

## **MULTIPLE PURCHASERS OF PROPERTY IN SOUTH CAROLINA**

### **JOINT TENANCY WITH THE RIGHT OF SURVIVORSHIP (JTWROS)**

**V.**

#### **TENANCY IN COMMON**

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A common question arises at the time of the purchase of real property located in South Carolina as to the manner of holding title. There are two ways in which co-tenants may hold real property jointly in South Carolina. Persons may also form corporations or limited liability companies to hold title, if they need to limit the liabilities from the property possibly affecting other assets. However, when two or more individuals own real property, they generally have the following two choices on how to hold title:

- (1) as "joint tenants with rights of survivorship (JTWROS)"; or
- (2) as "tenants in common"

#### **JOINT TENANTS WITH THE RIGHT OF SURVIVORSHIP**

The majority of people are familiar with the principles of JTWROS through their experience with joint banking accounts. In a joint tenancy with a right of survivorship, the co-tenants own the property as a whole. When one co-tenant dies, his or her interest passes automatically to the other co-tenant without the need for any formal probate proceedings in South Carolina, and regardless of any claims which creditors may have against the estate of the deceased co-tenant. The existence of a will does not affect the ownership of the land. JTWROS can, therefore, be a form of estate planning. There are four necessary "unities" in a joint tenancy:

- (1) Unity of Interest (the co-tenant's interests are the same)
- (2) Unity of Title
- (3) Unity of Time
- (4) Unity of Possession

Whenever a co-tenant acts in a way that one of these essential unities is destroyed, the joint tenancy is automatically severed. For example, if one co-tenant pledges its interest in JTWROS property as a security to a loan, or sells its interest, the joint tenancy is severed. A divorce between the two co-tenants does not, however, in and of itself, necessarily sever the tenancy. In other words, the property will need to be disposed of in the settlement process or by the divorce decree in order to effect a severance.

#### **TENANCY IN COMMON**

When co-tenants hold property as "tenants in common", each owns an undivided, equal interest. Thus, with two co-tenants, each has an undivided one-half (1/2) interest; if there are three co-tenants, each has an undivided one-third (1/3) interest; etc. When one co-tenant dies, his or her interest, unlike that under JTWROS, does not pass automatically to the surviving co-tenant, but rather according to the terms of the will or by laws of intestate succession. In addition, the deceased co-tenant's interest is subject to the claims of creditors. A will is very important in determining the distribution of the estate. Tenancy in common is characterized by only a single essential unity - that of possession or of the right to possession of the common property. A tenant in common who conveys an interest to a third party ceases to be a co-tenant, and the one who purchases the undivided share of a tenant in common becomes a co-tenant with the remaining owner(s).

#### **IMPORTANCE OF WILLS**

The existence or non-existence of a valid will has no effect on land held under JTWROS. Under JTWROS, the land automatically is given to the surviving co-tenant(s). However, a valid will is very important in the distribution of land held as tenants in common. A valid will provides several advantages. The most important is that it gives the Testator control of the distribution of his possession. If the owner dies intestate (without a will), a court will appoint an Executor for the Estate. The Executor follows South Carolina's statute of descent and distribution in allocating property. A will allows the Testator to decide who will distribute the possession and to whom they will be distributed. A will also enables tax planning which can provide for the minimization of estate taxes. Dying intestate can have the effect of maximizing taxes to be paid.

#### **SUMMARY**

This memorandum is not intended to imply any preference for one form of ownership over the other. It is intended to stress the importance of estate planning and of choosing a form of ownership consistent with that plan. Wiseman Law Firm, LLC will be happy to discuss the probate and tax ramifications of such a choice with you or your estate and/or tax advisor.