

# Is Your Property *Owned Correctly?*

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**T**he difference between your estate plan working the way you intend or not, will likely depend on the answer to one fundamental question, “Is your property owned correctly?”. Proper asset ownership and correct beneficiary designations is the linchpin between your planning documents and your family’s peace of mind. Even the best estate plans, with documents drafted by the most experienced attorneys, cannot control your property if it isn’t titled correctly.

## *Individual Ownership*

Many people own property in their individual names. Although individual ownership allows you to keep control of the property while you’re alive and well, you give up control upon your disability or death. You should name someone in a power of attorney to handle your affairs if you become disabled. If you don’t, the Court will name someone in a long, expensive, and public guardianship or conservatorship process. When you die (whether or not you have a Will), your property will be handled by a Personal Representative, appointed by the Probate Court.

## *Joint Ownership*

Joint ownership in Colorado can take two forms—joint tenancy with rights of survivorship and tenancy in common. The difference between the two is radically different and extremely important. Joint Tenancy with Rights of Survivorship. Although joint tenancy is very popular, particularly among seniors, it is perhaps *the worst way to own property*. Because each joint tenant owns 100% of the property, joint tenancy exposes the entire property to the creditors of *every* joint tenant. It may also cause horrific, unintended estate and gift tax consequences, and may transfer the property

to persons that you never anticipated. In addition, your will or trust *will not control* property owned in joint tenancy.

Joint tenancy is also a poor planning choice if a joint tenant becomes incapacitated. In that case, it may be necessary for the Probate Court to conduct a guardianship or conservatorship proceeding so the joint asset can be sold.

On a positive note, joint tenancy does avoid probate upon the death of the first owner. It is likely this result that attracts so many people.

## *Tenants in Common*

Unlike joint tenancy, tenancy in common provides that each person owns a percentage of the property and those percentages add up to 100 percent. Because each person only owns a percentage of the property, when one person dies, the property goes where their will or trust directs. The bad news is that if the deceased person owned his percentage of the property in his own name, that property interest must go through probate to be retitled.

## You can own property in one of three ways:

- *By yourself*
- *With someone else*
- *Through a contractual relationship*

Tenancy in common is also the better planning choice if an owner becomes disabled. The other owners may still sell or mortgage their portion and the disabled owner may still be able to access his portion through a power of attorney without the Probate Court’s involvement. In Colorado, if you own property jointly with someone and the title does

not specify “in joint tenancy,” then by law you own it in equal shares with your partner(s), as tenants in common.

## *Ownership by Contract*

Ownership by contractual arrangement can take several forms.

## *Trust*


When property is titled in the name of the trust, there is no need for probate since the property is controlled by the trustee of the trust. Also, the terms of the trust control the distribution of the property. Therefore, planning with a trust is *the most highly effective method* of controlling property.

## *Beneficiary Designation*

Here, you “designate a beneficiary” to receive the asset upon your death. This is a typical method of planning for assets such as life insurance, IRAs, 401(k)s, and bank accounts. Although this method of planning avoids probate, you lose the ability to control the asset when you die. Like joint tenancy, planning with a beneficiary designation is rarely recommended, but is widely used, primarily because it is easy.

## *Custodial Accounts*

Custodial accounts are used by parents and grandparents starting college or savings funds for their minor children and grandchildren. Colorado custodial accounts are governed by the Uniform Transfer to Minors Act (UTMA) where the owner holds title to the account as custodian for the beneficiary. The creator of the account is ultimately accountable to the beneficiary for the use or misuse of the funds in the account.

While these accounts are simple to create, administer, and fund, beware! When the beneficiary turns 21, she is entitled to receive the entire account, outright and free of any strings or other obligations. 

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