MILNE SELKIRK LAWYERS

PRESENTS **You & The Law**

Joint tenancy can help – or bite you

Ever heard of joint tenancy?

It's a type of co-ownership which has a unique feature: When one co-owner (or joint tenant) dies, his or her interest in the property passes automatically to the surviving co-owner. This is referred to the "right of survivorship", and is not found in the other form of co-ownership (called tenancy in common). The interest of a deceased tenant in common passes to his or her estate, not to the remaining co-owner.

Joint tenancy can be a very useful estate planning tool. A family home jointly owned by spouses passes to the surviving spouse automatically when the first of them dies, thereby avoiding provincial probate fees of 1.4 per cent on the value of the property, and also keeps that asset out of reach of the deceased spouse's creditors. The property is also insulated from judicial reapportionment under the *Wills Variation Act*.

With proper legal advice and documentation, a parent can simplify the administration of their estate by adding a grown child onto title as a joint tenant. Without proper documentation, undesirable results usually follow.

This is illustrated by a recent case in which a father transferred property into joint names with his son and then changed his mind after a falling out. He died before the issue could be addressed, so it fell to his executor to resolve.

The executor argued that the father hadn't intended to give the property to his son. Rather, he intended that his son would hold it for the benefit of the father's estate.

The B.C. Court of Appeal decided in favour of the son. It found that when the son and his father first met with a lawyer in early February, 2000, the father expressed a desire to transfer all of the property to his son outright. But after an explanation of how joint tenancy works, the father decided instead to transfer the property to both himself and his son as joint tenants.

A few days after the transfer was registered, the father, who might have been drinking, had a serious falling-out with his son. So he contacted the lawyer after a few weeks and told him he wanted to change the property title back into his own name alone. He was advised this would require that both he and his son execute a transfer. The father was given the transfer document, but never got it signed during the ensuing eight years before his death in 2008.

The court determined that the critical factor was the intention of the father at the time the property was put into joint tenancy. This was subject to some interpretation, given the long delay and the father's intervening death. Notwithstanding these challenges, the court found that the father intended to make an absolute gift to his son, and clearly understood how joint tenancy works. The son therefore received his interest free of any trust in favour of the father, and this gift couldn't be reversed later by the father acting alone.

This case amply illustrates the pitfalls of estate planning without proper legal advice. Consult your lawyer before putting any of your property into joint names with someone else.

Written by Janice and George Mucalov, LL.B.s with contribution by Milne Selkirk. The column provides information only and must not be relied on for legal advice. Please contact JAMES MACLEAN of Milne Selkirk for legal advice concerning your particular case.