

JOINT TENANCY: THE RICH MAN'S WILL?

Occasionally I meet people who tell me that they don't need a Will because they own all of their property in joint tenancy. This idea seems to have gained a foothold in recent years, so much so that joint tenancy is sometimes referred to as the "poor man's Will." Unfortunately, holding property in joint tenancy at the expense of not having a Will can wind up being an extremely expensive proposition (monetarily and otherwise).

Admittedly, holding property in joint tenancy (or tenancy by the entirety) with your husband or wife **is** an effective substitute for a Will at the death of the first spouse to die. At that point, probate is avoided, and all jointly-owned property automatically becomes the sole property of the surviving spouse.

The problem arises when the surviving spouse dies -- at this spouse's death, his or her property (if still owned in his or her own name) will become subject to probate. Furthermore, if the surviving spouse died without a Will (i.e. intestate), then all of this property will be distributed according to Illinois law rather than according to the surviving spouse's wishes. One example: you may be estranged from your son, but if he is your only heir under Illinois law at the time of your death, and you die intestate, he'll receive your entire probate estate.

Probate and intestacy can be avoided if the surviving spouse does some estate planning after the death of the first spouse to die, but we simply cannot assume that this will happen. Sometimes spouses die simultaneously, or soon after each other, and there's simply no time to do estate planning. Sometimes the surviving spouse becomes disabled, and doesn't have the capacity to execute estate planning documents. Or sometimes the surviving spouse just doesn't know enough about financial matters to think about seeing an estate planning attorney.

Even bigger problems can arise if the surviving spouse places property in joint tenancy with one of his or her children. Besides having potentially negative gift tax ramifications, making your child a co-owner of a bank account or home can greatly increase family strife. In many cases, the surviving spouse does not realize the nature of the property interest that he or she has given the child. What if the child empties out the joint bank account, or refuses to consent to the sale of the jointly-owned home? To the surprise of many people, both of these actions would be entirely within the child/joint tenant's rights. In addition, placing property in joint tenancy with a child can cause problems even after the surviving spouse's death. At that point, the surviving spouse's other children may attempt to argue that the joint tenancies were established only for convenience (instead of for gift purposes), or that the child improperly influenced the surviving spouse's decision to name the child as a joint tenant.

For more information regarding estate planning and alternatives to joint tenancy, please consult a qualified estate planning attorney.

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