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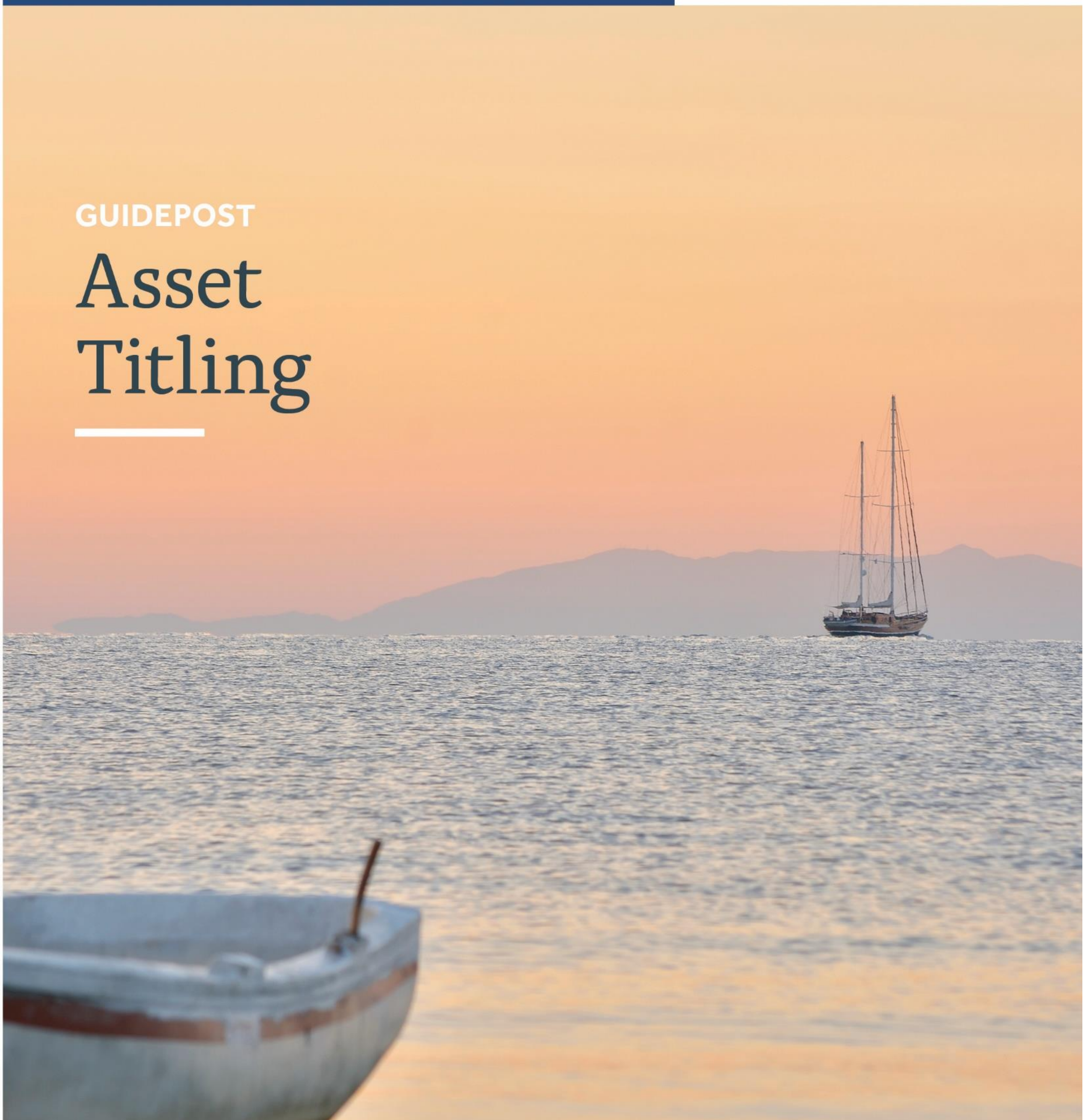
GUIDEPOST

# Asset Titling



# Asset Titling

Asset titling controls how asset ownership passes upon the death of the asset's owner. Even if wills and revocable living trusts are drafted to maximize estate savings, titling and beneficiary designations of property may prevent the documents from operating as intended. Additionally, asset titling can impact the level of asset protection afforded to an asset. For these reasons, it is important to review how assets of an estate are owned as part of any estate planning process.

## Description and Operation

### Joint Ownership

When two or more people own property, generally the title is held as joint tenants in common, joint tenants with rights of survivorship, or tenants by the entirety.

*Joint Tenants in Common (JTIC)*

When property is owned as JTIC, the deceased owner's fractional share passes by will or revocable living trust. While a JTIC owner has the right to control his/her share (such as lien, use, sale, partition), in practice, a JTIC may require the consent of the other owners. In the absence of the words "with rights of survivorship," many states infer that jointly owned property is owned JTIC.

