

A REVIEW OF METHODS OF HOLDING TITLE IN ARIZONA

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Occasionally it is useful to review the many forms of holding title to real property. All have different legal effects which make them suitable or unsuitable depending on circumstances. In addition to the widely known and common methods of holding title, Arizona recognizes several common law methods which are seldom used these days. In addition, several forms of title and rules of the common law have been abolished by statute in this state.

Joint Ownership.

There are various methods of jointly holding property which are recognized in Arizona.

Tenants in Common. This is a form of ownership where each owner has an undivided portion of the property. The percentages owned by each do not have to be equal. It is a common method of joint ownership where the owners are business partners. Legally, it is possible for one tenant to sell his interest to a buyer without the consent of the other owners, although finding a buyer for an undivided interest is, as a practical matter, very difficult. Interests as tenants in common do not terminate upon death of an owner. They may be inherited by the heirs of the owner and are subject to probate.

Joint Tenants. Joint tenancy with right of survivorship, a favorite of title companies, is a very common method of ownership between husband and wife, although it may exist between any two people, whether or not related. Unlike tenants in common, a joint tenancy between two people is terminated upon death of one owner, and the survivor becomes sole owner by operation of law. The advantages of holding title in this manner include avoidance of probate and taking the property free from the claims of creditors of the decedent. Disadvantages of the automatic transfer of title include taking the property outside the control of a will. Thus, property held in this manner is not available to fund a testamentary trust, such as a tax-saving bypass trust, unless the survivor disclaims his or her interest.

Community Property. Property held by a husband and wife may be community property, wherein each spouse is deemed to own an undivided 50% interest. Community property generally cannot be conveyed without the approval of both parties. Upon the death of one party, the other does not automatically inherit the interest of the decedent. Community property interests are devisable by will and subject to probate. They may be used to fund testamentary trusts. Community property may or may not be subject to the claims of creditors of one spouse. If the spouse incurred a debt for the benefit of the marital community, the property is subject to claims of the creditor. If the debt is not a community debt, the property is subject to the creditor's claim only to the extent of the debtor's contribution to the property.

Community Property With Right of Survivorship. This method of ownership is a combination of joint tenancy and community property. The property is treated as community except that the surviving spouse automatically succeeds to the interest of the other spouse at death. From an estate planning perspective, there is no difference between joint tenancy and community property with right of survivorship. However, there may be significant differences in the two forms in other areas of the law, such as domestic relations and debtor-creditor.

Beneficiary Deeds. A recent law, a beneficiary deed allows an owner of property to designate beneficiaries who will take the property upon the death of the owner. A beneficiary deed is, strictly speaking, not a form of joint ownership because the beneficiaries named do not have any present rights or interest in the property. They have only a future expectancy interest subject to defeasance. That is a fancy way of saying the grantor of a beneficiary deed can later change his mind and remove or change the beneficiaries. This form of deed avoids probate and may be superior to joint tenancy because it does not constitute a gift to the beneficiary. On the other hand, the property remains in the grantor's estate or the interest may be extinguished by the grantor's selling of the property. Property taken by beneficiaries under this type of deed is considered a non-probate transfer and may be subject to the creditors of the decedent.

Trusts. Again strictly speaking, this is not a form of joint ownership but allows several beneficiaries to enjoy ownership of the property now or in the future. A transfer may take place where a husband and wife deed their property to themselves as trustees of their revocable trust. The legal form of ownership has changed and this method of holding title may facilitate the funding of a bypass or marital trust, where ownership as a joint tenant would not. Property is held in the name of the trustee or trustees, rather than the trust itself. While revocable trusts are the most common vehicle for holding title, it is also possible for irrevocable trusts and business trusts to hold real property.

Common Law Methods of Holding Title.

As mentioned in the first paragraph of this article, many forms of title under the common law are recognized in Arizona, such as estates of life, estates for years, remainders, reversions and expectancies. Several others, including fee tail and the Rule in Shelley's Case are not recognized. These are dealt with in another article.