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## Property Ownership: Estate Planning

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*Describes the three main forms of property ownership in Montana and features of estate planning aspects for each.*

**TITLE IS THE MANNER IN WHICH A PERSON OWNS BOTH REAL** and personal property. Title for property may be proven by a certificate, deed, bill of sale, contract, or another document. A title is more than a piece of paper conveying ownership of a tractor, 100 acres of land, an automobile, a house, safe deposit box, or checking or savings accounts. It is not something to be stuck in a drawer and forgotten. Rather, a title is an important part of a total estate plan. In fact, a person should not create a Will<sup>1</sup> separately from the involved titles and the information on them.

Titles can affect how the owner's property is transferred, who receives it upon the owner's death (*with or without a Will*), and the eventual costs of estate settlement and taxes. All these results depend on the way the property is owned and titled. This MontGuide describes three basic forms of property ownership typical to Montana families: sole ownership, joint tenancy with right of survivorship and tenancy in common.

### Types of property

There are two basic types of property – real and personal.

**Real property** is land and whatever is built on, growing on, or affixed to it. Examples of real property include fences, buildings, water systems (unless removable), mineral deposits and standing uncut timber.

**Personal property** refers to assets whose ownership arises either out of physical possession of the property or as the result of a document showing ownership. In Montana, all property except real property is personal property. Examples of personal property include pets, livestock, machinery, stored grain, stocks, bonds, mutual funds, exchange-traded funds, checking and savings accounts, automobiles, and other transportation and recreational vehicles/vessels.

### Forms of property ownership

#### SOLE OWNERSHIP

When a person titles property in sole ownership, it is titled in only one name. Except for legal restraints such as being a public nuisance, infringing on the rights of others, zoning restrictions, and the interests of a surviving spouse, a sole owner may do as they please with the property during their lifetime. By writing a Will, the sole owner can decide the property's distribution after death. If the sole owner does not write a Will, the property passes to heirs according to the Montana intestate succession statutes. MSU Extension has an interactive website illustrating who receives a deceased's estate when a Montanan dies without a Will, [montana.edu/dyingwithoutawill](http://montana.edu/dyingwithoutawill).

Solely-owned real and personal property held by a person at death is included in their gross estate for the determination of federal estate taxes. If an estate is under \$13,990,000 in 2025, there is no federal estate tax. Solely-owned property passes through probate unless the owner filed a transfer-on-death deed (TODD) on real property, a payable-on-death (POD) designation on checking and savings accounts, or transfer-on-death (TOD) registration for stocks, bonds, and mutual funds.

#### CO-OWNERSHIP

Co-ownership of property exists when two or more persons hold legal title to the property. There are two types of co-ownership recognized in Montana: **joint tenancy** with right of survivorship and **tenancy in common**. The title, tenants by the entirety, is not recognized as a legal form of ownership in Montana. Also, Montana residents cannot create community property in the state. A married couple who are residents of a community property state could create community property. If a couple moves to Montana and becomes Montana residents, the property stays as community property.

<sup>1</sup>Will is capitalized to emphasize its importance.



**Joint Tenancy** – Joint tenancy with right of survivorship is a form of co-ownership in which two or more persons own the same property subject to the other joint tenant's ownership right. When a joint tenant dies, the economic interest of the deceased person automatically passes to any surviving joint tenant or tenants.

Typical wording on a document to create joint tenancy would be "to A and B as joint tenants with right of survivorship and not as tenants in common."

Real property held in joint tenancy does not go through probate. Although the real property transfers automatically, there is a legal procedure provided by the Montana legislature to update the public record to show the new ownership. The joint tenant survivor updates the public record by recording an affidavit with the clerk and recorder in the county where the property is located. See the MontGuide "*Transferring Real Property Owned in a Joint Tenancy or in a Life Estate Without Probate*" (MT201606HR).

After a couple is married, they often place their real and personal property in joint tenancy. The reasons are varied: to prove to one another they are as "one," to share and share alike, to avoid probate, or to use joint tenancy as a substitute for a Will.

