



Estate Planning Considerations for Ohio Families

Section 3

Property Ownership

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Two Classes of Property

Property is divided into two distinct classes—**real** and **personal**.

Real Property

Real property is land and improvements attached to the land. They are immovable possessions. Examples include: land, trees, fences, tile, buildings, furnaces, and fixtures built into or attached to the house or building. Crops still growing may be considered “realty” by the above definition, but if ready for harvest, they may be considered personal property.

Personal Property

Personal property is movable property. It is made up of two general classes: **tangible** and **intangible**.

Tangible personal property includes those articles which can be seen or felt—for example, household goods, personal apparel, automobiles, livestock, stored grain, and farm implements.

Intangible personal property is the kind that cannot be seen as such, but is represented by paper, such as life insurance policies, bank accounts, shares of stock, cash, and notes.

Ways of Owning Property

The way property is held and titled is an important tool in planning an estate. Property ownership is the right to possess, enjoy, and dispose of real and/or personal property. One’s interest in property may vary from complete ownership to a mere temporary right of occupancy. The nature of one’s interest in property may determine what becomes of that property upon one’s death. Table 1 summarizes the basic forms of property ownership in Ohio.

Differences between “estate in fee simple” and “life estate”: When a person holds land in fee simple, it means that the person is the absolute owner with all the rights of ownership during the person’s lifetime and

the right to dispose of it as the person wishes at death. If the owner does not dispose of it prior to death, the property will pass to the beneficiaries designated in the Will, in the law if no Will exists or by beneficiary designation.

Life estate means what it says—that one is entitled to the use and benefits of the property for life, but that these rights cease upon death. There are certain restrictions on a person having a life estate in property. The person cannot abuse the property so as to greatly decrease its value. The person can only lease the interest in it, which terminates at his or her death.

It is not uncommon for one parent to will property to the children with a life estate granted to the other parent, or for parents to transfer some of the family property directly to their children with the parents retaining a life estate. There are two ways of doing this, one of which is rarely advisable. One, parents may **give** their children property while they are alive (usually the house) and **retain** a life estate in the property. This is rarely advisable because property given with a retained life estate will be taxable in the estate of the person(s) who gave it. It also will be considered a taxable gift of the entire value of the property for federal gift tax purposes. Two, a person may **grant** a life estate in property to someone else, either during life or at death. It is common for a married person to will the residual value of the property to children but grant a life estate to their spouse for life. This provides the same estate tax savings as a trust and is much simpler, but it lacks the flexibility and possibility of assistance in managing assets available with a trust.

Table 1. Forms of Property Ownership in Ohio				
	Title/Examples	Power of Disposition	How Disposition Can Be Made	Whose Estate
A. Fee Simple, Single	John Doe	Complete (except for dower with real property) ²	Sale, Gift & Will	John Doe (P, FET, OET) ¹
B. Fee Simple Concurrent:				
Tenancy in Common, (Not Necessarily Equal Shares)	John Doe and Mary Doe OR John Doe, Peter King, and Sam Smith	Each tenant their undivided share (except for dower with real property)	Sale, Gift & will	Pro-rata share in each owner's estate (P, FET, OET)
Joint Tenancy (Equal Shares)	John Doe and Peter King for their joint lives, remainder to the survivor of them	Real Property: All may join or each dispose of his share (except for dower) Non-Real Property: Each has right to all	Sale & Gift. Property "automatically" passes to survivor at death regardless of provision in will.	If married, 1/2 in estate of 1st to die (unless acquired prior to 1977); if not married, total presumed to be in 1st estate (FET, OET). All in estate of 2 nd to die. (P, FET, OET)

Tenancy by the Entireties ³	John Doe and Mary Doe, husband-wife as tenancy by the entirety with rights of survivorship	Husband and wife must join	Sale & Gift. Property “automatically” passes to survivor at death regardless of provision in will.	1/2 in estate of 1st spouse to die (FET, OET) All in estate of 2 nd to die. (P, FET, OET)
Transfer on Death Deeds ⁴	John Doe OR John Doe and Mary Doe, transfer on death to Junior Doe (May not be used with survivorship deeds)	Each tenant their undivided share (except for dower). Beneficiary has no power until owner dies & property transfers.	Sale & Gift. Property “automatically” goes to beneficiary at death, regardless of provision in will.	Pro-rata share in each owner’s estate (FET, OET). Not in beneficiary’s estate until owner’s death & property transfers.

