

Joint ownership – estate and tax considerations

You may own assets jointly with others for various reasons. This includes your home with a spouse, investment accounts with family members, or bank accounts for convenience. Joint ownership can simplify estate planning and provide administrative ease. But it creates complexities and the tax rules and estate planning rules don't always align. This can lead to unexpected results if you don't plan properly. We review below the key considerations when owning assets jointly. We also provide guidance on documenting your intentions to avoid future disputes.

Understanding joint ownership types

Canadian law recognizes two main forms of joint ownership outside Quebec:

- **Joint tenants** – Each owner has an equal, undivided interest in the entire asset. You cannot divide ownership into different percentages. Each joint tenant has a "right of survivorship". This means when one owner dies, their interest automatically passes to the surviving owner(s). The asset generally doesn't form part of the deceased's estate.
- **Tenants in common** – Each owner has a specific percentage interest in the asset. These percentages can be equal or unequal (such as 70/30) and there is no right of survivorship. When an owner dies, their share passes to their estate. The deceased's will or provincial intestacy rules govern who receives their interest. The surviving owner doesn't automatically receive the deceased's share.

Quebec law doesn't recognize joint tenancy with right of survivorship. However, Quebec residents can own property outside Quebec as joint tenants. Understanding these concepts remains important if you live in Quebec. Further, the tax implications and attribution rules discussed below apply in all provinces and territories. Whether you own an asset as joint tenants or tenants in common depends on the type of asset. For real estate, you'd need to look at the deed. For investments or bank accounts, you look at the account opening documents.

Legal versus beneficial interest

Joint tenancy becomes more complex when you consider two types of interests:

- **Legal interest** – The person(s) whose name appears on title. They control the asset and can sign documents. They can give instructions about selling, mortgaging, or managing the asset.
- **Beneficial interest** – The person(s) who benefit from the property. They have use and enjoyment of the asset. They're entitled to its value.

Often, legal and beneficial ownership sit with the same persons. This is commonly known as a "true joint tenancy." Even though you can't divide joint tenancy into different percentages, you can separate legal and beneficial interests. This commonly occurs in trust situations where the trustee has legal title, and the beneficiaries have the beneficial interest. However, it can also arise with joint assets by your actions and intentions when setting up the joint asset. The key is to ensure you have sufficient documentation to show the intention to avoid disputes. This may include disputes with the other joint owners or with the Canada Revenue Agency (CRA). Tax rules generally follow beneficial interests, not legal title. Changing beneficial ownership generally triggers tax consequences. Changing legal ownership typically won't trigger tax.

Tax implications of joint ownership

The CRA requires you to report income and capital gains based on beneficial ownership. When you hold an asset jointly, the general rule is you report based on the proportion of contributions each beneficial owner made to the asset. Simply having your name on an account doesn't determine how you report taxes. You must look at who the beneficial owners are and determine what each contributed to the asset.

Example: Two spouses jointly own a rental property. They purchased it using a downpayment from their joint account where they've contributed equally. Both names appear on the mortgage. Payments come from the same joint account. In this case, each spouse likely reports 50% of the rental income and capital gains.

Changed facts: Same rental property, but the downpayment came from one spouse's account. All mortgage payments come from that same account. Even though both names are on title and the mortgage, tax rules require the contributing spouse to report all income and capital gains. This is due to attribution rules between spouses.

Attribution rules

The Income Tax Act (ITA) contains anti-avoidance provisions called attribution rules. These rules prevent certain income splitting by requiring income and gains to be reported by the original contributor. You trigger attribution rules when you give an asset to certain individuals attempting to tax income or capital gains in their hands. Similar rules apply whether you transfer the asset to them directly or indirectly – for example through a trust. Common attribution rules include:

- **Between spouses or common-law partners**– Both first-generation income and capital gains attribute back to the contributing spouse. This applies regardless of whose name appears on legal title or whose name is on the T-slip.
- **Between parent/grandparent and minor child/grandchild** – Income (but not capital gains) attributes back to the parent/grandparent. This prevents you from shifting income-earning assets to minors in lower tax brackets.

- **Between parent and adult child** – No general attribution rule applies. You are free to gift an asset or money to an adult child and they report future income and capital gains. However, the ITA does contain an attribution rule which could apply if the purpose of the transaction was to avoid tax.

Attribution generally ends when the original contributor dies. Also, attribution between spouses generally ends when the spousal relationship ends (separation or divorce). Finally, attribution generally doesn't apply to second-generation income – for example, income on income. This assumes you can properly track the second-generation income separately.

Making assets joint for estate planning purposes

Many people transfer solely-owned assets into joint names for estate planning. Common reasons include:

- Avoiding probate fees and delays
- Simplifying estate administration
- Ensuring assets pass to intended recipients
- Providing someone with authority to manage finances

These transfers are "gratuitous" – the new joint owner provides no payment. This creates uncertainty. Did you intend to gift the asset? Or did you add the person only for administrative convenience? Canadian courts developed presumptions to address this uncertainty:

- **Presumption of advancement** – You intended to gift both legal and beneficial ownership. The recipient receives the asset as an advance on their inheritance. This applies when parents transfer assets to minor children.
- **Presumption of resulting trust** – You didn't intend to gift beneficial ownership. The joint owner holds the asset in trust for your estate. They act as a trustee of the legal interest without beneficial interest. This applies when parents transfer assets to adult children. For example, if you add someone for administrative purposes only.

Both presumptions are rebuttable, meaning evidence showing contrary intention can overcome them. Keep in mind, it is the intention at the time you make the asset joint that is relevant. However, evidence is often missing or difficult to confirm when one owner has passed away. This leads to disputes among beneficiaries and potential litigation.

