

CO-OWNERSHIP BETWEEN UNMARRIED PERSONS

This article discusses the differences between tenancy in common and joint tenancy, where two or more persons not married to one another buy a house together. Corporations, partnerships, and limited liability companies, which require more formality and are more often used for business ventures, are beyond the scope of this article.

The distinguishing characteristic of joint tenancy is the right of survivorship. When a joint tenant dies, the surviving joint tenants automatically receive the decedent's interest in the property. The right of survivorship under joint tenancy even prevails over the decedent's will. Because the right to will away one's property is a valuable property right and because a joint tenant gives up that right, the law disfavors joint tenancies and requires a clearly expressed intention to create a joint tenancy. As a matter of good practice, the deed or will creating the joint tenancy should expressly recite "as joint tenants with right of survivorship, and not as tenants in common."

To create a valid joint tenancy, all joint tenants must have acquired their interests at the same time, through the instrument (deed or will), have equal shares in ownership, and have equal rights of possession, in addition to the requirement to clearly express the intention to create a joint tenancy. The failure to satisfy any one of these requirements will result in the creation of a tenancy in common, rather than a joint tenancy. Likewise, although a joint tenant's interest in the property is transferable in the absence of an agreement to the contrary, a transfer by one joint tenant severs the joint tenancy as to the remaining joint tenants.

On the other hand, no formality is required to create a tenancy in common. When two or more persons not married to one another acquire property, they are presumed to be tenants in common, unless a contrary intention is clearly expressed. Unlike joint tenants, tenants in common may acquire their interests in the property at different times, through different instruments, and have unequal shares. However, like joint tenants, tenants in common have equal rights of possession of the whole property, regardless of their respective undivided interests.

All co-tenants, whether tenants in common or joint tenants, have an obligation to contribute in proportion to their ownership interest toward repairs, maintenance, taxes, insurance, and debt service to preserve the property.

The primary advantages of joint tenancy are that the property is not subject to probate and that surviving joint tenants take the property free of the debts of a deceased joint tenant. The primary disadvantages of joint tenancy are that joint tenants give up the right to will away their interests in the property, which can result in an inadvertent disinheritance of children of a former marriage, and that it is easy to sever a joint tenancy, thereby frustrating the expectations of the remaining joint tenants.

When two or more persons not married to one another buy a house together, they should consider entering into a written co-tenancy agreement specifying the form of co-ownership, the rights and obligations of the parties, and, most importantly, a method of terminating the co-tenancy, typically through a buy-sell provision or right of first refusal. The parties should consult an attorney prior to closing to determine which form of ownership best reflects their intentions and to consider a co-tenancy agreement.

This article contains general information only, and should not be used or relied upon as a substitute for competent legal advice in specific situations.