



Can I Just Make My Child a Joint Owner of My Rental Properties (Or Cottage) And Avoid Capital Gains Tax That Way?

Description

This is one of the most frequent misapprehensions we come across and unfortunately, it is one that is regularly encouraged by well-meaning but misinformed (or occasionally less than scrupulous) accountants, advisors and lawyers. We'll get into the details below but to summarize:

You cannot get out of paying the capital gains tax on a property, during your lifetime or at death, by making a child a joint owner.

What is Joint Tenancy Anyway?

When it comes to real (and some other types of) property, Canadian common law (which applies to all provinces except Quebec) recognizes two types of joint ownership: Joint Tenancy and Tenants in Common.

When you have [tenants in common](#), each party owns a specific percentage of a property. I.e., Person A may own 75% of the property and Person B may own 25% of the property. Each owner may sell their portion of the property at any time, and should one of them die, their portion of the property goes to their estate and heirs. The other person retains ownership and control of their portion of the property.

When you have [joint tenancy](#), the owners of the property share equal and undivided rights to the property. I.e., Person A & Person B each have a 100% interest in the property, and neither one may sell the property without the consent of the other.

Legal vs Beneficial Ownership Trap

The first thing to be aware of if you are adding a child as a joint tenant to a property is that common law distinguishes between legal ownership and beneficial ownership.

In 2007, in *Pecore v. Pecore*, [2007] 1 S.C.R. 795, 2007 SCC 171 the Supreme Court ruled that should

an adult child be made a joint tenant, it is presumed they are holding the property in a resulting trust (legal ownership) for the elderly parent in the absence of clear directions from the parent to the contrary. To see the effect this has, see the section below.

If it is the parent's intention to gift the child actual joint ownership of the property while they are alive, this is referred to as beneficial ownership. They can do this by having a simple contract drawn up at the time the joint ownership arrangement is established. In the absence of this, the courts are left to infer the parent's intentions based on the circumstances should there be a dispute between the heirs, between the estate and CRA, or between any of the heirs and CRA. As noted above, the presumption in the absence of satisfactory evidence is one of legal, not beneficial, ownership.

Effects of Legal Ownership – What does it Mean?

The effects of a child's legal ownership in a joint tenancy situation are as follows:

- The child has no rights to the property during the parent's lifetime, and the property cannot be subject to claims from any of the child's creditors.²
- At the death of the parent, the property will become part of the estate and be distributed as indicated in their will.³
- The parent continues to report all income and capital gains on the property, and upon their death, the property is included in the T1 Final tax return. This means there is a deemed disposition of the property, triggering a capital gains tax payable by the estate. ⁴

Effects of Beneficial Ownership – What does it Mean?

The effects of a child's beneficial ownership in a joint tenancy situation are as follows:

- The entire property is now subject to claims from the child's creditors.⁵
- Property transfer tax is payable at the time of the transfer.⁶⁷
- At the time of the transfer, there is a presumed disposition of 50% of the property (presuming it is to 1 child), and the parent must pay capital gains on this amount in the year of the transfer.⁸⁹ At this time there will also be a recapture of the same percentage of the capital cost allowance previously claimed for this calculation.
- One half of all future capital gains tax accrues to the child. ¹⁰¹¹

And at the time of the parent's death:

- The property automatically transfers over to the child¹²
- It bypasses the estate and no probate is payable¹³
- **It is still considered a deemed disposition to the parent's estate and capital gains tax must be paid on the remaining 50%** (or whatever portion was not transferred and paid at time of entering into the joint tenancy) interest they had in the property.¹⁴¹⁵ At this time there will also be a recapture of the same percentage of the capital cost allowance previously claimed for this calculation.

Additional articles that may be of interest:

- [Why adding your kids to the house title will cost you](#)
- [Claiming income on a co-owned rental property](#)
- [Joint tenancy tax issues](#)

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