivorship. This is common for bank accounts, certificates of deposit and stock certificates, particularly where an elderly parent wishes these interests to pass outside of probate, or they wish to have their money - in the case of a bank account - readily accessible by a chosen child to immediately handle matters following their death. Real property may also be owned jointly with a right of survivorship. To create a joint tenancy with right of survivorship, the document of title - say a deed - must expressly say the property is held with the survivorship right (the absence of such language simply creates a co-tenancy). However, this is no longer common outside of marriage (see below).

Upon the death of a joint tenant, in a joint tenancy with right of survivorship, the entire property automatically passes to the surviving joint tenant or tenants, and does not pass in the deceased owner's will or by intestacy.

**Example:** *Laura is a widow with two children, Caroline and Elizabeth. Laura is getting older and becoming concerned that she may forget to pay her bills. Laura goes to the bank with her*

*youngest daughter, Caroline, and converts her account to a joint survivorship account, thus giving legal authority to Caroline to write checks and make deposits on her account.*

The creator of a joint bank account should be careful to consider his or her other wishes as to the distribution of other property. Continuing the above example:

*Laura had inherited two separate parcels of land from her father, and in her will she has directed that one parcel go to Caroline, the other to Elizabeth. Laura is made an attractive offer by the tenant on the parcel designated for Elizabeth, and decides to sell it to him. She then deposits the sale proceeds in the joint bank account. When Laura dies, Caroline becomes sole owner of the sale proceeds, and still inherits the other parcel through the will. Caroline likely has no legal obligation to share the money with Elizabeth. Such a situation could likely spawn litigation between Caroline and Elizabeth, which is probably not what Laura would want.*

**Tenancy by the entirety:** Joint tenancy, as described above, is generally how property acquired by a husband and wife is titled. If the document of title conveys the land to a husband and wife, modern real property law presumes that a tenancy by the entirety is created, unless the deed specifically states otherwise. In most circumstances, if the deed simply names the two married individuals, they take title with right of survivorship.

Only a husband and wife may own real property as tenants by the entirety. Under the law, each spouse owns the entire interest in the property, but neither spouse may sell, lease or mortgage the property without the written consent of the other. Divorce automatically ends a tenancy by the entirety, and the property is then owned by the ex-spouses as tenants-in-common. Property acquired by an unmarried couple is held as tenants-in-common, but their subsequent marriage does not automatically convert the property to tenancy by the entireties. The newly married couple must execute a deed changing the legal ownership nature of the property.

Creditors cannot take property held as tenants by the entirety for payment of a debt that is owed by only one spouse. Therefore, it is often advisable that one spouse not make the other a co-owner in a business entity operated by only the one spouse. This helps insulate the land held by the married couple from the creditors on the business entity.

Upon the death of one spouse, the surviving spouse automatically owns the property. The property is not transferred by the will of the deceased spouse and is not probated in the deceased spouse's estate.

**Example:** *Husband and wife own a farm, and have two children. The couple separate, but do not file for divorce, and the children have become estranged from their mother. During the separation, the children convince their father to execute a new will, leaving them his interest in the farm. The father dies, and the children triumphantly present their mother with a copy of his will. The mother consults a knowledgeable lawyer, who simply tells her, "It doesn't matter: the moment your husband died, you became 100% owner of the farm, there is no interest in the farm for your children to inherit."*

## **Conclusion**

As you can see, the way you own your property affects your rights to use, manage, sell or direct its distribution after your death. Automatic survivorship takes precedence over what is written in your will, and a carefully designed estate plan can be defeated if you fail to consider how your property is owned when you make certain decisions about its disposition. There may be times in your planning process that it is advisable to change the form of ownership to achieve farm transfer planning goals. Your lawyer will be able to determine how you own your property by looking up the deeds or otherwise knowing how and when you inherited it. It is not necessary to go into the lawyer's office with deeds in hand. It is usually enough to inform him or her the counties where you *think* you own land, and he or she can do the rest. Hopefully, your lawyer will follow the wisdom of Dr. Neil Harl of Iowa State University, who cautions in his multi-tome treatment of agricultural law: "You should never take your client's word that the farm is in their name alone."