The Hazards of Joint Tenancy

Financial planners and bank employees often recommend joint tenancy for estate planning purposes. The reason they advocate this is to avoid probate fees. This can be a false savings when you consider the risks, however, and it is important to take time to review the many issues surrounding joint tenancy before proceeding.

Property

It is customary for a married couple to register their principal residence as joint tenants. The intention is that upon the death of one spouse, the surviving spouse will become the sole owner of the property. They usually each have a Will that sets out what happens to the asset when the last of the pair dies.

Problems arise when the surviving spouse—or elderly couple—is advised to put a child or children on the title as joint tenants, with the intention that the ownership will naturally flow to the child or children when both parents are gone.

There are some serious consequences to be considered when using joint tenancy as an estate planning tool.

1. **What if the property is not a principal residence?**
   Property Transfer Tax (1% on the first $100,000 and 2% on any amount over $200,000) will be charged when the property is transferred to another person if it has not the principal residence of either the transferor or the transferee for a minimum of six months.

2. **What if the property taxes have been deferred?**
   If taxes on the property have been deferred, they must be paid in full before the transfer can be registered, unless the transfer is to a spouse.

3. **What if the person being added to title has financial difficulties?**
   If a person on title as a joint tenant runs into financial troubles, his or her debts can be attached to the property. That includes unpaid student loans, unpaid debts to Canada Revenue Agency, bankruptcy, and future law suits.

4. **What if a person being added to title becomes divorced or separated?**
   If a person who is added as a joint tenant goes through a divorce, the property could be attached and considered an asset to be shared by the spouse of the new owner.

5. **What if a person being added to title blocks your plans for the property?**

The original owner could lose control over the property if the new joint tenant refuses to sell the property or later decides that the sale proceeds belong to him or her prior to the death of the original owner.

6. **What if a person being added to title has a spouse who exerts pressure or influence over that person?**
   The spouse of the new joint tenant may have his or her own ideas about the property ownership. Often, the daughter or son-in-law pressures the spouse into doing irrational things to "protect *their* inheritance."

7. **What if the person being added to title dies before you do?**
   If the new joint tenant dies first, his or her interest in the property reverts to the original owner(s); it does not necessarily go to the children of the new joint tenant, as might be the natural objective. His or her interest would then fall into the estate of the surviving joint tenant and be dealt with according to that person's Will.

8. **What if the person being added to title wants some of the money upon sale of the property?**
   If the property is sold, the original owner might well need all the sale proceeds to support long-term care needs. The new joint tenant is not obliged to share those funds with the original owner, unless there is an agreement in place to that effect.

9. **What about tax issues?**
   The new joint tenant may not be aware there may be capital gains to be paid by him or her. If the property is not his or her principal residence, the tax would be on the equity accumulated during the time he or she owns the property. At 25 percent, capital gains are much higher than the 1.4 for percent probate fees.

10. **What if one of the owners becomes incapacitated?**
    Each person listed on title should have a valid Power of Attorney that can be registered in a British Columbia Land Title Registry. If you put a child on title and the child suddenly becomes incapacitated without a Power of Attorney, you would have to go to court to obtain a commiteeship if you wanted to sell the property. That could cost thousands of dollars and take many months. The Power of Attorney should always provide for an alternate attorney, in case the first person cannot act. All property owners should have a Power of Attorney.

11. **What if the person being added to title is a minor?**

In rare cases, people have put their minor children or grandchildren on title, hoping to keep the property “in the family.” In BC, a person cannot dispose of property until age 19. That could cause a serious problem if the property needed to be sold unexpectedly.

12. **What if a person who has been added to the title decides to live outside of Canada?**
    Having a non-resident on title creates additional closing costs and Capital Gain taxes when the property is sold.

It is also important to realize that in British Columbia the law assumes that two or more people hold title as tenants in common unless specifically stated. If joint tenancy, with right of survivorship, is intended it must be registered as such on title. Anyone wishing to contest this form of ownership must prove that it was a resulting trust and not a true joint tenancy.

Certainly, before considering putting someone on title as a joint tenant, the owner should seek legal and tax advice and have drawn either a deed of gift or an agreement that outlines the intentions and responsibilities of all parties.

Bank Accounts

You may be considering adding—or may have already added—someone to your bank account, either as a joint tenant or through your Power of Attorney. If you have done that or are planning to do it, there are several ways you can protect yourself.

1. If you are computer-literate, set up online banking so you can check your accounts frequently for irregularities.

2. If you are not computer-literate, ensure that the bank sends monthly statements to your home. Review them to check for irregularities.

3. If you notice an unfamiliar entry, call the bank or the person who has access to your account to find out what the entry is.

    - If you are not satisfied with the answer or you did not approve the charge, take steps immediately to prevent it from happening again.

    - If it is a small issue, perhaps a misunderstanding, remind the attorney that all expenses must be ratified by you to the extent possible.

4. The attorney should give a report to you every month if he or she is actively involved with your account. When setting up the Power of Attorney document, you may wish to have your attorney report to an independent third party in the

event of your incapacity. Your accountant is a good person to review your finances on an annual or semi-annual basis.

5. The attorney should be informed that your assets are to be used for you—and you alone, unless you have given him or her written permission to use your funds for any other person or reason.

Be sure to record the reason for making an account joint. If the intent is to pass that account on to the new joint tenant upon death as an outright gift, the document would be called a Deed of Gift. If the intent is that the account be used for testamentary expenses and then shared with other heirs, the document would be called a Declaration of Trust. Recording the intent gives clarity for those involved after you are gone and prevents hard feelings or accusations.

Occasionally, we see the attorney begin to feel he or he should be rewarded for performing errands. It often starts as a small thing, such as taking an extra $100 each time he or she goes to the bank to pick up petty cash for you. That behaviour often leads to a larger sense of entitlement and can become even more aggressive if the primary owner begins to lose capacity.

If you suspect the attorney is using your funds for his or her own benefit, you can revoke the Power of Attorney as long as you still have the mental capacity to do so. That must be done formally in writing and notice must be given to each financial institution.

It is not a good idea to revoke a Power of Attorney until you have another one in place.

In cases of flagrant financial abuse through Power of Attorney or joint tenancy, contact the Public Guardian and Trustee, the Community Response Network team in your area and in really serious cases, the RCMP.

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