Regardless of the reason, a couple's decision to place property in joint tenancy should be made only after thoughtful consideration of the consequences of such an arrangement. Joint tenants cannot leave their joint tenancy property to someone in a Will unless the owner survives 120 hours (5 days), nor does the interest pass to heirs by intestacy because the joint tenancy contract has priority.

**Example:** Ron and his brother Don own land as joint tenants with right of survivorship. Suppose Ron dies with a Will leaving his interest in the joint tenancy property to his son, Cory. The joint tenancy title prevails. Don receives Ron's interest in the land as the surviving joint tenant. Cory would not inherit his father's interest in the land, even though Ron's Will said he wanted the joint tenancy property to pass to his son.

If Ron owned the property as a tenant in common with his brother Don, then Ron could leave his half interest in the property to his son. Cory would then own half the property, and his uncle Don would own the other half.

At death, the surviving joint tenant can open safe deposit boxes titled in joint tenancy with right of survivorship. The surviving joint tenant also owns the checking and savings accounts.

According to Montana law, contents (other than those with certificates of title, such as stocks and bonds) in a safe deposit box belong to the surviving joint tenants because the title on the signature card is in their names. This is true even if the deceased's Will says those items of personal property are to be distributed to other individuals. Review the institution's safe signature card for the safe deposit box to figure out what was agreed to by all parties.

**Survival Requirement for Joint Tenancy Property** – A statute passed by the Montana legislature provides a method of distribution of property held in joint tenancy whenever the surviving joint tenant does not survive the first-to-die joint tenant by 120 hours (five days). If this should occur, or if it cannot be determined whether one survived the other by 120 hours, one-half of the property is distributed to the estate of one joint tenant and one-half to the estate of the other joint tenant.

If two people or more hold title to property in joint tenancy and the last tenant does not survive the others by 120 hours, or if it cannot be decided whether one survived the others by 120 hours, the property is distributed equally among the estates of each joint tenant. This statute applies unless the joint tenancy deed includes language dealing explicitly with deaths in a common disaster or requiring one joint tenant to survive the other joint tenant's death for a stated period, such as 30 days or six months. The following examples illustrate how property is distributed if joint tenants do not survive one another by 120 hours (5 days) and they die without writing a Will.

**Example (parent and child):** John and his father own property as joint tenants with right of survivorship. If they die within five days of one another, the property is divided with one-half to John's wife because she is his heir<sup>2</sup>, and the other one-half to John's mother because she is the father's heir. This example assumes the surviving spouse receives the intestate estate, which is the most common circumstance.

**Example (married couple):** Mary and Steve were deeded a ranch as a wedding present by her parents. Mary and Steve placed the ranch title in joint tenancy with right of survivorship. If they die because of an automobile accident and neither one survives the other by five days, the property passes one-half to Mary's parents and one-half to Steve's parents. Steve's parents are not interested in ranching and would sell their half. Mary's parents want

<sup>2</sup> The term "heir" refers to the person who receives property from one who dies without a Will. Depending upon who survives, the heir may, or may not, be a child of the deceased person.



to keep the ranch for another daughter, but would have to buy the other half from Steve's parents. This example assumes neither Mary nor Steve has any children.

If a joint tenant survives beyond the five-day limit, then the property becomes theirs. Upon that surviving joint tenant's death, the property is then distributed according to the person's Will or, if no Will has been written, by Montana intestacy statutes (dying without a Will).

In the first example, if John had survived his father by six days and then died, John would become the sole owner of the property as the surviving joint tenant. Upon John's later death, the property passed to John's wife as his heir. The mother receives nothing. However, if the father had survived John by six days and then died, all property would pass to John's mother. John's wife receives nothing. This example continues to assume that the surviving spouse will receive the intestate estate, which is the most common circumstance.

In the second example, if Mary had survived Steve for six days and died, then the ranch would pass completely to her parents. On the other hand, if Steve had survived Mary for six days and died, then the ranch would pass completely to his parents. This example assumes neither Mary nor Steve has children.

