

Ask the Probate Judge—Real Property Held as Tenants in Common
By Merri Rudd, appeared May 15, 2008, Albuquerque Journal, Business Outlook
Reprinted with permission

Q: When the title on a warranty deed is held in “husband’s name AND wife’s name,” does it have to go through probate when one spouse dies? Can the surviving spouse just record a death certificate to remove the name of the deceased? The title company says that the property was not taken in joint tenancy even though it was bought during the marriage, and both names are on the deed. The property is used for investment as a rental property. The deceased spouse had no will. C.M., Santa Fe

This question arose two days in a row at our court. Many couples believe that they have taken title to real property as “husband and wife, joint tenants.” But if they examine the deed to the property closely, they sometimes discover that the magic words “joint tenants” or similar words do not appear on the deed.

If both spouses were still alive, they could sign a corrected deed creating a joint tenancy in the presence of a notary public, record the deed in the county clerk’s office, and all would be well.

In your example, even though both names are on the deed and the property is community property (acquired during the marriage), the deed is missing the words that would have created a joint tenancy. If the names on the deed read only “Harry Husband AND Wendy Wife,” then it sounds like the investment property is held as “tenants in common.”

“Tenants in common” means each owner owns an undivided interest in the property and that interest does *not* pass automatically to the surviving spouse like a joint tenancy does. When one tenant in common dies, a court proceeding is necessary to pass the deceased owner’s share to the surviving spouse or other heirs or devisees.

If the couple in your example had used the property as their “principal place of residence,” the surviving spouse could avoid a court proceeding by using a shortcut called an Affidavit of Homestead, about which I have previously written. But this affidavit cannot be used for investment property.

Since there is no will, the laws of intestate succession apply. Under intestate succession, the surviving spouse is entitled to receive all community property of the deceased spouse. But a court proceeding in either the probate court or district court will be necessary to pass the decedent’s share of the investment property to the surviving spouse.

Once the court appoints the surviving spouse as personal representative, the court issues “Letters of Administration” that give the personal representative the power to act on behalf of the decedent’s estate. The surviving spouse can then prepare a personal representative’s deed from the estate of the deceased spouse to herself/himself.

You are correct that if the words “joint tenancy” had appeared somewhere on the deed, a court proceeding would not be necessary. Recording the death certificate would not remove the name of the deceased from the deed, but it would give notice that one of the joint tenants listed on the original deed had died. No further action would be necessary.

But under the facts you presented, a court proceeding is probably necessary to pass the property to the surviving spouse.

My advice to readers: if you believe you have a joint tenancy deed to your home or other real property, double-check the deeds. The words “joint tenants,” “joint tenancy,” “joint tenants with right of survivorship,” “JTWROS,” or similar words *must* appear on the deed. If you do not see these words, then your property is probably held as “tenants in common,” which may or may not be your intent.

© 2008, Albuquerque Journal, All Rights Reserved