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Joint Tenancy: Pros and Cons

Clients sometimes want to register property in joint tenancy with another person, perhaps a spouse or a child. Usually the purpose is to avoid probate fees. While joint tenancy is one way to avoid probate fees, it also contains traps for the unwary. In this article, we will review some uses of joint tenancy and potential problems.

What is Joint Tenancy?

A person can own property in three ways. It may be helpful to contrast different methods of ownership.

1. Property, such as a house, can be registered in one person's name alone. That person is the "sole owner." After death, the house will form part of his or her estate and be dealt with as directed in his or her Will.
2. The house can be owned "in common" with one or more other persons. Each person is a "tenant in common" with the others. (This has nothing to do with landlord and tenant law.) The share of each such owner passes under his Will upon death, also forming part of the estate.
3. A house can be owned with other persons "in joint tenancy." Each owner is called a "joint tenant" (again, this has nothing to do with landlord and tenant law). A significant feature of joint tenancy is "right of survivorship." When one joint tenant dies, his or her interest does **not** pass under the Will. Instead, it passes "outside the Will" to the surviving joint tenant(s). This means the interest of the deceased does not form part of the estate.

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The fact that jointly held property passes outside the estate, i.e., outside the Will, has significant implications. When planning their estates, people need to understand that it is a mistake to give away joint property in a Will. Jointly held assets should be excluded because right of survivorship entitles the surviving joint owners to receive the property, regardless of who is named in the Will.

Uses of Joint Tenancy

1. **To avoid probate fees**
   Probate fees are assessed on the value of a person's property within BC that passes to the personal representative. Such property must be disclosed in the probate application as passing under the Will, and is usually considered part of the estate (sometimes referred to as the "probateable estate"). Probate fees are approximately 1.4 percent of the value of probateable assets.

   Probate fees are immensely unpopular. If a person can plan his estate so that on his death, certain property passes outside his Will, probate fees can be avoided in respect of that property. One way to accomplish this is to register property in joint tenancy so it passes to the surviving joint tenant(s) by right of survivorship.

   For larger estates, testators may use "alter ego trusts" or life estates, to avoid probate fees. Also in certain cases, testators could consider making two, or even more, Wills. A 1998 case from Ontario (*Granovsky v. Ontario*, [1998] OJ No. 508) permitted a testator to avoid probate fees on the value of certain property by making two Wills: one for property required to go through probate, and a second Will for shares in a private company, which could be transmitted without a grant of probate. The second Will was not submitted for probate so the fees were successfully avoided on the value of the private shares that passed under the second Will.

2. **To avoid the *Wills Variation Act***
   Under the BC *Wills Variation Act* (*WVA)*, a person who is not satisfied with his or her gift under the Will of a deceased spouse or parent can ask the court to give him or her a greater share in the estate. Usually only the

estate that passes under a Will is vulnerable to a *WVA* claim. Registering property in joint tenancy with the desired beneficiaries can therefore avoid a *WVA* claim because the property passes outside the Will.

It should be noted that in some cases, it has been successfully argued that joint property is a part of the estate notwithstanding. There are other means available to avoid *WVA* claims, including the use of trusts, life estates, and *inter vivos* gifting.

3. **To avoid costs and delays associated with obtaining probate** To obtain probate of a Will, it is necessary to collect information, prepare documents, mail notices, meet several times with clients, and make at least two filings with the court. This process, in the author's experience, normally takes between three to six months and costs between $1,500 and $3,500, plus probate fees. To transfer real property to a beneficiary, we are then required to file with the Land Title Office; in some cases, property transfer tax must be paid.

   To transmit property held in joint tenancy requires only one meeting with the client and a simple filing with the Land Title Office. The cost is usually between $200 to $300, and avoids both probate fees and property transfer tax.

Problems with Joint Tenancy

A client should consider the following consequences and potential problems of registering his or her home in joint tenancy with other persons.

1. Loss of control, e.g., the ability to sell or mortgage the property without the agreement of the co-owners.
2. Exposure to creditors of co-owners: for example if you put a child on title with you and the child later falls into financial difficulties, his or her creditors may try to seize the child's interest in the property.
3. Tax considerations: the transfer of a home into joint tenancy with a person who does not live there may mean the loss of "principal residence" status for part of the property, resulting in tax payable if there is a capital gain when the property is sold. Any transfer of property into the names of joint co-owners may trigger tax consequences.
4. If a parent has two or more children, and the house is registered jointly with only one of them, the child taking the property might not deal with it in accordance with the wishes of the deceased parent.
5. If several children are named as joint tenants with a parent, one child might die before the parent. The children of the deceased child (the grandchildren) will have no share in the property because it will pass to the surviving joint owners. This may be contrary to the wishes of the parent. This problem would likely

have been avoided simply by letting the property pass under the Will.

6. If mortgaged property is transferred into joint tenancy, the transfer may void any mortgage insurance.
7. The spouse of a co-owner may make a claim against the property.
8. In unusual circumstances, the court may set aside a transfer into joint tenancy because it is an invalid "testamentary" gift, not signed in accordance with the *Wills Act*. In such a case, the property would fall back into the estate and probate fees may be payable after all. Also, the property could then be subject to a claim under the *Wills Variation Act*.

Some of these difficulties may be prevented or resolved with proper advance planning. Often, no problems arise simply because there is no dispute in the family, or no one challenges the arrangements that were made. In many cases, however, the risks and complications make joint tenancy unadvisable when all factors are carefully considered. ▲

Please note that the information contained here is by necessity general in nature and cannot take the place of an individual consultation with a qualified legal advisor.

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