Chance can be a major factor in deciding whose relatives receive an estate held in joint tenancy. The consequences of relying on joint ownership alone, without completing Wills, can be quite severe. Joint tenancy is not a substitute for a Will.

**Joint Tenancy Consequences** – Is it best for a parent and children, siblings, or unrelated individuals to hold title to real or personal property, such as stocks and bonds, checking and savings accounts, homes, or ranches, in joint tenancy with right of survivorship? The answer is not a simple “yes” or “no.” What is best for one family or situation may not be right for another family or situation. Joint ownership with the right of survivorship has consequences – some considered as advantages, others as disadvantages.

**1. By holding property in joint tenancy, a family could be disinherited.**

*Example:* A father and son had farmed together for 15 years with all the farmland in joint tenancy with right of survivorship. They assumed that upon the death of the father, the son would become the sole owner. But the unexpected happened – the son died in an automobile accident, leaving a wife. The son's widow was “disinherited” because the joint tenancy property passed to the father as the surviving joint tenant. Although the widow was

disinherited, she has a right to claim an “elective share” of what is called the “augmented estate.” This would include a portion of the joint tenancy property. The “elective share” procedure is complex and could have been avoided if father and son had NOT held the farmland in joint tenancy.

*Example:* Two brothers, Roger and Paul, own land as joint tenants with right of survivorship. If Roger dies, Paul receives Roger's interest in the land. Roger's wife does not inherit it because the surviving joint tenant would be Paul. If Roger left a Will saying his property passes to his wife, the joint tenancy deed has priority over the Will. Roger's wife does not inherit his joint interest. Once Roger and Paul became aware of the consequences of joint tenancy with right of survivorship, they changed the title of the land to Roger and Paul as a tenancy in common.

**2. If parents hold title to real property in joint tenancy with their children, the parent(s) lose control over their property. The parents can sell their interest, but it's doubtful anyone would buy it under such circumstances.**

*Example:* Jane owns her own home. A friend told her she could avoid Montana inheritance taxes by placing the property in joint tenancy with her daughter. Jane now wants to sell the home because she is going to remarry and move to Florida. “For her mother's own good,” Jane's daughter refuses to sell. Jane was unaware that her daughter would not have to pay an inheritance tax because the Montana legislature repealed the tax in 2001. Jane's estate would not have to pay a federal estate tax in 2025 either, because its value is under \$13,990,000. Jane's reasons for placing the property in joint tenancy were the result of misinformation.

**3. Hard feelings may develop if only one child's name is included on the joint tenancy deed and other children are excluded. Upon the death of the parent(s), the property passes to the surviving joint tenant. The other children are “disinherited.”**

*Example:* Mrs. Jones placed title to the ranch with her son with the understanding that after she's gone, he will share the ranch with his sister. After his mother's death, the son refused to give any of the property to his sister. Legally, he does not have to do so.

**4. Parents who think they can avoid federal estate taxes by placing titles, checking and savings accounts, and stocks, bonds, and mutual funds in joint tenancy with their children are misinformed. The total amount is**



included in the parents' gross estate, unless the children can prove they contributed funds to the joint tenancy formation.

*Example:* Nellie put her savings accounts totaling \$100,000 in joint tenancy with her grandchildren, thinking she could avoid having the account subject to federal estate taxes. She was mistaken. The total was included in her gross estate. However, because Nellie's total estate was under \$13,990,000 (2025), no federal estate tax was due.

