

## THE “QUESTION”: HOW SHOULD I OWN MY HOUSE?

**By Forrest J. Danley, Attorney**

The purchase of a house is one of the most important decisions and investments that most people make. A lot of time and attention (and TLC) is spent on the house. The good news is that home ownership usually turns out to be a very positive thing. As an estate planning attorney, I’m often asked, “How should I own my house?” That’s a very important question. We’ll call it the “Question.”

In answering the Question, let’s consider a couple of examples. The first example involves Joe and Betty, a married couple. The second example involves Fran, a single person.

***Joe and Betty.*** Joe and Betty are getting ready to close on the purchase of their new house. Let’s assume that Joe and Betty are meeting with me, and they ask me the Question.

First, I explain that considering the Question is part of the bigger picture in their estate planning. (More on the “bigger picture” below.) Second, I explain to Joe and Betty that there are two basic forms of ownership for them to consider: (1) Individual ownership; and (2) Living Trust ownership.

Individual ownership is where Joe and Betty’s names would go onto the title of their new house as the result of a deed given to them by the seller. A common form of individual ownership is Joint Tenancy with Rights of Survivorship (also known as JTWROS or Joint Tenancy). Joint Tenancy is a form of co-ownership. In general, if a Joint Tenant dies, his or her interest in the property terminates, and the surviving Joint Tenant(s) automatically owns the property.

Many married couples use Joint Tenancy ownership for their house, by default. I say “by default” because married couples will often take title at the closing of the purchase of their house via a Joint Tenancy Warranty Deed from the seller. That type of deed is frequently prepared by the title company, whose job is to close the purchase but not advise purchasers about the Question.

Through my many years of practice, I’ve discovered that when clients learn about Joint Tenancy ownership, the vast majority of them decide to use Living Trust ownership instead. One disadvantage of Joint Tenancy ownership is that probate is not avoided upon the death of the surviving Joint Tenant. For example, if Joe and Betty were to use Joint Tenancy ownership, then at Joe’s death, Betty would automatically inherit their house. (She would need to have an Affidavit terminating the Joint Tenancy prepared and recorded in the County Clerk’s office in order to remove Joe’s name from the property.) However, at Betty’s death, a probate would be required to determine who inherits the home from Betty. (A thorough discussion of the pros and cons of Joint Tenancy ownership is beyond the scope of this article.)

After discussing Joint Tenancy ownership, I explain to Joe and Betty the option of trust ownership of their new house (and other assets) by a type of trust known as a “Revocable Trust.” A Revocable Trust is often referred to as a “Living Trust” because the trust is created by you while you’re alive. The term “Revocable” means that you can undo the trust or change it during your lifetime.

I often refer to Living Trust planning as being like the “Texas Two Step.” The **first step** is creating your Living Trust. To create a Living Trust, Joe and Betty would sign a Trust Agreement named after them. They would be the Trustors (or creators), the trustees, and the beneficiaries. Their Trust would then need property (or assets), which takes us to the second step.

The **second step** is funding your Trust. I call this step “Trust Funding.” Trust Funding is basically the process of retitling your assets (such as your house) into the name of the trustee(s) of your Living Trust. It’s a crucial step. Probate can be required for assets that are individually owned and that are not funded into the Trust, thus defeating one of the primary benefits of using a Living Trust. In Joe and Betty’s case, they could go ahead and close the purchase of their home in their individual names, even as Joint Tenants, and then transfer (or convey) their home into their Living Trust.

What are the advantages and disadvantages of using a Living Trust? That’s an important question you need to consider so that you can reach “informed consent” about whether to use a Living Trust-based estate plan. As to the **advantages**, a Living Trust can:

- Avoid probate and its cost and inconvenience for the property (or assets) put into the Trust (such as Joe and Betty’s house), even for out-of-state real estate.
- Help avoid the need for a guardianship in the event of your incapacity.
- Usually be set up and maintained much more cheaply than the cost of probate.
- Be conveniently amended, changed, or revoked at almost any time.
- Maintain privacy of your important matters (that is, you generally show your Living Trust only to whom you want).
- Contain beneficial tax planning that can reduce or eliminate estate taxes, both federal and state.
- Lead to a quicker and easier distribution of assets and belongings at your death to your beneficiaries/heirs, as contrasted to a Will that must be probated to be carried out.
- Reduce problems of joint ownership of property.
- Provide easier transition for a surviving spouse.
- Provide for the management of inheritances by minor beneficiaries (such as children and grandchildren) without court supervision.
- Provide an effective way to make charitable gifts, to manage business interests, and to take care of other special planning needs.
- Provide security from contests or disputes by those persons to whom you leave your assets.
- Plan for life as well as death (because a Will only plans for death).