C. Life Estate

Retained for yourself	John Doe for life	John Doe may transfer life interest	Sale or Gift of life interest	If gift remainder interest and retain life interest total in donor’s taxable estate (FET, OET)
Received as a gift or by purchase	John Doe for life	John Doe may transfer life interest	Sale or Gift of life interest	If receive life interest by inheritance, gift or purchase, there would be a “0” value in life tenant’s estate
	Ruth Doe as remainderman	Ruth Doe may transfer remainder interest Both may join together to transfer entire interest if remainder interest is vested	Sale, Gift, or Will remainder interest	Remainder interest value is in remainderman’s estate (P, OET, FET)

¹ Probate (P), Federal Estate Tax (FET), Ohio Estate Tax (OET)

² Dower is the right of a spouse to a 1/3 life interest in real property owned by the other spouse. For this reason, a spouse is asked to release dower when real property is transferred or when a mortgage is placed on property.

³ Ohio law, effective April 4, 1985, disallows the creation of a tenancy by the entireties after April 3, 1985. Tenancy by the entireties deeds in place before April 4, 1985, will remain as such.

⁴ The beneficiary has no legal interest in the property until the current owner(s) dies.

Co-Ownership of Real Property

There are several ways for two or more people to own property together.

Tenancy in Common: Each owner in common owns an interest in the undivided property. Individual owners need not own equal shares and need not be related. Each owner has the right to dispose of his or her share in

the property without the consent of the others. If one of the owners dies, his or her share descends to his or her heirs by the statute of descent and distribution or by will. These heirs may or may not be the co-owners of the property. The interest (degree of ownership) of each owner may be seized for his or her debts. One owner may force a division of the land or sale of the entire parcel by lawsuit, known as a partition action.

Joint Tenancy with Right of Survivorship (JTRS): Joint tenancy is often called joint tenure. It is a common way for husband and wife to hold such property as the family home. If federal estate taxes are a concern, a husband and wife should carefully select property and minimize property owned with right of survivorship.

For real property, JTRS ownership can be severed if one tenant elects to transfer his or her interest by sale or gift. Only the interest can be transferred. For personal property, such as bank accounts, each co-owner is entitled to spend or withdraw the entire account without the other's approval.

An important feature is the right of survivorship. This means if one owner dies, those remaining become the owner(s) of the whole property, regardless of what the decedent's will states.

For additional information read the following Ohio State Bar Association article: Joint Ownership of Property: Common Sense Advice for Older Persons: <http://www.ohiobar.org/conres/lawyocanuse/article.asp?bhjs=1&bhs=800&bhsh=600&bhswi=796&bhshi=445&bhflver=-1&bhdir=-1&bhje=1&bhcold=16&bhrl=-1&bhq=-1&bhmp=-1&bhab=-1&ID=72&bhcd2=1013787456>

Tenancy by the Entirety: This is a special kind of joint tenancy in real estate, provided for in the laws of some states, which can be created only between husband and wife. It carries the right of survivorship. Once this type of co-ownership has been entered into, neither the husband nor the wife can break the arrangement unless both join in a deed to convey away what they both own. Since April 4, 1985, Tenancy by the Entirety ownership deeds may not be created in Ohio. However, such deeds created before April 4, 1985, are still valid.

Because of the impact of federal estate taxes in estate settlements, it may not be good judgment for a husband and wife with combined estates close to or exceeding the federal tax credit exemption (\$1,000,000 in 2002 and increasing and now known as the applicable exclusion amount) to hold much of their property in joint tenancy or in tenancy by the entirety. To do so removes the flexibility in estate planning that may be helpful in reducing federal estate taxes.