> **Example:** Mark and Mary own stock as JTIC, and Mary's Last Will and Testament leaves her stock to her son, Manny. Upon Mary's death, Manny would receive Mary's share of stock and become a JTIC with Mark.

Property held as JTIC provides no creditor protection whatsoever. Creditors of one JTIC can force a sale of the entire property to satisfy a co-owner's personal debts, but the creditor can receive value only to the extent of the co-owner's interest in JTIC property.

*Joint Tenants with Rights of Survivorship (JTROS)*

If property is owned as JTROS, when one of the owners dies, the surviving joint owner automatically receives control and ownership of the entire property. The assets do not pass through the probate process.

> **Example:** Mark and Mary own stock as JTROS, and Mary's Last Will and Testament leaves her stock to her son, Manny. Upon Mary's death, Mark will own the stock entirely by operation of law even though her will leaves the stock to Manny.

Generally, JTROS property, whether personal property or real estate, creates the same creditor risks as does JTIC property. Creditors of either joint owner can place liens against the JTROS property, and although the creditors cannot collect on a lien from the non-debtor's share of ownership, the creditors can force the sale of the JTROS property to collect from the debtor owner's share.

*Tenancy by the Entirety (TBE)*

TBE is a statutory form of ownership like JTROS; however, it is available only to spouses. Each spouse owns the entire property so neither one of them can convey property independently, nor can property be partitioned, providing some degree of asset protection. If a spouse dies, the survivor will become the sole property owner. Not all states have TBE, and in those that do, most require that both spouses must act together to convey, encumber, partition, sell or otherwise transfer TBE property, while some allow a spouse to act alone. In states where the spouses must act together, TBE property is usually exempted from the bankruptcy proceedings if only one spouse is the debtor of a creditor.

The most important right in the context of asset protection with regards to TBE property is the right that creditors do not have, which is the right to force the sale of TBE property. The protection against seizure of assets enjoyed by tenants of TBE property applies to nearly all creditors of an individual spouse. Exceptions include federal tax liens. Other than foreclosure, regulations vary from state to state regarding the degree of asset protection provided under tenancy by the entirety.

As stated, property held under TBE can still be seized as the result of a federal tax lien. The U.S. Supreme court has ruled that TBE property is subject to a federal tax lien against one spouse. This also includes criminal fines and forfeitures resulting from federal criminal cases. Therefore, the federal government (including the IRS) has the right to administratively seize and sell.

*Community Property*

Other common forms of ownership are community property (with or without rights of survivorship) and separate property. Only a limited number of states operate under the community property system: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Furthermore, Alaska and Tennessee are opt-in community property states which allow both spouses the option to sign an agreement (before and/or during marriage) designating which of their property is to be considered community property. Where a deed for real estate is issued as community property with rights of survivorship, it is not likely to protect the property against one spouse's debts. In community property states, both spouses are equally responsible for debts incurred during the marriage, even if only one spouse contracts for them. Also, residents of community property states may take advantage of an income tax rule that provides a full step-up in basis to fair market value on the entire property, not merely the decedent's interest in the property.[1]

## Non-Probate Assets

Another potential asset titling problem relates to assets that pass by contract or beneficiary designation. Common assets are individual retirement accounts (IRAs) and other qualified plan accounts, annuities and life insurance contracts.

> **Example:** Mary names Mark as beneficiary of her IRA (on the appropriate beneficiary designation form), and Mary's Last Will and Testament leaves her IRA to her son, Manny. Upon Mary's death, the IRA will pass to (or may be rolled over by) Mark, even though her will leaves the IRA to Manny. (In some states, Mark will receive the IRA even as an ex-husband.)

Some accounts also may require naming a successor owner. It is common for bank accounts and investment accounts to be titled as Payable on Death (POD) or Transfer on Death (TOD), which means that an account so designated will pass by operation of law and not through probate to the designated successor.

## Other Considerations

- Beneficiary designations and financial accounts should be checked frequently to make certain the beneficiary or the ownership is as the owner intends.
- Non-probate assets cannot fund trusts created in a will or a revocable living trust unless the beneficiary designation specifically states the name of the trust. Additionally, certain requirements must be included in the trust document when retirement plans are made payable to trusts.
- When the first owner of community property dies, both the decedent's and the survivor's halves of the community property receive a step-up in basis. Therefore, it is important to take care when re-titling community property.
- Change of ownership of a residence may affect the homestead exemption, title insurance and liability insurance.
- For changes to bank accounts, credit union accounts and securities accounts, FDIC, NCUA and SIPC considerations respectively should be considered.
- Changes of title may result in gift tax, due to change of ownership.
- Both probate and non-probate assets owned by the decedent are generally included in the estate.

1 Internal Revenue Code §1014(b)(6).