Titling of assets
Residents of community property states

For your estate planning purposes, the way you title your property determines which method of distribution is used when your estate is settled. Understanding the advantages and disadvantages of each asset titling option—and double-checking your assets are properly titled for your estate plan—helps your heirs receive these assets according to your wishes.

At death, property passes to new owners one of five ways:

- By law
- By beneficiary designation
- Under the deceased’s direction through a will administered by the courts (a process called “probate”)
- Under the deceased’s direction through a trust administered by a third-party
- According to the laws of the state if there is no will (a condition called “intestacy”)

**Passing by law**

Property owned by two individuals (generally husband and wife) titled as Joint Tenants with Rights of Survivorship (JTWROS) passes to the surviving individual by right of law at the death of the first individual.

Using joint ownership for the family home and a modest bank account is a simple way to help the family continue as normal as possible while the decedent’s estate is being settled. However, joint ownership may remove some of the flexibility in transferring assets. It may preclude the use of various estate planning techniques that may help minimize estate taxes, such as utilizing the applicable exclusion amount. In addition, it should be noted that assets can be attached by creditors of either joint tenant.

**Passing by beneficiary designation**

Assets that have designated beneficiary designations pass directly to the named beneficiaries without going through probate. These assets include, but are not limited to:

- Life insurance policies
- Annuities
- Qualified retirement plans
  - IRA
  - 401(k) or 403(b)
  - Roth IRA
- Transfer on Death (TOD)

**Passing through the probate process**

Probate is a court-supervised legal process to confirm all estate taxes and liabilities of the decedent have been paid. If property is owned in more than one state, probate must be completed in each state individually. This process can be time consuming and expensive—costs may range from one to five percent of the estate, or higher. Plus, as a court proceeding, estate settlements through probate become public record.

The following asset titles pass according to the court-supervised probate process and the directions of the decedent’s will.

**Community property**
If you are a resident of AZ, CA, ID, LA, NM, NV, TX, WA or WI, you live in a community property state. If property is owned as community property, each spouse owns a one-half interest in the asset. At death, the property does not automatically pass to the surviving spouse.

**Separate property**
This includes property owned by an individual before marriage or property acquired through gifts or inheritances.

**Tenants in common**
Individuals own property in a named percentage allocation. The individuals need not be related and the ownership can be any percentage allocation.

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**Passing through a trust**

Assets held by a trust generally avoid the probate process. The common trust for estate planning is the Revocable Living Trust. In addition to avoiding probate, it has the additional advantage of providing management of the funds for the heirs for some time after the decedent’s death. Also, in the event the person setting up the revocable trust becomes incapacitated, a successor trustee can take over management of the trust for the benefit of this person while they are alive.

**Benefits of proper asset titling**

Coordinate your asset ownership to align with your overall asset protection and wealth transfer goals for efficient asset management in the event of your incapacity and at your death. Minimizing state and federal estate tax liability can also be accomplished with proper asset titling.

**Portability**

Under current law, each individual has the ability to pass property estate-tax free up to the federal estate tax applicable exclusion amount. Under prior law, it was important for couples having a combined estate in excess of one exclusion amount to have enough property owned by each of them to allow for maximum usage of each spouse’s exclusion amount. Prior to 2011, a typical estate plan included balancing the ownership of assets between spouses and a bypass or family trust which was created at the first spouse’s death to house their exclusion amount.

The American Taxpayer Relief Act of 2012 made permanent “portability” between spouses. Portability allows the estate of a decedent who is survived by a spouse to make a portability election to permit the surviving spouse to apply the decedent’s unused exclusion to the surviving spouse’s transfers during life and at death. Portability can be used to apply the unused portion of a deceased spouse’s exclusion amount no matter how assets are owned between a husband and wife. Consequently, a couple with under $23,160,000 (in 2020) net worth that has done little or no planning is not as likely to be exposed to federal estate taxes as they were pre-portability.

However, other factors should be considered when determining whether portability is the appropriate estate plan.

- **Asset protection** — Portability does not protect assets for future generations from creditors and predators. Using the first spouse to die’s exclusion amount helps protect assets for your beneficiaries and for future generations.

- **No inflationary factor on ported amount** — Under the portability election, the amount of the decedent’s unused estate tax exemption does not appreciate. Consequently, all of the appreciation in these assets may be exposed to estate taxation at the time of the surviving spouse’s death.

- **State estate taxes** — Portability does not apply for state estate taxes. Many states have a state estate tax with significantly lower exemptions or exclusion amounts than the federal exclusion amount. Consequently, more people will be impacted by state estate tax than federal estate tax.

- **GST exemption is not portable** — The Generation Skipping Transfer Tax (GST) is a separate federal tax on transfers of property an individual makes either during their lifetime, or at their passing, to an individual who is more than one generation removed. The GST exemption can be allocated to the family trust. However, if via the portability provision, the deceased spouse’s exemption is passed to the surviving spouse for future use, the GST exemption cannot be carried forward along with the federal estate tax exemption. Consequently, the GST exemption for the deceased spouse would be lost, leaving only the surviving spouse’s GST exemption available.

**What method of titling assets is right for you?**

Each estate is different. For assistance determining an asset titling strategy that optimizes your estate plan, talk to your financial advisor. They, along with their team of wealth strategists, can help you make well-informed decisions that are effective for you and your heirs.