

How Should Two or More People Own Property? Does It Matter?

Written By **Justin M. Lewis** (jml@wardandsmith.com)

September 12, 2011



When two or more people (whether spouses, friends, or business partners) purchase property, they put significant thought into, among other things, the property's value, appearance, and condition, and how they are going to improve the property. They rarely, however, consider how they should take title to the property.

Concurrent ownership exists where two or more people own property together, with neither person having exclusive use and possession of any specific part of the

property. In North Carolina there are, for all practical purposes, three types of concurrent ownership: (1) Tenancy in Common, (2) Joint Tenancy with the Right of Survivorship, and (3) Tenancy by the Entirety. Each type of concurrent ownership has its own distinct advantages and disadvantages, especially in matters involving the sale of the property, estate considerations, protection from creditors, and contribution toward maintenance and repair of the property. Before you purchase property with someone else, you should consider how you plan to use the property and how you plan to dispose of it during and after your lifetime, and then consider which one of the following forms of ownership will work best for you.

Tenancy in Common

Tenancy in common is the most prevailing form of concurrent ownership of real property used by unmarried people. In a tenancy in common, two or more people own the same parcel of land in undivided interests which may be equal or unequal in size. For example, two people each may own a $\frac{1}{2}$ undivided interest or one might own a 25% undivided interest and the other one the remaining 75% interest. Whatever the size of the undivided interests, each of the owners is entitled to the use and possession of all of the property.

Each owner's undivided interest in the property is freely alienable by sale, gift, or otherwise and, therefore, this form of concurrent ownership is the most unrestricted form. Each owner is free to sell, encumber, and allow that owner's interest in the property to pass by will or intestate succession to the owner's heirs or devisees (the other owners having no right of survivorship in any other owner's undivided interest in the property). Someone who purchases property for investment purposes, who wants to be able to devise his or her property pursuant to a will or trust, or who simply does not have a plan for the property should consider this form of ownership.

Although a tenancy in common allows each owner the freedom to dispose of that owner's interest in the property as that owner chooses, there are a few obligations and potential problems that anyone taking title to property as a tenant in common should consider:

- Each tenant in common is responsible for payment of property taxes, assessments, liens on the

property, and repairs. If one owner pays the taxes or assessments or makes necessary repairs, that owner is entitled to contribution from the other owners. There may be exceptions to this rule if the owner seeking contribution is the only owner in actual possession of the property, but generally each owner is obligated to contribute toward the maintenance and preservation of the property in proportion to that owner's undivided interest.

- Generally, a tenant in common who possesses the property does not have to pay the other owners for possession of the property as long as the other owners are free to use and possess the property as well. If, however, one owner denies the other owners the right to use and possess the property, those owners may take legal action to regain possession of the property and may be entitled to damages.
- If there is a dispute regarding the use or disposition of the property (for example, one tenant in common wants to sell the entire property, but the other owners refuse to sell) or if one of the owners simply wants sole ownership and possession of a discrete portion of the property, any of the owners may force a partition of the property. If the court allows a partition, the property will be divided among the owners, with each becoming the sole owner of the portion of the property awarded to that owner. If the court finds that physically partitioning the property would cause substantial injury to one or more of the owners, the court can order the entire property to be sold and the proceeds divided among the owners according to their undivided interests.

Joint Tenancy with the Right of Survivorship

A joint tenancy with the right of survivorship is similar to a tenancy in common, having the same attributes mentioned above, but with one very significant additional attribute: the right of survivorship. Under a joint tenancy with the right of survivorship, when one owner dies, the other joint tenant gets that owner's share in the property, regardless of the provisions of the deceased owner's will or the laws of intestate succession. If the ownership interests among three or more joint tenants are held in unequal shares, the share of the deceased owner is divided among the surviving joint tenants according to their respective pro rata interests, unless the creating instrument provides otherwise. Because of the effect of this form of concurrent ownership on the disposition of one's property after death, a joint tenancy with the right of survivorship should be used only after consultation with an estate planning professional.

Before creating a joint tenancy with the right of survivorship, it is important to consider the following:

- Make sure the instrument creating the joint tenancy with the right of survivorship explicitly states that the purpose of the instrument is to create a joint tenancy with the right of survivorship and not a tenancy in common. If two unmarried people take title to property, the law presumes that they will hold title as tenants in common unless the language in the instrument clearly provides otherwise.
- Despite the "right of survivorship" as discussed above, one joint tenant can sever the joint tenancy with the right of survivorship by transferring that owner's undivided interest to another party and thereby create a tenancy in common. Despite the intention of the party creating the joint tenancy with the right of survivorship, one joint tenant can unilaterally destroy that form of concurrent ownership.

Tenancy by the Entirety

Only a husband and wife (a bill has been introduced in the General Assembly to change references to "husband" and "wife" in tenancy by the entirety statutes to "spouse") can own property as tenants by the entirety. It was the early common law's version of "social security" because of the legal fiction that neither the husband nor the wife owns the property; rather, it is the marital state or union that owns the property. As a result, a lien or judgment docketed against one spouse will not attach to property owned as tenants by the entirety because the property is not owned by the husband or the wife, but by the marital entity. If two people who are married to each other take title to property, they will own the property as tenants by the

entirety unless the instrument of conveyance clearly provides otherwise. Note, however, that a man and woman who own property and then subsequently get married do not then automatically own the property as tenants by the entirety. They must record a new instrument of conveyance to create a tenancy by the entirety.

A tenancy by the entirety is similar to a joint tenancy with the right of survivorship, but with a few additional characteristics:

- Whereas a joint tenancy with the right of survivorship can be severed by one owner, neither spouse can sever the tenancy by the entirety by selling an interest in the property. In fact, neither spouse may sell or encumber the property or any interest in it without the other spouse executing the deed, deed of trust, or other instrument. One spouse also cannot devise his or her interest in a will.
- Despite the common law protection of the property from the individual debts of the husband and wife, there is a limited exception for federal tax liens. The United States Supreme Court held that a federal tax lien against one spouse will attach to that spouse's "interest in the property" pursuant to state law, but it is still unclear exactly what that interest is for federal tax purposes in states such as North Carolina where, at least until death, divorce, or voluntary conveyance, neither spouse is considered to own any interest in the property.
- A tenancy by the entirety may be destroyed only by: (i) voluntary partition where the married couple conveys the property to themselves as tenants in common (neither spouse can force a partition); (ii) absolute divorce, in which case the former spouses become tenants in common, each with a $\frac{1}{2}$ undivided interest in the property; or (iii) death of one spouse, in which case the survivorship element of the tenancy by the entirety automatically makes the surviving spouse the sole owner of the property.

Conclusion

The form of ownership in which you take title to property can significantly affect the way in which you can use the property, dispose of it, and pass it to others. Because there are benefits and consequences to taking title to property by each of the ways described above, especially regarding estate planning matters, it is important to take time to consider, along with the many other considerations you make when purchasing property, exactly how you intend to use and ultimately transfer the property.

© 2011, Ward and Smith, P.A.

For further information regarding the issues described above, please contact Justin M. Lewis.

--

This article is not intended to give, and should not be relied upon for, legal advice in any particular circumstance or fact situation. No action should be taken in reliance upon the information contained in this article without obtaining the advice of an attorney.

We are your established legal network with offices in Asheville, Greenville, New Bern, Raleigh, and Wilmington, NC.