It’s difficult to think of disadvantages of a Living Trust for most clients. One possible disadvantage is that a Living Trust can require more initial work by clients than a Will because the Trust needs to be funded (remember the second step of the Texas Two Step). (However, my clients have usually discovered that they’re very capable of doing their part of Trust Funding after I provide them with information about doing so. I normally fund clients’ real estate into their Trust as my part of the Trust Funding.) Another possible disadvantage is that a Trust-based plan can cost more in legal fees up front than the drafting and use of a Will. (However, those

costs are generally much lower than the costs of a probate, and in the case of a married couple, the use of a Trust can avoid two probates.)

**Fran.** In my hypothetical meeting with Fran, we discuss many of the same things about the options of Joint Tenancy ownership and Trust ownership. However, the concept of Joint Tenancy ownership may be even more important for Fran to think through. Sometimes, single parents like to add a child's name as a Joint Tenant in order to avoid probate at the parent's death. That approach can cause future problems among Fran's other children, especially if her Will provides that her children are to share equally in her estate. The child who is the surviving Joint Tenant could claim that he or she is entitled to keep the house as the surviving Joint Tenant to the exclusion of the other children. The use of Joint Tenancy ownership could also create unanticipated tax problems, depending on Fran's circumstances. By contrast, a Living Trust-based estate plan could be very beneficial for protecting and taking care of Fran's children upon her death or incapacity.

**The "Bigger Picture".** You should consider the Question and give time and attention to the "bigger picture" of your estate planning needs, much like the time and attention that you devote to your house. By looking at the "bigger picture," you can get answers to important questions like these:

- Who will inherit my house (and other assets), and how can probate (and its cost and inconvenience) be avoided at my death?
- Who will take care of my assets (including my house) if I ever become unable to take care of it during my lifetime, and how can guardianship (and its cost and inconvenience) be avoided in the event of my disability or incapacity?
- How can I make things easier for my spouse, family, and loved ones in the event of my death or incapacity?
- What are estate taxes, and how can I avoid or minimize them?
- What plans do I need to make now for the care of my minor children in the event of my death or disability?
- What will happen to my business if I die or become disabled?
- How should I plan for a child with special needs, and should I consider using a Special Needs Trust?
- Who should be named beneficiaries of my life insurance, annuities, IRA's, pensions, and other retirement benefits in the most practical and tax beneficial way?
- Do I need to consider Long-Term Care planning for me or someone I know, such as Medicaid planning to pay for nursing home care?

A Living Trust-based estate plan provides useful answers to many of these questions, particularly when combined with the following important documents: A "Pour-over" Will; Durable

Power of Attorney for Property; Durable Power of Attorney for Health Care; Advance Directive for Health Care; HIPAA Authorization; and Trust Funding-related documents.

I enjoy helping clients carry out their wishes and goals, both during their lifetimes and after their deaths, with appropriate planning and legal documents. Many people make the crucial mistake of “doing nothing” when it comes to estate planning. I hope you avoid that mistake.

***About the Author.*** Forrest Danley, Attorney practices law in Edmond, Oklahoma with The Danley Law Firm, P.C. He previously practiced law with large firms in Washington, D.C. and Oklahoma City. He and his staff work hard to provide trusted solutions to their clients' legal questions and needs in a caring, capable, and understanding way. They are uniquely able, under one roof, to help with Estate Planning (Wills, Living Trusts, Wealth Preservation Strategies, & more), Trust Administration & Probate, Business Planning (Design, Formation, Maintenance, & Succession), and Elder Law (Special Needs Trusts for disabled heirs & Medicaid Planning for payment of nursing home & long-term care). Please call (405) 478-9455 to learn about Mr. Danley's free Initial Estate Planning Consultation, or see more information at [www.danleylaw.com](http://www.danleylaw.com).

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