There are also certain disadvantages involved in joint tenancy. While joint tenancy, with its elimination of the necessity of administration of an estate, can be very valuable, there are other cases for which it is unsuitable. This is most likely to be true when the amount involved is fairly substantial, and joint tenancy may actually increase the expense of transferring between two or more generations. For example, if you establish a joint tenancy with a child, you have made a taxable gift at that time and will owe gift tax if your aggregate gifts exceed the applicable exclusion amount for federal gift tax purposes (\$1,000,000 and not increasing). Therefore, joint tenancy should be created only under the **guidance of an estate planning counselor.**

Transfer on Death Deed

In August 2000, the Ohio General Assembly enacted a law to allow individuals to use a "Transfer on Death Deed" for property transfers. As of July 23, 2002, Transfer on Death registration of motor vehicles is now available. Under the new law, a landowner executes a deed that states that the property will transfer to certain named beneficiaries upon the landowner's death. This allows the property subject to a Transfer on Death Deed to avoid the probate process and the gift tax consequences of joint tenancy, but the property is still subject to estate taxes.

There are several requirements necessary for a valid Transfer on Death Deed. The deed must conform to the language of Section 5302.22 of the Ohio Revised Code, which contains a sample Transfer on Death Deed. The deed must specifically name the beneficiary or multiple beneficiaries of the property, and must be properly executed.

Only those beneficiaries who survived the property owner are eligible to inherit the property. Therefore, you cannot specify a class of people, such as “my children” or “my lineal descendants, per stirpes,” as you can in a Will or trust. If you have any children or grandchildren born later or there is an unexpected death, you may need to prepare a new deed. Heirs to named beneficiaries who did not survive the property owner do not hold a legal interest in the property. However, the property owner may designate in the deed “contingent beneficiaries” to take the place of a beneficiary who predeceases the property owner.

Upon the death of the property owner, the surviving beneficiaries must file an affidavit with the county recorder in the county where the land is located. The affidavit must:

- state that the owner of record is deceased,
- identify the property,
- name all beneficiaries who survived the property owner, and
- name all beneficiaries who did not survive the property owner.

A certificate of death must accompany the affidavit. When the county recorder accepts and records the affidavit, the property transfers to the surviving beneficiaries.

Where the Transfer on Death Deed designates multiple beneficiaries, the beneficiaries become co-owners and each takes an equal share in the property. All beneficiaries must agree to any sale, transfer, or division of the property. The beneficiaries take the property subject to any liens, encumbrances, or other rights of creditors.

A beneficiary who is named in a Transfer on Death Deed does not hold a legal interest in the property during the property owner’s lifetime. The beneficiary has no ownership rights until the property owner dies.

While the Transfer on Death Deed does away with the need for probate, a property owner should not try to avoid the use of an attorney for preparation of the deed. A deed that does not conform to the requirements of the law will be deemed invalid, and the property must then pass through the deceased’s estate.

For the Transfer on Death Deed law, see Section 5302.22 of the Ohio Revised Code at <http://onlinedocs.andersonpublishing.com/revisedcode>.

Co-Ownership of Personal Property

Bank accounts and certificates of deposit, stocks and bonds, U.S. Savings Bonds, safety deposit boxes, and other personal property can be co-owned. Such accounts in banks and similar institutions are generally set up in joint tenancy with right of survivorship, unless tenants in common ownership is specifically requested. JTRS property is part of the gross taxable estate for both Ohio and federal estate taxes. When a married individual dies, and an account is co-owned with a spouse, one half of the account balance is included in the taxable estate of the decedent. If a joint account is owned with someone other than a spouse, the entire account balance is presumed to be owned by the decedent unless the surviving owner can show that he or she contributed to the account.

Bank accounts and certificates of deposit: A joint bank account with right of survivorship is payable to either owner during his or her lifetime or to the survivor at the death of the first owner. Although the bank will hold up payment of checks immediately after the death of one of the parties (except for a spouse), the surviving party can obtain a tax release from the County Auditor. This release can usually be secured rather quickly and will give the survivor the right to draw on the account. A spouse has ready access to funds received by rights of survivorship. The tax release is not required for accounts passing to the surviving spouse, or for accounts passing to others if the total value of the decedent’s accounts at that financial institution does not exceed \$25,000.

