

**Benjamin Franklin once said, "In this world nothing is certain but death and taxes." The thought of having to pay tax because you died makes many people's blood boil. Consequently, many British Columbians go to great lengths to avoid probate tax. While some strategies can be very effective other strategies are fraught with pitfalls. This article will examine one of the more commonly used strategy's that is fraught with danger: adding an adult child on title to your property to avoid probate tax.**

## Know the pitfalls of trying to avoid Probate



In my law practice I routinely prepare Wills and Estate documents, and it seems to me that the question most often asked by my clients during the 1990's was: "How do we avoid Probate Fees?" I thought this question had faded away, but recently, perhaps because of the increase in the value of residential real estate, it has surfaced again. The clients usually propose to avoid the Probate Fee (really a tax) and other Probate expenses by placing title to their residence in joint names with one or more of their children. This suggestion usually comes from neighbours, talk shows and other similarly reliable sources.

The word "joint" refers to joint tenancy, an arrangement where all of the owners have an equal interest in the asset, and on the death of any of them, the survivors own the whole. That is the rationale for this optimistic but short-sighted Probate avoidance scheme: ownership of the asset (usually the family home) passes automatically to the survivors and is not part of the estate of the deceased. In this process, the residence is not governed by the Will of the deceased, and accordingly is not involved in the Probate process, thus avoiding the Probate Fees on the value of the residence.

Does this sound too good to be true? In most cases it is -- life is generally more complicated than that. Over and above the basic presumption that the parent will die before the children, there are a number of reasons why this simple "solution" usually does not work. A few examples will illustrate some of the potential problems:

1) **Loss of Control:** Once the title is registered in the names of the children, the children have to be parties to any transaction involving the residence, for example a sale, or even a refinancing. This means that the children effectively have a veto over any decision. Also, if you are depending on the sale proceeds of the residence to pay for your future care, you are relying on your children not only to agree to your decision to sell (and at what price) but also to your level of future care. To pay for that care, you will be counting on your children to gift their share of the sale proceeds back to you.

2) **Family Politics:** If you have more than one child, do they get along? Sad to say, sibling rivalry is a real fact. Adult children really do fight over Mom and Dad and their assets. Will they co-operate when the time comes to sell the home? If there is a second marriage? Let's not even go there!

3) **Your Estate Plan:** A properly drawn Will provides a complete plan for the distribution of your assets in any number of foreseeable events. For example, a properly drawn Will would contemplate not just the most likely event (that the parent will die before the children), but also that the parent might survive the children. What is to happen if your child dies first, leaving children of her or his own - your grandchildren? A joint title arrangement effectively disinherits these grandchildren. Is that what you would want?

4) **Income Tax:** Have you thought through the income tax situation? Under the Canadian Income Tax Act, your home is your castle. If it is your principal residence, it is exempt from capital gains-based income taxes (i.e. "profit" made on the sale of your home). Presumably the children do not live in the residence. Accordingly, transferring an interest to them converts an asset for which the gains are exempt in your hands, to an asset for which future gains are partly taxable in their hands. It does not take much of a gain to more than cover off the Probate Fee and other Probate expenses.

5) **Creditors:** Have you considered that your children may have creditor problems? How stable is your child's marriage? Do you want your child's former spouse to benefit from your residence? If you transfer an interest in the residence to your children, it becomes security for your children's creditors.

I have not raised an often unspoken hazard in attempting to plan around tax statutes. The tax authority can change its rules at any time. The Probate Fee is presently 1.4% (in round numbers) of the value of the assets. If the Province of B.C. gets serious about Probate Fees, it can change the rate or the system of taxation. One need only think back to the bad old days of succession duties and gift taxes. None of these Probate avoidance schemes would have avoided those taxes.

The foregoing outlines just a few of the applicable issues. It does however illustrate some of the problems that arise with the notion of circumventing Probate Fees by putting your residence into joint ownership. There are techniques for dealing with the problems, but these techniques themselves add complication and expense. In short, the best solution for most individuals is simply to leave things as they are and to have a properly drawn Will. Perhaps Benjamin Franklin's old saying should be expanded to include complications and legal fees.

In reality, planning for your estate may be the most important legal step you ever take. Such a critical decision should not be taken lightly, and requires proper professional advice. This often includes input from your accountants and financial advisors. It should always include legal advice. At Johns Southward Glazier Walton & Margetts we are committed to assisting you in obtaining the estate plan that is right for you.

Per:

Johns Southward Glazier Walton & Margetts

Victoria Office (250) 381-7321 Toll Free: 888-442-4042

Duncan Office (250) 746-8779 Toll Free: 877-746-8779