5. **Often, an elderly person places their checking account in joint tenancy with a relative or friend so the person may write checks to pay bills, purchase food and clothing, or pay funeral expenses after the elderly person has died. However, upon the death of the elderly person, the surviving joint tenant may claim the account as their own.** This can disinherit others, contrary to the wishes of the deceased. Estate lawsuits over estates have arisen out of such circumstances. A durable financial power of attorney, or authorization on the signature card for someone other than the owner of the account to sign checks, may be preferable to joint tenancy with right of survivorship. See the MSU Extension MontGuide *"Power of Attorney (Financial)"* (MT199001HR).
6. **Joint ownership may be useful in passing property such as vehicles and vessels to the surviving owner conveniently and quickly.** See the MSU Extension MontGuide *"Using a Beneficiary Designation (Form MV13) to Transfer a Montana Vehicle or Vessel Title at Death"* (MT202404HR).
7. **A joint bank account with the right of survivorship can provide funds immediately for the maintenance of joint survivors and payment for funeral or memorial services.**
8. **Generally (except between spouses), a gift tax liability arises when one of the spouses creates a joint tenancy with the separate funds, and the other joint tenant contributes no funds or less than a proportionate share of the consideration.** However, when a joint tenancy bank account is opened, another rule applies. When the noncontributing joint tenant makes a withdrawal of more than their part of the contribution, a gift occurs at the time of withdrawal. A gift does not have to be reported until the amount exceeds \$19,000 (2025). For more information, see the MSU Extension MontGuide *"Gifting: A Property Transfer Tool of Estate Planning"* (MT199105HR).

As these examples illustrate, those considering joint tenancy should carefully examine all the possibilities and assure themselves that joint tenancy would be a satisfactory arrangement regardless of who dies first.

**Tenancy in Common** – With this method of ownership, two or more persons hold undivided interests in the same property with no right of survivorship for the surviving tenant in common. **Undivided interest** means they each own a part of the total value. For example, one tenant in common cannot claim to own the valuable section of land with an oil well and claim the worthless section with sagebrush belongs to the other tenant in common. Each tenant in common has the right to transfer their proportional share by selling it, giving it away, or transferring it to people of their choice by a Will.

Owners can create a tenancy in common in real estate by writing the words "to A and B" on the title. They do not need to add any other wording. If owners hold title to real estate as tenants in common, all co-tenants have equal rights to manage and live on the property. Upon the death of a tenant in common, the interest passes to their heirs by the Montana law of intestate succession, or to their beneficiaries by a Will.

For federal estate tax purposes, only the portion of the property owned by the deceased tenant is subject to tax. If a person's total estate is under \$13,990,000 in 2025, there is no federal estate tax. The fractional share owned by the deceased tenant is also subject to probate and settlement costs.

*Example:* Two brothers, Dan and Sam, own land they inherited from their parents as tenants in common. If Dan dies, his 50 percent interest passes by his Will to his wife and two children, not to Sam. If Sam dies, his 50 percent interest passes by his written Will to his wife and children, not to Dan. In case of Dan's or Sam's death, only the portion owned by the one who is deceased is subject to the federal estate tax. The land's value is \$1,800,000. Thus, if Dan dies, only half of the tenancy in common property (\$900,000) is included in his estate for federal estate tax computation purposes. There is no estate tax for Dan because his total estate value is under \$13,990,000 (2025).

## Summary

How many titles do you have, including everything from land to snowmobiles? Where are they kept? Whose names are on the documents? Perhaps now is a suitable time to gather those titles from various hiding places and examine them in relation to present and future estate planning goals.



Examine the circumstances carefully. Whether to continue to hold property presently owned in joint tenancy with right of survivorship, tenancy in common, or sole ownership, or how to title property bought in the future requires careful consideration. Changes in tax laws, property laws and property values, as well as other factors, affect such a decision.

Are the real and personal properties going to be distributed according to your wishes if you die without a Will? If you are not familiar with the Montana intestate succession statutes, ask for the MontGuide *“Dying Without a Will in Montana”* (MT198908HR), which provides an explanation. The Montana Multiple-Party Accounts Act is described in the MontGuide *“Nonprobate Transfers”* (MT199509HR).

## **Disclaimer**

This publication is not intended to be a substitute for legal advice. Rather, it is designed to help families become better acquainted with the consequences of owning property as a sole owner, in joint tenancy with right of survivorship, or as tenant in common. Future changes in laws cannot be predicted, and statements in this MontGuide are based solely upon those laws in force on the date of publication.

## **Acknowledgment**

The Business, Estates, Trusts, Tax and Real Property Law Section of the State Bar of Montana has reviewed this MontGuide and recommends its reading by all Montanans who want to learn more about the forms of property ownership.





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