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## Estate Planning: Property Ownership

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## ESTATE PLANNING: PROPERTY OWNERSHIP

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**TITLE** is the manner in which both real and personal property is owned. Title may be proven by certificate, deed, bill of sale, contract, or other document.

A title is more than a piece of paper conveying ownership of a tractor, 100 acres of land, an automobile, a house, or safe deposit box. It isn't something to be stuck in a drawer and forgotten. Rather, a title is an important part of a total estate plan. In fact, a will cannot be constructed separate from the titles involved and the information on them.

Titles can affect how property is transferred, who will receive it (with or without a will), and the eventual costs of estate settlement and taxes. All of these results depend on the way the property is owned. This fact sheet describes three basic forms of property ownership typical to South Dakota families: sole ownership, joint tenancy, and tenancy in common.

### TYPES OF PROPERTY

There are two basic types of property: real and personal. Real property is land and whatever is erected, growing on, or affixed to it. Examples

of real property include fences, buildings, water systems (unless removable), mineral deposits, and standing uncut timber.

Personal property refers to assets whose ownership arises either out of physical possession of the property, or as the result of a document showing ownership. In South Dakota, all property except real property is personal property. Examples of personal property include livestock, machinery, stored grain, stocks and bonds, checking and savings accounts, automobiles and other transportation and recreational vehicles.

### FORMS OF PROPERTY OWNERSHIP

**Sole Ownership:** Sole ownership of property is characterized by the fact that it is owned by a single individual. Except for some legal restraints such as maintaining a public nuisance, infringing on the rights of others, zoning restrictions, and the interests of a surviving spouse, a sole owner may generally do as he or she pleases with the property during his lifetime, and may, by writing a will, designate its distribution after his or her death. If the sole owner does not write a will, the property is dis-





tributed according to the South Dakota Laws of Intestate Succession.

Any solely owned real and personal property held at death will be included in the gross estate for the determination of federal estate taxes. Usually solely owned property goes through probate to clear the title for heirs.

Generally, a solely owned safe deposit box can be opened by the personal representative named in the will in the presence of a bank officer for the purposes of making an inventory of the box and removal of an original will.

Checks signed by the decedent that are still outstanding at death are generally paid in the normal course of check clearing, unless there is a significant amount of time between the date of death and the deposit of the check into the system. Typically the decedent's checking accounts are closed as soon as possible after a personal representative has been appointed. The balances of the accounts are transferred to a new account opened in the name of the estate.

Money in a savings or checking account cannot be removed by a personal representative until he or she has been appointed by the court. Once the letter of appointment has been received, the personal representative can remove the money and distribute it to the heirs.

**Co-Ownership:** Co-ownership of property exists when two or more persons hold legal title to the property. There are two major types of co-ownership: tenancy in common and joint tenancy.

**Tenancy in Common:** With this method of ownership, two or more persons hold undivided interests in the same property with no right of survivorship for the surviving tenant in common. "Undivided interest" means they each own a part of the total value. For example, one tenant in common cannot claim to own the valuable section of land with an oil well and claim the worthless section with sagebrush

belongs to the other tenant in common.

Each tenant in common has the right to transfer his or her proportional share by selling it, giving it away, or by transferring it to persons of his or her choice at his or her death by a written will.

A tenancy in common in real estate is generally created by the words "to A and B" and nothing more needs be added. If title to real estate is held by persons as tenants in common, all co-tenants have equal rights to manage and live on the property. Upon the death of a tenant in common, the interest passes to his/her heirs by the South Dakota law of intestate succession, or to his/her devisees (beneficiaries) by a written will.

For federal estate tax purposes, only the portion of the property owned by the deceased tenant in common is subject to tax. The fractional share owned by a decedent is also subject to probate and settlement costs.

**Example:** Two brothers, Dan and Sam, own land they inherited from their parents as tenants in common. If Dan dies, his interest may pass by a written will to his wife and two children, not to Sam. If Sam dies, his interest may pass by a written will to his wife and children, not to Dan. In the event of Dan's or Sam's death, only the portion owned by the one who is deceased is subject to the federal estate tax. The land is valued at \$800,000. Thus, if Dan dies, only his half of the tenancy in common property (\$400,000) is included in his estate for federal estate computation purposes.

**Joint Tenancy:** Joint tenancy with right of survivorship is a form of co-ownership in which two or more persons own the same property subject to the other joint tenant's ownership right. When a joint tenant dies, his or her economic interest automatically passes to any surviving joint tenant or tenants. Typical wording on a document to create joint tenancy would be "to A and B as joint tenants with right of survivorship, and not as tenants in common."

