



# JOINT PROPERTY OWNERSHIP: PROBLEMS AND PITFALLS

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*Update, March 2018: The author has confirmed the laws referred to in this article remain the same as they were in 2011, when this article was first published.*

Joint ownership of property is a popular estate planning tool. If a property is held jointly with right of survivorship (as opposed to, for example, as tenants in common) when the first joint owner dies, the surviving joint owner in the normal course automatically becomes the owner of all of the property.

As a result, there's no need to change title or administer the asset through the estate of the deceased joint owner. This achieves a smooth and simple succession of the asset. With married couples, titles to homes, bank accounts, and other financial assets are often held this way. Joint ownership is also now being used more frequently between parents and children and others, often with the objective of minimizing probate fees (in Ontario called "Estate Administration Tax").

Yet, because of the many potential pitfalls associated with joint ownership, it's essential to consider all the legal and tax implications, and the relative advantages and disadvantages of a proposed transfer of assets to joint ownership, to determine where this strategy is advisable or not.

## **Immediate tax consequences on transfer into joint ownership**

A transfer to joint ownership with another person, such as a family member where beneficial ownership is changed, will result in an immediate disposition of property for income tax purposes. This triggers any unrealized capital gains and results in immediate tax. Under the Income Tax Act, assets may be rolled-over tax-free only to a spouse, but not to other persons (with a few exceptions, including for farm properties).

## **Exposure to creditor and matrimonial claims**

Joint ownership can expose a property to claims by the joint or new owner's personal or business creditors, or spouse on a matrimonial breakdown. In certain situations, this could force a sale of the property to pay or contribute to the payment of debts or the claims of a joint owner.

## **Loss of control and co-owner disputes**

One of the biggest disadvantages of transfer to joint ownership is the loss of control of the property by the original owner – leading to a host of possible problems. In the case of a bank account, the new joint owner can drain the funds or otherwise misuse them if he or she has sole signing authority; and in the case of real property, decisions regarding the property have to be made jointly.

Should disputes arise, regarding things like maintenance, payment of expenses, receipt of rental income, or sale of the property, ultimately a joint owner may even be able to force a sale of the property by court application to resolve matters. A joint owner could also sever the joint tenancy, turning it into a tenancy in common, and deal with his or her interest, including passing it down in his or her will.

### **Joint owner not only intended owner on death of original owner**

While an obvious planning technique to minimize probate fees or Ontario Estate Administration Tax is to place assets in joint ownership with right of survivorship, this strategy may only achieve its aim if the surviving joint owner is the intended beneficiary of the asset. Otherwise the estate may own the asset and probate fees or Ontario Estate Administration Tax may be payable if it is necessary to probate the will.

Further, if the transfer is made to someone other than a spouse or minor child, a legal presumption arises that the person to whom the transfer has been made holds on trust for the person who made the transfer. The court will assume a gift was not intended, unless the recipient can prove to the contrary. This legal principle has been the cause of many family disputes and much expensive litigation in recent years.

### **Decisions cannot be made for an incapable joint owner**

A joint owner of a property does not automatically have the right to make decisions regarding the property on behalf of another joint owner who becomes incapable.

If the joint owner is not also appointed as the incapable owner's attorney or guardian of property, they could end up having to make decisions regarding the property in conjunction with an entirely different person who is appointed as the incapable owner's attorney or guardian of property. This person may have a legal obligation to liquidate a non-productive asset such as a cottage or family home.

### **Lack of ability to engage in complex tax and succession planning**

Joint ownership with right of survivorship, while often a good planning technique for avoidance of probate fees or Estate Administration Tax, will not allow for more complex tax and succession planning under one's will. It will preclude the use of tax-driven trusts to hold the property on the first spouse's death under the terms of his or her will in order to reduce taxes, or the use of trusts to ensure capital succession to future beneficiaries (including children and grandchildren, particularly where there are children from a prior marriage).

### **Not generally suitable for US properties**

Joint tenancy may not be advisable for U.S. properties owned by Canadians who are not U.S. citizens, because it can give rise to significant U.S. estate and gift tax issues arising from the interaction between the U.S. and Canadian taxation regimes.

As can be seen, deciding on whether an asset should be held in joint ownership involves considering a host of tax and legal factors, not a simplistic focus on the narrow issue of saving probate fees, and requires professional advice, taking into account each person's individual circumstances.

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