"TRUSTWORTHY"

A Free Estate Planner's Email Newsletter by Lawrence J. Robertson, P.C.
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AVOID PROBATE AND SAVE TAXES WITH LIVING TRUSTS

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A Note on This Topic – Joint Ownership with Children

Over these 34 years of practice I have had many clients come to me asking that I "UNDO" a situation brought about by unwise use of joint ownership of assets with a child or children. Although they received their "advice" from well-meaning friends or advisors, the fact that they placed their assets in this form of ownership brought them and their family to disastrous consequences. The loss of control of the asset and the exposure to the joint tenant's liabilities are not thought of when the client merely wants to "avoid probate." I thought the information would be helpful to you and your clients.

Larry Robertson

Joint ownership with your child(ren) is risky.

Aging parents often want to name a child as a joint owner of a house or other property to avoid estate problems. It's not a good idea, estate planning lawyers say.

Probate, according to Webster's, is the "act or process of proving before a duly authorized person that a document submitted for official certification and registration, especially a will, is genuine." Probate, instituted in the 1500's in England, makes sure that creditors get paid and that the proper persons (heirs, beneficiaries, legatees…etc.) actually receive that which is rightfully theirs by law or by last will and testament.

Probate makes a lot of people cringe, and they'll do just about anything to avoid it. The probate process can be time-consuming (10-12 months average) and costly. Attorney's fees and personal representative's fees in probate are

expensive. It also puts everything that transpires in court on public record for every citizen of their town to see.

One of the most popular ways parents try to avoid probate is by **naming a child as joint owner** of a property -- a bank account, CD or house, for example.

Knowledgeable lawyers and financial advisors **say this is a mistake**.

Opens a can of worms-

Laws vary by state but, generally, you'll bypass probate with a joint ownership agreement. In combination with a joint bank account, it would make life easier for a child who's taking care of an elderly parent. But a joint ownership agreement opens up the proverbial can of worms, too.

The scenario that is usually the greatest problem is when a sole surviving parent puts **one** of several children on the deed to their house or a financial account.

The problem is that they just made a **gift** of that property to the ***one child to the exclusion of the others***. Usually, it's done with the understanding that the daughter, or whoever, will split it with her siblings. That doesn't always happen. One child can totally withhold the property from the others unless the recipient child voluntarily makes gifts to the others.

If the child does **divide** the property with the other siblings, that **creates a problem, too**!

As an example: A parent has $100,000 in CDs in a joint account with Sally, a daughter who lives nearby. There are two other children. The parent tells Sally, "after I die, divide the cash equally with your siblings." Sally is a good daughter and transfers $33,000 to each of her siblings. But now she has made a gift that's potentially subject to **gift taxes**.

A potential solution would have been to put the CD's (and all other property) in a Revocable Living Trust with Sally as the trustee. She'd have a **clearly defined duty** to make payments, and there would be no tax consequence to her.

Add up the tax consequences-

Take a look at what happens to a child tax-wise when you make him co-owner of your house. You're giving half the property to the child – that's a gift. The gift is valued at half of whatever you paid for the house!

The child doesn’t get a stepped-up basis on that half of the house when you die. A stepped-up basis would bring the value of the gift up to its present-day value and would result in a far lower capital gain tax if the child eventually made a profit selling the house. Instead, when you die, the other half of the house passes to the child as an inheritance and the child receives a stepped-up basis on that half only.

Property held in joint ownership usually passes automatically upon the death of one owner to the other owner. The person, presumably the child, becomes the sole owner and can do what he wants with the property.

The joint ownership supersedes a Will, (that is, joint assets are not probate assets and not affected by the Will) so even if the parent stipulates in a Will that a particular property should be divided evenly among all the children, the surviving owner doesn’t have to carry out those wishes – because the assets are not probated.

Other nightmarish scenarios-

Even if there are no other siblings, a joint ownership with a child can become a nightmare because of circumstances outside your control.

You may find your jointly held property at risk if the child is involved in a contentious divorce (it’s marital property in Missouri)! The court orders YOUR house sold in a divorce to which you are not a party??

If the child has credit problems, the creditor may go after the child’s half of the property.

Assume three children and mother become joint owners. If one of the joint owners (presumably children of the deceased) would predecease Mom or Dad and leave children; those grandchildren would receive NONE of the asset because **only the surviving owners** – the other siblings - would take. The grandchildren are cut out!

The lesson to be learned is that somebody is in court over this and paying attorneys. That’s not something the mother wanted. The question is, what are you achieving by putting accounts in joint names?

By the way, even if your child (your joint-owner) has perfect credit and handles money in the most responsible fashion, his

or her assets could be targeted someday because of an auto accident or some other catastrophic incident.

Sometimes the goal is to protect assets in the event the parent needs to go into a nursing home. Most states require individuals to pretty much deplete their assets before Medicaid will pay nursing home costs.

In all cases, the state will ask you if you've made any transfers of property in the last FIVE years. That property will be counted as an asset for you. They'll say, "We'll make you ineligible for as long a period of time where you could have paid for nursing home care with the property you gave away."

That's not to say you absolutely can't qualify for Medicaid if you've put property into joint ownership within five years. There are exceptions and a good Medicaid estate attorney can help you protect assets legally.

Seek out the alternatives-

There are alternatives to joint ownership.

If you have a bank account you want to pass to a child and avoid probate, consider a pay-on-death designation or, in the case of stocks, a transfer-on-death account.

A more common and sensible option is a **Revocable Living Trust**. Assets pass seamlessly to your child, or equal shares to *all of them*. While you're alive, the assets are yours and are not subject to the claims of your child's creditors or spouse.

A house can be left to a child in a trust -- with ***no probate***, and the benefit of a stepped-up basis. The child would also get a stepped-up basis if the house is in a will, but wills are subject to probate.

As always, I stand ready to assist your clients in explaining all of the alternatives at a ***FREE consultation***.

And, as always, **I very much appreciate your continued kind referrals**.

Sincerely,

Larry Robertson