

Pros & Cons of Owning Property as Joint Tenants with Right of Survivorship

In common-law provinces, couples commonly hold property as Joint Tenants with Right of Survivorship ("JTWROS").¹ In certain circumstances, there are several benefits to this ownership structure, including:

- Each spouse has the ability to manage the property without written consent of the other;
- Upon the first death, the surviving spouse automatically owns 100% of the property that was held JTWROS; and
- Probate tax is payable on the value of the property only once (i.e., at the time of the second to die of the joint tenants).

However, JTWROS ownership for couples may not be appropriate if a spouse, who if they are the first to die, wishes to benefit children from a prior relationship, other family members, friends, charities or other beneficiaries.

In addition, conflicts may arise during the administration of the estate of an individual who had transferred an asset to JTWROS with a non-spouse for no consideration (i.e., a gratuitous transfer). In that case, if the joint tenancy is challenged, a presumption of a "resulting trust" arises. This rebuttable presumption provides that the surviving non-spouse joint owner holds the asset in trust for the benefit of the estate of the original owner on their death. The onus is then on the surviving joint tenant to provide evidence of the deceased's intention to make a "gift" of the right of survivorship as well. This intention is best documented at the time of the transfer into joint tenancy to minimize the risk of estate litigation. Disgruntled beneficiaries, heirs at law or creditors may try to claim that the property held jointly should form part of the deceased's estate to be distributed in accordance with the terms of their Will, or be subject to estate liabilities.

When a parent transfers property to JTWROS with only some of their children, there is potential for conflict among the other children or beneficiaries as to whether an immediate gift was intended at the time of transfer, or whether the surviving joint owners hold the property on resulting trust for the parent's estate.

In addition to potential conflict, a host of other problems may be associated with the transfer to JTWROS.

FOR EXAMPLE

If the property transferred has an accrued taxable capital gain, there could be an immediate tax liability triggered upon transfer. If the family home is transferred to JTWROS, there may be a loss of some of the Principal Residence Exemption in the future. In general, property should only be transferred into joint tenancy with adult children when an immediate gift is intended.

If you are contemplating a JTWROS ownership structure, you should be aware of the following:

- 1 All owners have immediate, full access to the property.
- 2 The property passes to the surviving owners on the death of one joint owner by right of survivorship, bypassing the deceased's estate and possibly conflicting with distribution plans in their Will.

FOR EXAMPLE

The Will may provide for an equal division of the estate among surviving children. If property is held jointly with only one of the adult children, the question is whether it was intended that such child receive this property in addition to an equal share of the estate.

- 3 If there is an out of order death, family members may be disinherited.

FOR EXAMPLE

What if one of the adult children dies before the parent? Usually grandchildren receive a gift of their deceased parent's share under their grandparent's Will. However, with joint tenancy, grandchildren who are the surviving children of a predeceased child of the testator will not receive their deceased parent's share. On the grandparent's death, the property will pass only to the surviving adult children who are joint owners.

- 4 In the event of the simultaneous death of two joint tenants, the law converts the joint tenancy into a tenancy-in-common in certain jurisdictions. When an asset is owned by tenants-in-common, the proportionate share of a deceased joint tenant forms part of their estate to be distributed according to their Will.
- 5 The property may become subject to the claims of creditors of each of the joint owners. In the event of divorce of one of the joint owners, a creditor could include an estranged spouse of one of the joint owners.
- 6 A transfer of property into joint names, unless to a spouse, is a deemed disposition or sale at fair market value for income tax purposes on the portion passed to the other joint owners. The death of a joint owner also triggers a deemed disposition of that person's share and possibly tax payable by their estate.
- 7 All joint owners must declare their portion of the income and capital gains from the jointly held property, if any, annually.
- 8 A portion of the Principal Residence Exemption will be lost if the jointly owned property is a principal residence for only one, or some, of the joint owners and other joint owners have their own residence on which they intend to claim such Exemption.
- 9 Any one of the joint tenants can sever the joint tenancy, converting the ownership to co-tenancy (also known as tenancy-in-common), without consent of the other joint tenants.

If property is held jointly and you want to avoid any of these consequences, it is recommended to seek professional advice. If you are a joint owner or are considering becoming one, talk to your tax and legal advisors about the benefits and risks.

For more information, please speak with your BMO Private Wealth professional.



¹ Joint tenancy with right of survivorship is not recognized in Quebec. In Quebec, ownership of property by more than one person can only be achieved by way of co-tenancy, also known as tenancy-in-common.

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