



Continuing last month's estate proceedings article, estate proceedings vary greatly with the way title is held. In particular, various forms of tenancies direct the transfer and estate proceedings in title.

There are certain interests in real property that pass by operation of law to the survivors of the decedent. One of the most common of these is interest held by an individual who owns or holds real property as a joint tenant with others. When a joint tenant dies, his interest passes to the surviving joint tenants and said survivor(s) then holds the entire interest in the property.

Found just as frequently are interests held as "tenants by the entirety". Similar to a joint tenancy, tenancy by the entirety expires when one of the tenants dies, resulting in the surviving spouse holding the entire estate. We should note that an interest held as a tenant in common is very different from the interests outlined above since tenants in common do not lose their interest upon death, as it does not pass by operation of law. Instead, the interest held as a tenant in common passes in exactly the same manner as that of individual owners of real property.

The critical point to remember in a joint tenancy is that each tenant is regarded as a tenant of the complete property, for purposes of possession as well as survivorship. Each tenant has the right to occupy every part of the premises. Their right of possession is not limited or segregated to 50% of the subject property. The outstanding characteristic of joint tenancies is the right of survivorship. This means that when one of the joint tenants dies, his concurrent interest in the real property is automatically and immediately extinguished and the surviving joint tenant(s) receive, by operation of law, the complete interest in the premises.

It should be underscored that for purposes of conveyances, prior to the death of any joint tenant, each tenant has an undivided share in the real property. Each tenant has the right to convey his interest to a third party during his lifetime, however, such a conveyance will, of course, destroy the status as a joint tenancy thereby converting the interests of the remaining prior joint tenant and the new purchaser to a tenancy in common.

From this it follows that the survivorship feature of a joint tenancy is terminated by the act of the parties in conveying their interests. The right of survivorship only remains viable in a joint tenancy that is not severed. It would be erroneous to assume that the right of survivorship in any way signifies that the surviving joint tenant takes title to the whole property free of any liens or judgments against the decedent.

The survivor in a joint tenancy takes the property of the deceased joint tenant subject to claims of judgments, creditors or lienors with the exception of Federal and New York Estate Taxes explained above.

It is important to understand the differences between joint tenancies and tenancies by the entirety. A tenancy by the entirety is created when there is a conveyance to a

husband and wife. Because the outstanding feature of both joint tenancy and tenancy by the entirety is often thought of simply as a joint tenancy for married couples. There is however, one fundamental difference between the two types of interest.

In a joint tenancy, each tenant's share can be conveyed by either tenant thereby terminating the survivorship right of the other tenant. In a tenancy by the entirety, the conveyance by one tenant cannot affect the survivorship rights of the other.

For title purposes, in a tenancy by the entirety or joint tenancy wherein the surviving tenant is transferring title to a third party for full and adequate consideration, the lien of New York Estate Tax and Federal Estate Tax do not affect the real property, as it is deemed that the estate tax lien instead attaches to the proceeds of the sale and not to the real property as found in Section 6324(a)(2) of the Internal Revenue code regarding Federal Estate Taxes and Section 975(e) of the New York State Tax Law regarding New York Estate Taxes. Estate tax liens are unique as they arise immediately upon the death of the decedent without the taxing authority having to take additional steps. In the title industry, we are accustomed to the notion that in order to create a lien affecting real property, the creditor/lienor must file the lien/judgment in the county where the real property is located.

Whenever there is a death in the chain of title, disposing of the potential estate tax lien is critical to enable the title company to insure clean title. Federal Estate Tax Liens can be disregarded if death occurred more than ten years from the present and New York Estate Tax Liens can be similarly ignored if death occurred more than fifteen years ago since those are the respective lien duration benchmarks.

In cases of small estates and or on a case-by-case basis, the title company may accept affidavits stating that the estate falls under the applicable exclusion amount for the particular year of death.

While each transfer from a decedent's estate should be a practical title matter, generally disposed of by standard underwriting guidelines, each case can present a different and unique situation where heirs at law need to be tracked and identified, and subsequent deceased heirs need their heirs traced to dispose of their interests in the real property.