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– William Ernest Henley

Issue 13 • AUTUMN 2015

# RAISING THE BAR

*Raising the Bar is a newsletter for clients and friends of Beacon Law Centre intended to maintain a valued business relationship with you at any stage—even after our legal services for you are completed. With Raising the Bar, we hope to keep up the best aspects of our service: meaningful information, trusted advice and outstanding service. In turn, you can pass on our name (and maybe even this newsletter) to someone else who might need our services.*

## Joint Ownership With Children A Simple Solution to Avoid Probate?

“Probate” is a court application to confirm the validity of a Will. It is an increasingly complex process, and requires payment of a probate tax. For many couples, probate can be avoided on the first spouse’s death by using joint ownership. Not surprisingly, after the first spouse dies, the family may assume that joint ownership with the children is appropriate to avoid probate. This may or may not be the case.

Joint ownership is complex because our laws recognize two types of ownership (legal and beneficial), two types of joint ownership (joint tenancy and tenancy in common), and three types of joint tenancy!

The two types of property ownership are legal (registered) ownership and beneficial (underlying) ownership. Usually you have both, but when legal ownership and beneficial ownership are different, you have a trust. The legal owner is considered a trustee, and holds the asset on behalf of the beneficial owner, the beneficiary.

The two types of joint ownership are joint tenancy and tenancy in common (don’t let the word “tenancy” mislead you – in this context it has nothing to do with renting). With a joint tenancy, all co-owners have one and the same interest. Upon death a joint tenant’s interest terminates, and passes to the remaining owners by right of survivorship. Tenants in common, on the other hand, have separate and not necessarily equal interests. Upon death, the interest passes to the deceased owner’s estate.

And to make matters more complicated, there are three types of joint tenancy. If you use the wrong type to try to avoid probate, the result can be disastrous. Consider the



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three types below in the context of a mother transferring her investment portfolio into joint names with her daughter.

### **Type 1 – ‘True’ Joint Tenancy**

A true joint tenancy is one where mother transfers both legal and beneficial ownership of the asset. Mother and daughter now have the same rights to the asset. Even if the transfer is a gift, Canada Revenue Agency considers it a taxable disposition of one half of the portfolio, and mother may have to pay capital gains tax. If the asset is real estate, property transfer tax may also be payable. Further, if the asset is mother’s principal residence, the daughter’s half of any further increase in value will not be exempt from capital gains tax. As a beneficial owner, daughter’s interest in the asset is exposed to her creditors, including perhaps an ex-spouse. If mother dies before daughter, legal and beneficial ownership will pass to daughter by right of survivorship and probate is avoided.

### **Type 2 – “Resulting Trust” Joint Tenancy**

If mother transfers the portfolio into joint names with daughter, but retains beneficial ownership for herself, this is known as a



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“resulting trust” joint tenancy. Because mother did not give away her beneficial ownership, the capital gains tax issues of a true joint tenancy are avoided, and the asset should not be exposed to daughter’s creditors. Because of that, this is the type of joint tenancy most often used to avoid probate fees. Ironically it is also the type that may not be effective. That is because, if mother dies first, only mother’s legal interest passes by right of survivorship to daughter. The beneficial interest remains with mother’s estate, to be distributed according to mother’s will. If probate of mother’s estate is still required because mother was the sole owner of another asset, such as a car or bank account, the value of the portfolio will be subject to probate fees as it is part of mother’s estate. So while a resulting trust joint tenancy avoids some of the problems of a true joint tenancy, it only works to avoid probate if no other asset triggers probate.

**Type 3 – Gift of Right of Survivorship**

While the right of survivorship has always been considered a feature of a joint tenancy, it is now also considered a separate property right that can be gifted, thanks to a 2007 decision of the Supreme Court of

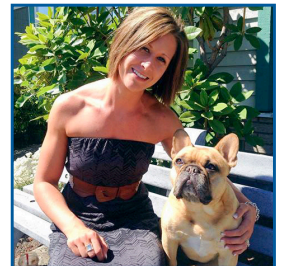
Canada. Under this type of joint tenancy, mother can gift the right of survivorship of her portfolio to daughter, but retain full beneficial ownership. If mother dies first, both legal and beneficial ownership pass to daughter by right of survivorship, bypassing mother’s estate so that probate is not required. While this type of joint tenancy can be thought of as a hybrid of a true joint tenancy and resulting trust joint tenancy, perhaps offering the best of both, the tax implications are not yet certain.

**Bottom Line**

While many consider creating a joint tenancy to be simple, it is anything but. This article highlights just some of the consequences that can arise from creating a joint tenancy. Joint tenancy litigation is on the rise, as the child(ren) added as joint tenant(s) may claim that the parents intended a gift, while the beneficiaries of the estate will claim that the parents intended a trust. To ensure that your wishes are carried out, and prevent unintended consequences, it is critical to get legal advice about your specific situation, and to use a written legal document to confirm which type of joint tenancy is intended.

**Staff Profile**

Meet Whitney Corbett (nee Salvador), our Real Estate Client Care Manager. If you have called our office with a question regarding a new real estate transaction, you probably spoke with Whitney. Whitney has been very busy in the past year. Not only did she earn her BBA in Human Resources Management and Leadership (top GPA in the program!), while working fulltime at Beacon Law, but after much nagging from Hemi, her French bulldog, she tied the knot with her partner Chad in a beautiful oceanfront ceremony. Congratulations Whitney! We are lucky to have you, and so are our clients.



**Making a Difference**

We owe so much of our success to our wonderful community and we are honoured to show our gratitude through donations, sponsorships and personal volunteerism. Recent recipients include Saanich Peninsula Hospital Foundation, Pacific Christian School, Camp Imadene, and a cause that Sharron Tyler of our Corporate Department is very involved in, Balfour’s Friends Foundation. We are also very proud that Lianne Macdonald has actively served in her local Rotary Club for 25 years!

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