After a couple marries, they often place their real and personal property in joint tenancy. The reasons are varied: to prove to one another that they are as “one,” to share and share alike, to avoid probate, or to use joint tenancy as a substitute for a written will.

Regardless of the reason, the decision to place property in joint tenancy should be made only after serious consideration has been given to the consequences of such an arrangement. A joint tenant cannot leave his or her interest to someone in a written will, nor does his interest pass to his heirs by intestacy because the joint tenancy contract has priority.

**Example:** Ron and his brother Don own land as joint tenants with right of survivorship. Suppose Ron dies with a will that leaves his interest in the joint tenancy property to his son, Cory. The joint tenancy title prevails. Don receives Ron’s interest in the land as the surviving joint tenant. Cory would not inherit his father’s interest in the land, even though Ron’s written will stated he wanted the joint tenancy property to pass to his son. If Ron owned the property as a tenant in common with his brother Don, then Ron could leave his half interest in the property to his son. Cory would then own half the property and his uncle Don would own the other half.

At death, safe deposit boxes held in joint tenancy in South Dakota with right of survivorship can be opened by the surviving joint tenant. Checking and savings accounts can be used by the surviving joint tenant just as though the decedent were still living.

One joint tenant can effectively break the joint tenancy by transferring his or her interest in the property to a third party. The effect of such an action would be to sever the joint tenancy, and the person to whom the property was transferred would become a tenant in common with the other joint tenants.

### SURVIVAL REQUIREMENT

A statute passed by the South Dakota legislature provides a method of distribution of property held in joint tenancy whenever the last joint tenant fails to survive the other by 120 hours (five days). If this should occur, or if it cannot be determined whether one survived the other by 120 hours, one half of the property is distributed to the devisees, or heirs, of one joint tenant and one half to the devisees, or heirs, of the other joint tenant.

If the joint tenancy is held by more than two people and the last tenant fails to survive the others by 120 hours or if it cannot be determined whether one survived the others by 120 hours, the property is distributed equally among the estates of each joint tenant. This statute applies unless the decedents have written wills that contain language dealing explicitly with deaths in a common disaster, or requiring that the beneficiary survive the testator (person who makes a written will), or survive the testator for a stated period, before receiving an inheritance under the will.

The following examples illustrate how property is distributed if joint tenants fail to survive one another by 120 hours (five days) and they die without writing a will.

**Example A:** Parent and child. A father and his son John own property as joint tenants with right of survivorship. If they die within five days of one another, the property is divided one-half to John’s wife because she is his survivor, and the other one-half to John’s mother because she is the father’s closest survivor.

**Example B:** Married couple. As a wedding present, Mary and Steve were deeded a ranch by her parents. Mary and Steve placed the ranch title in joint tenancy with right of survivorship. If they are killed in an automobile accident, neither surviving five days, the property is divided one-half to Mary’s parents and one-half to Steve’s parents. Steve’s parents are not interested in ranching and would probably sell



their half. Mary's parents want to maintain the ranch for another daughter, but would have to buy the other half from Steve's parents.

If a joint tenant survives beyond the five day limit, then the property becomes his or hers, and upon death, a part of the estate for inheritance purposes. Property is then distributed according to the person's written will or, if no will has been written, by the South Dakota law of intestacy.

In Example A, if John had survived his father by six days and then died, all property would first pass to him as surviving joint tenant and then to this wife as his closest survivor. The mother would receive nothing. However, if the father had survived his son by six days and then died, all property would go to the mother. John's wife would receive nothing.

In Example B, if Mary had survived Steve for six days and died, then the ranch would have gone completely to her parents. On the other hand, if Steve had survived Mary for six days and died, then the ranch would have gone completely to his parents.

In many cases, chance is a major factor in determining whose relatives will receive the estate. The consequences of the decision to rely on joint ownership alone without bothering with written wills can be quite severe. Joint tenancy is not a substitute for a written will.

#### JOINT TENANCY CONSEQUENCES

Is it best for a parent and children, a brother and sister, or unrelated individuals to hold title to real or personal property such as stocks and bonds, checking and savings accounts, homes or ranches, in joint tenancy with right of survivorship? The answer is not a simple "yes" or "no." What is best for one family or situation may not be right for another family or situation.

Joint ownership with the right of survivorship has many consequences. Some may be considered advantages, others disadvantages.

1. By holding property in joint tenancy, a family could be disinherited.

**Example A:** A father and son had farmed together for 15 years with all of the farm land in joint tenancy. They assumed that, upon the death of the father, the son would become the sole owner. But the unexpected happened: the son was killed in an automobile accident, leaving a wife and five children. The son's family was almost totally "disinherited" because the joint tenancy property passed to the father as survivor.

