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Scales Elder Law Newsletter

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Understand the Pitfalls of Joint Ownership of Property

In my practice I am often working with seniors who have property in joint ownership. Joint ownership refers to the ownership of property that is titled in more than one name. The property involved can be “personal property” such as bank accounts, CDs, or mutual funds, or “real property” such as land or oil, gas and minerals.

There are a number of different types of joint ownership, the most common in Pennsylvania being tenancy by the entireties, tenancy-in-common, and joint tenancy with right of survivorship (JTWROS).

Tenancy-by-the-Entireties. This is the most common form of joint ownership in Pennsylvania – it is simply ownership of property by husband and wife. Unlike other forms of joint ownership, in which each co-owner has a distinct interest that can – at least theoretically – be sold, in a tenancy-by-the-entireties it is not the husband and wife who each own half of the property, but rather “the marriage” which owns the entire interest. While this sounds very academic, it does have one very practical result – creditor protection. A creditor of only one spouse has no claim against property owned by husband and wife, because that spouse doesn’t own an interest in the property, the “marriage” owns the entire property. This means that a creditor of only one spouse, even a creditor with a judgment on record at the courthouse, cannot force the sale of any property owned by both husband and wife as long as both spouses are alive and the marriage is intact.

Tenancy-in-Common. This is another common form of joint ownership and is the *presumed* ownership form for multiple owners who are not husband and wife. It gives each co-owner an undivided interest in the property. So, for

example, if parents transfer their house to their three children, Bill, Mary, and Alice, then these children are presumed to be tenants-in-common unless the deed makes it clear they are not. What this means is that if one of the owners – say, Bill – later died, his one-third share of the house would be part of *his estate* and would go to the people he had named in his Will. So, if his Will left his interest in the house to his children, then Mary and Alice would each own a one-third interest, and Bill’s children would own the remaining one-third share.

Unlike the joint tenancy with right of survivorship discussed below, the tenancy in common permits the co-owners to own different percentages. Thus, the deed to Bill, Mary and Alice could specify that Bill was to have a one-half interest, with Mary and Alice each having a one-quarter interest.

Joint Tenancy with Right of Survivorship (JTWROS). This is also a common form of joint ownership, found on bank accounts, CDs, as well as real estate. As the name implies, what characterizes this type of ownership is that when one joint owner dies, his or her interest passes automatically to the surviving joint owner(s), not to the decedent’s estate. So, in the above example, if the parents’ deed to Bill, Mary and Alice had stated that they were to be “joint tenants with right of survivorship,” then if Bill died, his one-third interest would pass automatically to the surviving joint owners, his sisters Mary and Alice, who would each then own a one-half interest. But, as noted above, with JTWROS, each joint tenant must own an *equal* share with all other joint tenants.

Advantages of JTWROS. Because of the survivorship feature of JTWROS, it is often used as a simple means to avoid probate. For example,

Wilma is 80 years old and has a savings account at Bedrock Savings and Loan. She adds her 55-year old son, Fred, to the account as JTWR0S. If Wilma is the first to die, as is most likely given her age, the entire account will automatically belong to Fred and so avoid probate in Wilma's estate. Also, if Wilma had added Fred's name to the account at least a year before she died, inheritance tax would only have to be paid on one-half of the account balance.

The Pitfalls of JTWR0S. While the simplicity of JTWR0S makes it an attractive tool for avoiding probate, it carries with it a number of potential problems. Technically, JTWR0S does not *avoid* probate but rather *postpones* it until the death of the surviving joint owner. This can be a problem when people do not die in the order anticipated. For example, if Fred were the first to die, while probate of this account in Fred's estate would have been bypassed, the entire savings account balance would be back in Wilma's name and subject to probate at her death. Furthermore, Wilma would have to pay inheritance tax on half the value of the account just to get it back!

And while adding a joint owner is relatively easy, it is not so easy to remove a name once added. If Wilma later changes her mind about having Fred as a joint owner, she cannot remove his name without Fred's permission. And while Fred's name is on the account, he has total access to Wilma's money. This means that Fred's creditors may also gain access to the account. And since a divorcing spouse is one type of creditor, if Fred gets divorced, the funds in the joint account can be subject to the property settlement agreement.

Another common problem with JTWR0S occurs if the senior has several children and has a Last Will and Testament leaving everything equally to all of them. For example, if Wilma has five children, but Fred is the only joint owner on her checking and savings accounts, then Fred becomes the sole owner of these accounts at Wilma's death. If most of Wilma's estate was composed of these two accounts, then Fred would end up with the lion's share of the estate with little or nothing going to the other four children. Even though the Will leaves everything to all five children equally, the Will only controls the distribution of assets that are in mom's sole name and does not control who gets the jointly held assets. Needless to say, this could cause significant problems in some families

Risk of Long-term Care. Finally, none of the above forms of joint ownership would protect any part of the joint accounts if Wilma later needed long-term nursing care. I find this is often misunderstood by my clients, who assume that if one child's name is on an account as joint owner, then only half the

value of that account would have to be used to pay for long-term nursing care. While, as noted above, joint ownership can be a way of reducing inheritance tax at Wilma's death – because the Pennsylvania Department of *Revenue* would view half the value of the account as belonging to Wilma – the Pennsylvania Department of *Public Welfare* (DPW, the Medicaid folks) take a different view. As long as Wilma has the right to withdraw all of the money in the account without Fred's agreement, then unless Fred could show that he contributed his own money to the account, DPW would treat all of it as "available" to Wilma and thus have to be spent down before she could qualify for Medicaid.

Conclusion. Most of my clients are concerned about protecting their assets from the risk of long-term nursing care and also making sure their assets and property pass at their death to their choice of beneficiaries as simply and as economically as possible. But without good advice and planning, a person could wind up with disastrous unintended consequences. That is why it is important to consult with an experienced professional such as an elder law attorney for your estate planning needs. Estate planning is done for your loved ones. An important by-product of careful estate planning is the peace of mind of knowing you have properly taken care of your legal and financial affairs.

Kemp Scales, CELA,* is an Elder Law Attorney who serves clients throughout western Pennsylvania from his offices in Erie, Titusville, and Pittsburgh. Attorney Scales frequently makes presentations to professional and civic groups, to senior centers, hospitals and long-term care facilities throughout western Pennsylvania. If you would be interested in having attorney Scales speak to your group, please contact us at toll free at (888) 827-2788 or by e-mail at Info@ScalesElderLaw.com.

Certified as an Elder Law Attorney by the National Elder Law Foundation as authorized by the Pennsylvania Supreme Court.

Kemp Scales will be presenting a seminar at the **Gertrude Barber Center** in Erie on **March 5, 2008** beginning at **6:30 pm**. The event is open to the public but is geared specifically to seniors who are caring for an adult child with special needs. *To reserve a seat please call our office at 888-827-2788.*