Often a bank account or certificate will be held in joint ownership between parent and child. Sometimes this is

to allow the child to take care of the affairs of an elderly parent. Upon the death of the parent, the whole account transfers to the child. A more desirable alternative in most situations is to give the child a power of attorney to transact the desired affairs. It may be difficult to keep distributions among children balanced if accounts are held as JTRS. It is much easier to put a clause in the will indicating the fraction of accounts to go to each child.

The signature card and/or other contract which constitutes the agreement between the depositors and the bank contains the specific wording which creates the right of survivorship between the depositors.

Payable on death (POD) accounts are typically held in the name of one person, but at the death of that person go directly to a named beneficiary by the terms of the account. POD accounts are non-probate property. They are, however, still subject to estate taxes.

Payable on Death Accounts

Ohio law allows the owner of bank accounts to pass the account proceeds to a named beneficiary upon the owner's death. To do so, the owner enters into a written contract with the bank, building and loan or savings and loan association, credit union, or society for savings that holds the account. The contract designates the individual, entity, or organization to whom the proceeds will pass.

Accounts that may be designated as Payable on Death, or POD, include investment share certificates, share accounts, deposits, or stock deposits. Where an account is designated POD, the account will not be included in the owner's estate at death. An individual holding an interest in a joint account may also use POD to pass the proceeds of the account.

Unlike a joint account, the POD does not give the named beneficiary an interest in the account during the account owner's lifetime. The beneficiary may not make withdrawals on the account while the owner is still living, and creditors of the beneficiary may not attach the account to secure their financial interests. The owner of a POD account continues to maintain full ownership rights over the account during his or her lifetime. The owner may change the designated beneficiary at any time, but must do so according to the institution's provisions for changing a beneficiary.

Typically, the institution holding the account requires that the named beneficiary submit a Certificate of Death prior to releasing the account to the beneficiary. See the Ohio Revised Code Sections 2131.10, 1109.07 and 1339.63 for POD provisions, and contact your financial institution for its specific requirements for POD accounts.

Stocks and Bonds: These are often owned in joint ownership. The wording showing ownership should be carefully checked to determine if owned with rights of survivorship or as tenants in common. These can be set up with a Transfer on Death (TOD) designation similar to POD bank accounts. Please note that a number of brokerage companies have begun charging fees to establish a TOD account, in some cases more than the cost of establishing a trust.

U.S. Savings Bonds: The U.S. Treasury provides a choice of registration for bonds held in a joint ownership. One of the permitted forms for U.S. Bonds is "Harry A. Smith **or** Mary A. Smith." Another permitted form is "Harry A. Smith, payable on death to Ms. Helen Bell Smith." In the first case, upon the death of one co-owner, the surviving co-owner will be recognized as the sole owner; in the second case, upon the death of the owner, the named beneficiary will be recognized as the owner. In either case the bond is still included in the decedent's estate.

Safety Deposit Boxes: There are several ways in which the tenancy of a personal safety deposit box may be arranged:

- husband and wife can hold the box in both of their names as joint tenants with rights of survivorship;

- it can be taken in the name of one, with the other named as deputy to enter; or
- it can be taken in the name of either with no deputy named.

The safety deposit box can also have a POD designation on the contract with the bank. The bank is no longer required to seal the box upon the death of an owner until it can be opened in the presence of a representative from the County Auditor's office. However, if the original will is stored in the box, an attorney or other court representative may have to be authorized to open the box. The fact that the safety deposit box is held in the name of one individual, or jointly in the names of two or more individuals, does not necessarily govern the ownership of the property which may be in the box. Title designations on the property in the box determine ownership.

Other Personal Property: Tangible personal property, such as livestock, farm equipment, and the family car, are most often held in one individual's name and would become a part of that person's estate at his or her death; but these, too, may be held in joint ownership. You may also establish a TOD designation for motor vehicles. In addition, there is a statute that allows up to two personal vehicles to pass to a surviving spouse outside of probate if the combined value of the vehicles is under \$40,000. Items like farm equipment, livestock, crops, and household goods do not have a written title, so evidence such as depreciation schedules, loan documents, or written memos help to determine ownership.

What fits one family's needs may not be suitable for another. For this reason, an attorney should be consulted as property is acquired, or at least periodically to review property ownership.

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November 2003

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