

# Musings on Ownership

## Part II

1031

Knowledge

This is the second piece in a series of articles covering planning considerations relating to ownership of real property, starting with individual ownership and moving outward to discuss agents, trusts, and the role of legal entities in ownership and income, and estate tax planning matters relevant to investors holding significant real property investments. The first article covered ownership issues facing investors during life and can be accessed here: [Musings on Ownership, Part I](#).

In presenting these articles, we hope to provide basic education on issues faced by real estate investors and to provide a referral source to attorney resources in your state to the extent that you wish to explore estate and tax planning opportunities in more detail.

Even if nothing goes wrong with a real estate portfolio during the owner's life, the owner's death can present a serious challenge for those left behind. As a practical matter, death always results in a transfer of property from the deceased person to other persons or entities, but transfers at death can be simple and well planned or slow, complicated and costly. A transfer of real property at death may occur in two ways: (i) by operation of law, or (ii) through the administration of a legal entity called an "estate." A transfer by operation of law occurs where a decedent's death itself triggers a transfer of property without the involvement of a court or third party. With respect to real estate, the most common method for transferring by operation of law is a transfer of property from a deceased joint tenant to the surviving joint tenants who held title at the time of the decedent's death "as joint tenants with right of survivorship." Other examples of transfers by operation of law include a transfer via a contract provision called a "beneficiary designation" commonly used in life insurance contracts, retirement accounts and certain joint or pay-on-death accounts at financial institutions.

### JOINT OWNERSHIP

A transfer among joint owners that occurs at death is instantaneous and may be confirmed by the transferee on presentation of identification and proof of the joint owner's death. In the case of real

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HQ 800.282.1031 | NY 866.394.1031  
[apiexchange.com](http://apiexchange.com) | [info@apiexchange.com](mailto:info@apiexchange.com)

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transfer. Despite the instantaneous transfer and ease of administration, the surviving transferee may not be quick to pick up and exercise control over the property. Moreover, if a dispute arises concerning the validity of the deceased person's original intent to affect the transfer to the surviving joint owner, court proceedings may be initiated with associated delays and expense. This could happen if the deceased person's estate planning documents conflict with the transfer to the surviving joint owner. For example, a deceased father may have held title to a property with his son as joint tenants with right of survivorship, but his will leaves his entire estate to his spouse. Which instruction should control? Surprisingly, in the absence of undue influence or duress, the transfer by operation of law generally trumps the provision benefitting the surviving spouse in the decedent's will!

But even if there is no controversy, a transfer by operation of law is a blunt instrument insofar as the transfer is generally outright rather than managed for the transferee, may fail to integrate well with the overall estate plan or might have unintended results if the transferee dies before or near in time to the transferor. Consequently, while a simple joint tenancy is easy and inexpensive to implement, there are usually much better ways of reaching the desired estate planning result that would provide for alternative or contingent distribution arrangements depending upon the age, competence, and composition of the decedent's transferees.

The second general category of transfers at death is through the administration of a legal entity called an estate. An estate can be a "probate estate" to the extent that the assets of the deceased are managed and transferred by a judge or a "trust estate" to the extent that management authority is exercised by a trustee under a trust arrangement made before the owner's death. The result of both procedures is the same insofar as a judge or trustee is given legal authority to marshal the assets of the decedent, pay the expenses of the decedent's death and to distribute or manage the property of the estate in accordance with the decedent's expressed wishes. Where they differ greatly is in the process by which these activities are carried out.

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