

HOMESTEAD - LIFE ESTATE OR JOINT TENANT IN COMMON – SOME CONSIDERATIONS?

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Under normal conditions the passing of a married couples' property is simple, the real property is held in joint names and at the death of one of the spouses the property immediately transfers to the surviving spouse by operation of law. But sometimes there is a breakdown in relationships or the married couple marries late in life where both spouses own their own home, moved into the other's residence and forgot to place the new spouses name on title to the property. The other spouse's property is sold and the profits from the sale are used to pay off any remaining mortgage of the new spouse's property. Everyone is happy until the death of one of the spouses. This kind of situation creates problems for the surviving spouse of a marriage which can become exceptionally complicated if there are children from prior marriages.

Why is this a potential problem? Florida's constitution and probate statutes state in pertinent part that a married couples Florida residence (homestead) cannot be devised away from a spouse or when dependent children exist. Should this occur, the surviving spouse is granted a life estate in the property with a remainder interest to the descendants of the deceased spouse. Alternatively, the surviving spouse could elect within 6 months following the death of their spouse a joint tenancy in common with the deceased spouse's children. If the joint tenancy in common election is taken, it becomes irrevocable.

In the above scenario, the surviving spouse invested the profits from the sale of his or her residence to pay off the mortgage of the deceased spouse's real estate and is now faced with the prospect that he or she will lose that investment and possibly not have a legacy to leave to her descendants. The decision to be made by a surviving spouse, creates a problem that presents itself is an economic one or possible displacement depending on the decision that he or she makes as explained below.

In the event the surviving spouse elects to take joint ownership in the property as a tenant in common, the next hurdle he or she may face will be the possibility of having the property partitioned by the decedent's children, heirs or whoever is a devisee of the dead spouse's estate. Partitioning of property occurs when one or more joint owners' wants to sell property and the other joint owners do not. The law provides a remedy to the owner who wants to sell by allowing them to use the courts to forcibly sell jointly owned property on the court house steps. There are certain procedures that the court must follow in a partition action to try and not displace one of the joint tenants. One of those proceedings is to determine if the property can be equally divided such that each joint tenant will receive an equal value of land. If this can be accomplished, the Court will likely break out separate but equal valued parcels for each joint tenant. However, if the property cannot be divided up into separate but equal parcels, the court will place the property up for sale. Thus, the daunting problem for the surviving spouse is displacement from the residence that he or she paid off the mortgage on and depended on it for shelter following their spouse's death.

In the event the surviving spouse does not make a joint tenant claim within 6 months of the death of their spouse, the surviving spouse will receive a life estate with a remainder interest in the descendants of the deceased spouse. In such event, the surviving spouse will be protected from a partition action because he or she will own the property in its entirety for the length of his or her life. The only problem is that life estates are generally not salable unless the deceased spouse's descendants agree to sell the property. So why would a surviving spouse elect to take a life estate interest other than to protect themselves from a possible partition action? Simply put, it could be an economic one.

Remember that a spouse who becomes a joint tenant will receive only 50% of the net proceeds should the property be sold with their dead spouses devisees or descendants. However, a life tenant spouse could receive greater than 50% of the net proceeds should the property be sold. This is all based on the life tenant's age. For example, a person who is 50 years of age could receive as much as 85% of the net proceeds. This is based on life estate actuarial tables. Florida law does not dictate which actuarial chart must be used to determine a life tenant's interest when property is sold; thus, if you can find a lucrative life tenant chart, you should use it. Normally, the cross over point where a joint tenant decision is economically more feasible is at age 76.5. Thus if you are younger than 76.5 years of age, the net proceeds from the sale of a life estate is in your favor if you are the life tenant.

However, not all decisions should be based solely on the above analysis. For example, if the dead spouse's devisees or heirs do not want to sell the property, then you are stuck as a life tenant with all the expenses that go with it (e.g. taxes, mortgage interest, condo/homeowner's assessments and insurance). Therefore, a person facing a life estate remedy should make sure that the persons who will take the property following the surviving spouse's death want to sell it.

Another issue to be considered is whether the surviving spouse has the ability to sustain themselves following the death of their spouse. For example, if the surviving spouse's income or capital is such that he or she cannot maintain the homestead property, the ability to sell the property immediately may warrant selecting joint tenancy to spread the cost of maintaining the property among the dead spouse's devisees or heirs. If nothing else, this could be the impetus to engage in an early sale and avoid a partition action where the full fair market value of the property is not likely to be achieved when sold on the Court house steps. On the other hand, if the surviving spouse will end up living the rest of their life out of their car, maintaining a life estate may provide him or her with shelter.

As you can imagine each situation that a person is in can create different outcomes and consequences. If you are currently or about to face this problem, contact the attorney of your choice to discuss your financial condition and decisions that are available to you. There is no perfect solution, but at least you will know what to expect. It could be the best investment you make.

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