**Example B:** Two brothers, Roger and Paul, own land as joint tenants with right of survivorship. If Roger dies, Paul will receive Roger's interest in the land. Roger's wife and children would not inherit it because the surviving joint tenant would be Paul. If Roger left a written will stating that his property was to go to his wife, the joint tenancy deed would have priority over the written will. His wife would not inherit his interest. Once Roger and Paul became aware of the consequences of joint tenancy, they changed the title to the land naming them as tenants in common.

As the previous examples indicate, those considering joint tenancy should carefully examine all of the possibilities and assure themselves that joint tenancy would be a satisfactory arrangement regardless of who died first.

2. If a parent holds title to real property in joint tenancy with his or her children, the parent loses control over his or her property. The parents can sell their interest, but it's doubtful if anyone would buy it under such circumstances.

**Example:** Jane, through her own efforts and those of her husband, now deceased, owns her own home. She was told by a friend that she could save estate taxes by placing the property in joint tenancy with her daughter. Jane now wants to sell the home because she is going to remarry and move to Florida. Jane's daughter, "for her mother's own good," refuses to sell. Jane was unaware that her daughter would not

have to pay an inheritance tax because it has been eliminated. The estate would not have to pay an estate tax, either, because its value is under \$1.5 million. Consequently, Jane's reasons for placing the property in joint tenancy were the result of misinformation.

3. Hard feelings may develop if only one child's name is included on the property deed and other children are excluded. Upon the death of the parent, the property passes to the surviving joint tenant. The other children are "disinherited."

**Example:** Mrs. Jones placed title to the ranch with her son, requesting that after she's "gone" he would share it with his sister. After his mother's death the son refused to give any of the property to his sister. Legally he is not required to do so.

4. Parents who think they can avoid federal estate taxes by placing titles, checking and savings accounts, etc. in joint tenancy with their children are misinformed. The total amount will be included in the parent's gross estate, unless the children can prove that they contributed funds to the joint tenancy formation.

**Example:** Nellie put her savings accounts totaling \$100,000 in joint tenancy with her grandchildren, thinking she could avoid paying federal estate taxes on the amount. She was mistaken. The total was included in her gross estate. Since her total estate was under \$1.5 million (2004) no federal estate taxes were due.

5. Often an elderly person puts his or her checking account in joint tenancy with a relative or friend so that the person may write checks to pay bills, purchase food and clothing, or to pay funeral expenses after the elderly person has died. However, upon the death of the elderly person, the surviving joint tenant may claim the account as his or her own. This can disinherit others, perhaps contrary to the wishes of the deceased. Many lawsuits concerning estates have arisen out of such circumstances. A durable power of attorney, or authorization on the signature card for someone other than the

owner of the account to sign checks, may be more preferable than joint tenancy.

6. Joint ownership may be useful in passing property such as an automobile or home to the surviving owner conveniently and quickly.

7. A joint bank account with the right of survivorship may provide funds immediately for the maintenance of joint survivors.

8. The titles to property held in joint tenancy can be terminated by the personal representative or an attorney. Joint tenancy property does not go through probate.

9. Generally, (except between spouses), a gift tax liability arises when a joint tenancy is created with the separate funds of one of the joint tenants, and the other joint tenant contributes none or less than a proportionate share of the consideration. However, when a joint tenancy bank account is opened, another rule applies. When the noncontributing joint tenant makes a withdrawal of more than his or her portion of the contribution, a taxable gift occurs at the time of withdrawal.

10. Joint tenancy may result in adverse estate taxation.

### PROPERTY OWNERSHIP AND YOU

How many evidences of titles do you now have, including anything from land (deed, bill of sale) to snowmobiles? Where are they kept? Whose name or names are on the documents? Perhaps now is a good time to gather all those titles from their various hiding places and examine them in the light of your present and future estate.

Examine your circumstances carefully. Whether to continue to hold property presently owned in joint tenancy with right of survivorship or tenancy in common or sole ownership, or how to acquire additional property requires careful consideration. Changes in tax laws, property laws and property values, as well as other factors, affect such a decision.



Will your real and personal property be distributed according to your wishes if you die without a will?

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### DISCLAIMER

This publication is not intended to be a substitute for legal advice. Rather, it is designed to help families become better acquainted with some of the devices used in estate planning and to create an awareness of the need for such planning. Future changes in laws cannot be predicted, and statements in this guide are based solely upon those laws in force on the date of publication.

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This publication is suggested for the reading of all South Dakotans. It has been reviewed and approved by the South Dakota Bar Association and South Dakota State University faculty in the Human Development, Consumer and Family Sciences Department, College of Family and Consumer Sciences, March 2005.

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