



## Andrea L. Jakob, PA

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# Myths and Frequently Asked Questions Estate Planning When You Own Real Estate

## **Myth 1: If both spouses' names are on the deed to their home, the house will automatically avoid probate when the first spouse passes away.**

Many people may assume that if both spouses are listed on the deed, their home will automatically pass to the surviving spouse without involving the court-supervised process known as *probate*. However, that is not always the case.

The key is how the property is owned (*titled*), not simply whose names appear on the deed. Different forms of property ownership come with different legal consequences:

- **Joint tenancy with right of survivorship:** The surviving spouse automatically becomes the owner of the property.
- **Tenancy by the entirety:** Available only for married couples, the surviving spouse automatically becomes the sole owner; however, this form of ownership is not available in every state.
- **Tenancy in common:** This form of ownership does **not** include an automatic right of survivorship; instead, each spouse owns a separate share in the home, which may still need to go through probate.

Probate determines who gets your property after you pass away. It may add time, costs, and administrative complexity to the process of settling your estate and distributing your assets. If you and your spouse have a blended family, probate may come with additional complications if different family members have competing expectations about what should happen to your real property.

Even when spousal ownership avoids probate, it may raise other questions, such as how the property will be treated in the event of divorce, creditor claims, or remarriage.

## **Myth 2: Adding a child to a deed is a simple way to avoid probate.**

Parents may add their child(ren) to the deed to their home because they believe doing so will avoid probate or make life easier for their loved ones if they need to step in to manage the property during periods of illness or incapacity. However, adding your child to the deed is not simply putting a plan for the future in motion; it is a present transfer of ownership, through which your child immediately becomes a legal co-owner of the property.

This approach can create unanticipated and undesirable consequences. One consequence is gift tax issues. Since you will be making a gift of valuable property, it is highly likely that it will at least carry reporting obligations even if it does not result in a tax payment liability. Another consequence is losing a full step-up in tax basis; if you own the property, it is likely eligible for a full basis adjustment on your death, but transferring a portion to your child now impairs that adjustment and



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can increase capital gains tax liability if your child later sells the property. This choice also exposes your home to your child's creditors, lawsuits, or divorce. In addition, you may now require your child's consent to sell, refinance, or mortgage the property. If you have more than one child, adding only one of them to the deed to your home could also backfire by creating unwanted family tension or confusion around what should happen to your property at your death.

### Frequently Asked Questions

#### **Question 1: If the property is currently in my spouse's name, can I legally force my spouse to add my name to the deed?**

Generally speaking, you cannot legally force your spouse to add your name to a deed unless there is an enforceable legal agreement, such as a prenuptial or postnuptial marital agreement, that requires it.

To add your name to a property your spouse already owns, you also cannot "edit" the old deed (for example, by writing in your name on a paper copy). Instead, your spouse must create and sign (and most likely record) a new deed that transfers the property from "Spouse A" to "Spouse A and Spouse B" together.

If your spouse wants to refinance the mortgage, most lenders require both spouses' names to be on the title to protect the bank's interests. If you file for divorce, a judge can order that the title be changed or that the property be sold and the proceeds split.

Before pushing to be added to the deed, note that most mortgages have a *due-on-sale clause* that requires the full loan to be due and paid if ownership changes (though federal law generally prevents banks from triggering this when adding a spouse to a title or transferring property to a spouse).

Even if your name is not on the deed, you may still have a legal interest in the property. In *community property states*, property acquired during the marriage is usually considered to be owned equally by both spouses, regardless of whose name is on the deed. If you used marital funds, such as joint paychecks for the mortgage or home improvements, the property is usually treated as a marital asset in any state.

In addition, some states have rights that are granted to spouses if the property is considered the married couple's *homestead property*. The exact rights granted to a surviving spouse may vary depending on the state where the property is located and whether or not there is a valid prenuptial or postnuptial agreement.

#### **Question 2: How can I remove someone from ownership of my home?**

Removing someone from a property deed can often be more complicated than adding them. Because property ownership is usually treated as a protected legal right, you generally cannot unilaterally remove someone else from a deed without their consent or a court order.

There are three common ways to remove someone from home ownership.

- **Voluntary removal.** If the person is willing to be removed, they can usually "gift" or sell their portion of the ownership. There are various ways to accomplish this, and it



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would likely require that new deeds be properly created, signed, and filed with the appropriate recording office.

- **Mandatory removal.** If the other person refuses to be removed from the title, you cannot simply file a new deed by yourself. You must seek a legal remedy, such as asking a judge to partition the property so that you each have your own discrete interests, or forcing a sale and splitting the sale proceeds between you and the other person.
- **Removal at death.** If you own the home as joint tenants with right of survivorship, removing a deceased owner is usually a simpler process, but it may involve the court.

Keep in mind that removing someone from the deed does **not** usually remove them from the mortgage if they are also a party to it. So, if you and an ex-partner are both on the mortgage and they sign a deed to give you the house in its entirety, they may remain legally responsible for the debt in the eyes of the lender. There are ways to remove them from the mortgage, but it may require refinancing the home in your name only.