

## Focus TAX LAW

# Pitfalls of reducing probate fees with joint ownership



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Although probate of a deceased's will isn't mandatory, it is often required by financial institutions and government agencies as judicial confirmation that the will is valid and that the executor is authorized to act in the estate.

When a will is submitted to the court for probate, estate administration tax (the probate fee) is charged in Ontario at approximately 1.5 per cent of the gross value of the estate.

This has resulted in a focus on probate fee reduction strategies by estate planning lawyers and their clients, including the transfer of assets such as a home, cottage, bank account or investment account to a joint owner so that the asset passes automatically to the surviving joint owner outside the will and is not subject to probate fees.

While this has become a popular strategy, it is in fact the most problematic and can result in a number of negative consequences as follows:

**1** The transfer may not work to save on probate fees. In a transfer from a parent to an adult child, the presumption is that the child holds title on a resulting trust. The child must prove the intention of the deceased joint owner was to make a gift (see *Pecore v. Pecore* 2007 SCC 17 and *Madsen Estate v. Saylor* 2007 SCC 18).

There is a need in such a case to include evidence of a clear intention to transfer the beneficial interest in the asset, best provided by way of a written declaration of such intention. Assets held on a resulting trust are included in calculating probate fees so no savings results. Such a transfer may also result in expensive litigation to determine the parent's intention after death.

**2** Adverse income tax consequences. The transfer of an asset with accrued gains to someone other than the owner's spouse is a deemed disposition at fair market value which will trigger tax on any accrued capital gains on the half gifted by the transfer. The transfer of a home into joint ownership with an adult child by a parent will result in the loss of the full capital gains exemption on the home's future gain in value, turning a 100 per cent tax-free gain into a partially taxable gain on the half that is gifted to



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the child. After the transfer of an income producing asset, the joint owner will have to file tax returns claiming his share of the income earned and pay tax at his marginal rates, which may be higher than the parent's.

**3** Loss of control of the property. The original owner will no longer be the only person with control of the property. The property can't be sold or transferred back to the original owner without the joint owner's consent. The use of the property and funding for the maintenance of the property may also become an issue between the owners, for example, in the case of the transfer of ownership of a cottage.

**4** Skewing of the estate plan. The parents' overall estate plan may not be what actually happens. If the asset transferred into joint tenancy with one beneficiary creates a taxable disposition in the estate, the tax payable on the capital gains will be payable by the estate and borne by the residue, while the asset with accrued gains will go to the joint owner without the tax burden.

**5** A change in the treatment of the property for family law purposes. If the original owner is a spouse and transfers the matrimonial home to his spouse as joint tenants, on a subsequent

separation of the parties, the original owner does not get the benefit of the exclusive growth

after the date of separation in the value of the property because it is now owned by both parties.

**6** Unanticipated claims of the spouse of the new joint owner. If a half-ownership of an asset is transferred to an adult child and the adult child has a spouse who they later separate from, the child's spouse could have a claim on the child's half of the asset, particularly if that asset is a matrimonial home such as a cottage. Even if the gift is of an asset that is excluded from the equalization calculation, such as an investment portfolio, gifted wealth enhances the child's ability to pay support.

**7** Unanticipated claims regarding the new joint owner. If the joint owner has financial problems or declares bankruptcy, their ownership in the asset could be subject to claims by their creditors.

A number of other probate savings strategies are available in the estate planning lawyer's arsenal including alter ego trusts, joint partner trusts, bare trustee arrangements and dual wills that may better achieve probate fee savings without the adverse consequences that can result from transferring assets into joint ownership.

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## Proud mom posts 7-year-old's driving lesson

It's a fine thing to teach your child to drive, but not when they have trouble seeing over the steering wheel. An Altamonte Springs, Fla., woman recently pleaded no contest to charges of contributing to the delinquency of a minor and allowing an unauthorized person to drive a motor vehicle, reports [orlandosentinel.com](http://orlandosentinel.com). The trouble began when the woman picked her 7-year-old son up after school at a bus stop and decided to let him drive the third of a mile home. Worse, she took a video of him driving as she sat in the passenger seat and posted it on social media. To top it off, the boy wasn't wearing a seatbelt. The car travelled at an average speed of 28 m.p.h. and no one was hurt. A local school resource deputy saw the video, recognized the child as being a pupil at the school and alerted the Seminole County Sheriff's Office, who then charged her. Circuit Judge Debra Nelson placed her on 12 months' probation and ordered her to take a parenting class and a driver improvement class. — STAFF