

# TAX RESULTS OF JOINT OWNERSHIP

Joint ownership can be an effective technique for avoiding probate but it is important to consider potential tax implications now and in the future



## What does joint ownership mean?

There are two principal modes by which groups of two or more people will normally hold property (whether personal property or real estate): Joint ownership (JO) and tenancy-in-common (TIC).

The principal characteristics of the two types of ownership include:

### Nature of ownership interest

**JO** - Owners have an equal undivided right to the entirety of the property.

**TIC** - Owners' rights may be in equal or unequal proportions.

### Alienation of interest

**JO** - Owners may not sell or pass their interest without the consent of the other joint owner(s).

**TIC** - Subject to the owners having entered into an agreement to limit their rights, any owner may sell the interest that that person holds to any person at any time.

### Rights of survivorship

**JO** - The interest of a deceased owner passes on to the surviving owner(s).

**TIC** - The deceased owner's interest in the property falls into the estate to be distributed according to the terms of the Will or by the rules of intestacy.

## How can joint ownership be used in probate tax and estate planning?

It is the right of survivorship under joint ownership that gives rise to the opportunity to reduce probate tax.

Probate tax is levied on the value of the estate that is brought before the court. As an example, the inclusion in the estate of a home worth \$250,000 (free of a mortgage) would result in an additional \$3,250 payable to the court for probate tax. That's a significant cash cost to the estate which can cause particular financial strain if the principal beneficiary is a surviving spouse.

To counteract this probate levy, spouses often hold their home in joint ownership. Upon death, the interest in the home passes to the surviving spouse by virtue of joint ownership survivorship, bypassing the Will and escaping probate taxes.

In addition to escaping probate taxes, passing property under joint ownership protects the property from the clutches of estate creditors.

The probate tax will be delayed until the death of the second spouse, or may be avoided altogether if the spouse disposes of the property prior to death or takes other probate planning steps.

## Other issues to be considered

**The obvious question:** Why not avoid probate entirely by transferring everything into joint ownership? Some considerations:

### Legal and registration cost

For lesser valued properties, the costs of transfer may approach or exceed the eventual probate tax savings, and there will be further such costs after a joint owner's death anyway.

### Tax effect of transfer to joint ownership

Unless the transfer is between spouses, capital gains tax will likely be immediately payable. Land transfer tax must also be factored in.

### Exposure to creditors of joint owner(s)

Creditors of joint owners may attempt to realize on debts owed by encumbering the property, or even forcing the sale of the property to collect their due.

### Family Law Act implications

Assume a parent transfers a property into joint ownership with a son:

- If the property becomes the son's matrimonial home and the son dies before the parent, the joint tenancy is converted into a tenancy-in-common with the son's share passing under his Will or by the rules of intestacy, likely to his spouse.
- Upon marriage breakdown, the value of the property may influence the determination of the son's assets for equalization of net family property.

## Caution ...

### Retention of beneficial ownership

On the face of it, the new joint owner(s) will have equal standing in ownership with the initial transferor owner.

However, a transferor owner may wish to retain beneficial ownership while passing only legal ownership. In such a situation, Canada Revenue Agency may step in and assess capital gains tax.

Ultimately, the financial result of the transaction is uncertain without informed professional advice.

### Principal residence exemption lost

With the possible exception of intra-family transfers, half the future exemption may be lost if the transferee of a principal residence does not live there.

### Liability in estate

Any remaining capital gains tax will be payable by the estate at death. If the surviving joint owners and the residual beneficiaries are not one and the same, the the tax burden will fall on the beneficiaries.

### Lost tax planning opportunities

For income-generating properties, planning opportunities inside the Will using testamentary trusts may far exceed any tax savings gained by avoiding probate.

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[www.empire.ca](http://www.empire.ca) [info@empire.ca](mailto:info@empire.ca)