



## How Should You Hold Title to Real Estate?

Your home is probably the most valuable asset you own. Yet most people don't think about how to hold title until the title company poses the question when you buy or refinance. But this deserves careful consideration, because how you hold title to real estate has far-reaching effects. Let's look at some common ways to hold title.

**Individual Name:** You can hold title in just your name even if you are married. However, there are some drawbacks you should know about.

First, what would happen if you become mentally or physically incapacitated due to illness or injury and the property needs to be refinanced, or a line of credit needs to be opened or increased? If you are unable to conduct business, the court will need to appoint someone to act for you.

"But, I have a will," you say. A will can't help; because it only goes into effect after you die, not if you are incapacitated.

"But, I have a power of attorney," you say. Most powers of attorney end at incapacity. A *durable* power of attorney is valid at incapacity. However, many financial institutions will not accept one unless it is on their form. And if accepted, it may work too well, giving the person the ability to do whatever he or she wants with your assets. You could recover to find the property mismanaged or even sold and the proceeds gone.

The court's job is to provide supervision to protect your assets. But once the court gets involved, it will stay involved until you recover or die. The court, not your family or friends, will control how your assets are used to care for you. It is often a public process that can be expensive, embarrassing, time consuming, and difficult to end if you recover.

Next, what happens when you die? If yours is the only name on the title, the property will almost certainly have to go through the probate court system before it can be distributed to your heirs, even if you have a will. Think about it: if your name is the only one on the title, and you have died, you can't sign your name to transfer title. While there can be exceptions, in most cases the only way to remove your name and put the new owner's name on is through the probate court, which can be an expensive and time consuming process.

**Joint Tenants with Right of Survivorship:** This is how most married couples hold title, because it seems fair, it's easy, and it's free. Parents and their adult children also often hold title this way, as do unmarried couples.

Indeed, when one owner dies, full ownership does transfer automatically to the surviving owner without probate. But usually this just postpones probate. If the surviving owner dies

without adding another owner (which often happens), or if both owners die at the same time, the property will almost certainly have to go through probate before it can go to the heirs. There are other problems, too. When you add a co-owner, you lose control. With real estate, all owners must sign to sell or refinance. If your co-owner disagrees with you, you could end up in court. If your co-owner is incapacitated, the court will probably get involved to protect your co-owner's interest...even if the ill owner is your spouse.

You expose the property to your co-owner's debts and obligations; you could even lose your home to your co-owner's creditors if he or she is successfully sued. There could also be gift and/or income tax problems if your co-owner is not your spouse.

Finally, because a will does not control jointly owned assets, you could disinherit your family when your co-owner inherits your share. Sadly, and all too often, children from a previous marriage are disinherited when a new spouse is the surviving owner.

**Tenants-In-Common:** With this kind of ownership, each owner's share will be distributed as directed in his or her will. If there is no will, the property will go to the owner's heirs.

**Community Property:** Nine states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin) have a form of joint ownership between spouses commonly called community property. When you die, your share of community property automatically goes to your surviving spouse, unless your will says otherwise.

The problem with both tenants-in-common and community property is that you could find yourself with several new co-owners when your co-owner dies and the heirs inherit the property. Imagine how difficult it could be to get several owners to reach an agreement, especially if you are trying to sell the property.

You can also run into the other problems (incapacity, lawsuits, etc.) as explained under joint tenants with right of survivorship, but with several owners involved, your risks and problems are multiplied.

**Tenants-by-the-Entirety:** This form of joint ownership, available between spouses in some states, is similar to joint tenants with right of survivorship in that when one spouse dies, his/her share automatically goes to the surviving spouse, even if the will says otherwise. So you have many of the same risks, including unintentional disinheritance and court interference if one spouse becomes incapacitated.

However, as tenants-by-the-entirety, neither spouse can transfer his/her half to someone else without the other's approval - something joint tenants with right of survivorship and tenants-in-common can both do.

**Revocable Living Trust:** When you have a living trust, the title of your real estate can be held in the name of the trustee of your trust. Usually you will be your own trustee, so you keep full control of the property. You can buy, sell, and refinance real estate just as you can when the property is not in your trust.

If you become incapacitated, the successor trustee you named when you set up your trust will be able to step in and act for you. Because the title is no longer in your individual name (or joint names if married), there will be no need for court interference. If you are married, you

and your spouse can be co-trustees, in which case your successor trustee would step in only after you have both become incapacitated or have died.

Your successor is legally obligated to follow the instructions you put in your trust. If you recover, your successor simply steps aside and lets you resume control. When you die, the property will be distributed without probate according to the instructions in your trust, so you don't have to worry about unintentionally disinheriting someone.

**SUMMARY:** How you hold title to real estate should be given careful consideration. Check your titles and make any changes now while you can.