Tax consequences of gratuitous transfers

Keep in mind, when you transfer a solely-owned asset into joint names, tax consequences may arise:

At the time of transfer:

- Between spouses – Usually occurs on a tax-deferred rollover basis
- To adult children – May trigger a capital gain on the portion transferred

Ongoing tax reporting:

- Depends on whether you transferred both legal and beneficial ownership
- Attribution rules may apply between spouses or with minor children/grandchildren

Example: A parent owns an investment account worth \$100,000 (adjusted cost base: \$60,000). They add their adult child as joint owner. If the parent transfers both legal and beneficial ownership, the parent realizes a capital gain of \$20,000 ($50\% \times [\$100,000 - \$60,000]$). Going forward, the parent and adult child each report 50% of income and gains.

Alternative scenario: The parent only transfers legal ownership but retains all beneficial ownership. No immediate capital gain occurs. The parent continues reporting all income and gains. The child acts as trustee holding the asset for the parent. Keep in mind you need strong documentation to avoid future disputes with this scenario. Also, in this scenario, the asset may not avoid probate unless they can rebut the presumption of resulting trust. Legal advice is needed. See below under "Gift of beneficial right of survivorship."

What about the tax treatment on the death of an accountholder? The deemed disposition tax treatment depends on how you transferred and reported the transfer into joint names and who has beneficial ownership of the account for tax purposes.

Common pitfalls to avoid:

- **Adding one child among many** – You may add one child to your accounts for convenience. Perhaps they live nearby or manage finances well. However, if you intend for all children to share equally, problems can arise. Upon your death, that child may receive the full account by right of survivorship. Your other children receive nothing from that account. This creates disputes and potential litigation.
- **Fluctuating asset values** – You may make different assets joint with different children. You intend each child to receive "their" asset. However, asset values fluctuate. One child's asset may grow significantly while another's declines. This creates inequality and potential claims the joint ownership wasn't a true gift.
- **Administrative purposes only** – You may add someone to accounts for administrative help. You don't intend to gift the assets. Without proper documentation, a presumption of resulting trust likely applies with adult children. However, the joint owner may claim you intended a gift. This leads to disputes with other beneficiaries.

- **Ignoring tax consequences** – Making accounts joint may not achieve desired tax outcomes. As discussed above, tax rules follow beneficial ownership and contributions. Simply having names on accounts doesn't determine tax reporting. You need proper structuring and documentation.

Non-tax consequences of gratuitous transfers

In addition to the above, keep in mind non-tax consequences of gratuitous transfers and making assets joint. These include:

- **Loss of control** – You potentially give up sole control of that asset and any associated income to someone else. The results depend on whether you transfer legal, beneficial, or both interests.
- **Creditor protection** – The asset may now be subject to the recipient's creditors or marital claims

If you want to gift an asset, you need to be comfortable with the associated consequences. If you wish to keep control or avoid the above concerns, outright gifting isn't the best solution for you.

Documenting your intentions

You can reduce disputes by clearly documenting your intentions when making assets joint:

- **Include provisions in your will** – You can include provisions in your will confirming your intention for any joint asset. This may confirm a gift with right of survivorship passing to the joint owner. Or it may confirm the asset is not meant to pass by right of survivorship. *Note: Including this in your will doesn't make the asset subject to probate if you truly intended right of survivorship. It simply clarifies your intention.*
- **Work with legal advisors** – Consider a formal deed of gift or trust agreement. This documents the legal and beneficial ownership split. It clarifies tax implications and estate intentions.
- **Maintain detailed records** – Keep notes of conversations about why you made accounts joint. Document your intentions at the time of transfer.
- **Communicate with beneficiaries** – Discuss your estate plan with intended heirs (if comfortable). This reduces surprises and potential disputes.

Gift of beneficial right of survivorship

Some legal practitioners suggest a middle ground. You can potentially gift only the beneficial right of survivorship without gifting current beneficial ownership. This means:

- You retain all beneficial ownership while alive
- All tax consequences remain with you
- Upon death, beneficial ownership passes to the joint tenant
- The asset avoids probate

This structure requires proper legal documentation from a lawyer. In addition, most financial institutions don't administer this arrangement or recognize it formally as a type of joint account. Finally, the CRA may scrutinize the arrangement without proper documentation. Given the complexity and limited availability, discuss this option carefully with legal and tax advisors.

Balancing estate and tax planning

Estate planning goals and tax planning goals don't always align with joint ownership:

Estate planning seeks to:

- avoid probate fees and delays
- maintain control during your lifetime
- ensure intended distribution to beneficiaries
- provide administrative assistance

Tax planning seeks to:

- minimize current and future tax liabilities
- properly report income and gains
- avoid attribution rule violations
- defer capital gains when appropriate

You may need to balance these competing objectives. What works for estate planning may create tax complications. What works for tax planning may not achieve estate goals. For example, you want to avoid probate on your principal residence. You add your adult child as joint owner. From an estate perspective, this may achieve your goal if properly documented. However, from a tax perspective, you may trigger an immediate capital gain on 50% of the property. You also potentially lose future tax-planning opportunities – e.g., the principal residence exemption on a portion your principal home.

The bottom line

Joint asset ownership provides benefits for estate planning and administrative convenience. However, it creates significant complexity. You must consider both estate, tax and other non-tax implications. These don't always align and may compete.

Proper planning avoids unintended consequences, family disputes, and unexpected tax bills. Your advisor can coordinate with your legal and tax professionals to structure and document joint ownership properly.