BACK STORY

JOINT TENANCY VS. COMMUNITY PROPERTY WITH RIGHTS OF SURVIVORSHIP: WHAT'S THE DIFFERENCE?

BY ANTHONY L. BARNEY, ESQ.

"If we hold our real estate as joint tenants, rather than as community property with rights of survivorship, what happens to it when we die?" As attorneys, we know the answer to that question—or do we? Clients and real estate professionals often ask the question, but the answer isn't well known.

There are many ways to transfer one's property to one's intended recipients at death. One common probate avoidance method under Nevada law is through either a joint tenancy or community property with rights of survivorship designation in the instrument of real property conveyance. Upon the death of one of the joint tenants or community property owners, the deceased person's interest in the property is extinguished, and the property title is vested by operation of law in the remaining owner(s).

Joint tenants at common law had a right of survivorship; upon one tenant's death, the entire tenancy remains with the survivor(s).In order to create a proper transfer to the survivor of a property owned by joint tenants, the deed, or other instrument of conveyance creating ownership, must specifically declare that the recipient is a joint tenant. NRS 111.065.

However, the deed, or other instrument creating ownership as community property with a survivorship interest, must specifically state that married spouses take ownership of the real property as community property with a right of survivorship, not simply as spouses. NRS 111.064(b).

Real property can't be held in both joint tenancy and community property; these ownership designations are mutually exclusive. After real property rights are determined under Nevada law, Federal law determines the tax consequences.[1] Under Nevada law, a spousal transfer of real property by either joint tenancy or as community property with rights of survivorship appear to have identical probate avoidance and ownership outcomes—until one considers their respective tax basis treatment to the surviving owner under Federal law.

Under Federal law, the surviving spouse's one-half interest in community property with rights of survivorship achieves a step-up in basis, pursuant to 26 U.S.C.§ 1014(b)(6),[2] for the fair market value of the property; the one-half interest in the joint tenancy does not.[3] This distinguishing characteristic of community property with rights of survivorship provides a probate avoidance benefit, and a potential benefit from a capital gain tax standpoint, in that the entire property (not just the half belonging to the deceased spouse under a joint tenancy) will receive a step-up in basis on death.[4]

Consider the following examples:

Example 1: Real property owned by spouses as joint tenants with rights of survivorship was originally purchased for $100,000 and is worth $200,000 when one of the spouses dies. The new basis for the surviving spouse would be $150,000, equal to the original basis of $100,000, plus one-half of the increased fair market value, or $50,000.

Example 2: Real property owned by spouses as community property with rights of survivorship was originally purchased for $100,000 and is worth $200,000 when one of them dies. The new basis for the surviving spouse would be equal to the fair market value on the date of death ($200,000), because the surviving spouse would receive a step-up in basis to the fair market value as of the date of death.

These examples illustrate the difference in the taxable basis of real property held by a surviving spouse, based solely on the manner in which the spouses originally took title to their real property. While there are better estate planning alternatives available for leaving property to one's intended recipients, it important to understand the difference between the most common forms of joint ownership in real property. NL

1. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 18 L. Ed. 2d 886, 87 S. Ct. 1776 (1967) (Where state law governs the ownership of property, the state's highest court is the best authority on its own law.)
2. *Holt v. United States*, 39 Fed. Cl. 525, 527, 1997 U.S. Claims LEXIS 252, *8-9, 97-2 U.S. Tax Cas. (CCH) P50,929, 97-2 U.S. Tax Cas. (CCH) P60,293, 80 A.F.T.R.2d (RIA) 7677 (Fed. Cl. 1997); *See also* 26 U.S.C. § 1001 (Gain or loss from the disposition of property is determined by the tax basis held by the owner in the property.)
3. *Hahn v. Comm'r,* 1998 U.S. Tax Ct. LEXIS 13, *7-8, 110 T.C. 140, 143-144, 110 T.C. No. 14 (T.C. 1998) (A surviving joint tenant, however, is considered to have acquired property from the decedent only to the extent that the property was required to be included in the estate of the deceased joint tenant. 26 U.S.C.§1014(b)(9). Correspondingly, the portion of property not included in the decedent's estate retains the survivor's adjusted basis.)
4. 26 U.S.C.§ 1001; *Commissioner v. Tufts*, 461 U.S. 300, 304, 75 L. Ed. 2d 863, 103 S. Ct. 1826 (1983).

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