

# Avoiding The Pitfalls of Joint Ownership As An Estate Planning Tool and Effective Alternatives

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## Fact Pattern:

- Husband (H) & Wife (W) own a business (Corporation).
- They have three children, A, B, & C, listed by age.
- Being conservative good clients, H & W establish a well designed estate plan, including A/B trusts to address federal estate tax (FET) liability. At the time these trusts are created the FET exemption (FETE) is 600,000 (1997).
- H & W age.
- H & W sell their business, all real estate holdings, and their residence and move into a retirement community.

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## Fact Pattern (cont.):

- At this point in their lives, their assets are greatly simplified. They have:
  - Each of their trusts owns a checking and savings account.
  - Each of them has a traditional IRA.
  - Each of their trusts owns a brokerage account.
  - Personal property including furniture etc. is divided equally into each of their trusts by bill of sale.
  - 1 vehicle owned jointly.
  - Their net worth is approximately \$1,000,000.00, which is divided equally between them for the most part using the A/B planning at the time.

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Fact Pattern (cont.):

- They enjoy their time in the retirement community (luxurious and quite costly) and use their assets to pay their expenses every month.
- H dies.
- At the time of H's death, the FETE is 5,000,000 (2011).
- H's trust is administered. W is the trustee.
- W meets with a financial advisor (FA) who reviews her assets (including those held in H's trust) and also the couple's estate plan.

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Fact Pattern (cont.):

- FA rightfully recognizes that the clunky estate plan originally created for the couple likely is not necessary today and it would be a good idea to simplify the plan.
- FA advises the wife to:
  - Shut down H's trust (recall she is trustee – and for purposes of this presentation ignore the fact that she probably abused her power and made inappropriate decisions/actions), take the assets formerly held by H's trust and make them jointly owned with her eldest son, A.
  - Take all of the assets held in W's trust and also make them jointly owned with her eldest son, A.
  - Also, name eldest son A as sole beneficiary on the IRAs.

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Fact Pattern (cont.):

- W follows FA's advice and makes all assets jointly owned with her eldest son A.
- W dies.
- Children A, B, & C meet with trust attorney (Atty) to commence administration.
- Atty reviews bank and brokerage statements etc. and discovers there are no assets in the trusts, but all assets (except for IRAs) are jointly owned with son A.

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### Analysis of FA's Advised Estate Plan

- Did it simplify the plan – maybe, maybe not.
- Pros:
  - It avoids probate and trust administration.
  - It allows one person to be in charge of all assets rather than all 3 children.
- Cons (Pitfalls):
  - Enforceability of "sharing"
  - Suspicion of child A by children B & C – potential litigation.
  - Tax consequences to child A.
  - Potential Medicaid eligibility issues had W required Medicaid for Long Term Care prior to her death. (Divestments)
  - Potential creditor (of child A) issues.
  - Potential difficulty or issues with child A's "misuse of funds" or restrictions on W's use of funds/assets.

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### Cons/Pitfalls: Theory

- Usually the theory is: I will title the assets jointly with my eldest child and he/she can share with his siblings:

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### Cons/Pitfalls: Enforceability

- It may be difficult to enforce the theory or even promise of the child with whom assets are jointly titled to share with their siblings.
- Relevant Statutes:
  - Michigan's Joint Bank Account Statute, MCL 487.703 (banks or trust companies).
  - Statutory Joint Account Act, MCL 487.711 et seq. (banks or trust companies).
  - Credit Union Multiple-Party Accounts Act, MCL 490.51 et seq. (credit unions).

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MCL 487.703 (Joint Bank Account Statute)

- In pertinent part:
- When a deposit shall be made, in any bank by any person in the name of such depositor or any other person, and in form to be paid to either or the survivor of them, such deposits thereupon and any additions thereto, made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same together with all interests thereon, shall be held for the exclusive use of the persons so named and may be paid to either during the lifetime of both, or to the survivor after the death of 1 of them, and such payment and the receipt or acquittance of the same to whom such payment is made shall be a valid and sufficient release and discharge to said banking institution for all payments made on account of such deposits prior to the receipt by said bank of notice in writing not to pay such deposit in accordance with the terms thereof.
- ....
- The making of the deposit in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding, to which either such banking institution or surviving depositor or depositors is a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors.*

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Statutory Joint Account Act (MCL 487.711 et seq)

- MCL 487.716 in pertinent part:  
The creation of a statutory joint account is a contract as to ownership of the deposits and is effective pursuant to its terms without regard to requirements of testamentary dispositions. The rights of persons in joint accounts which are not statutory joint accounts are not affected by this act. The failure to answer a question in a statutory joint account contract shall not invalidate the contract, but it shall be enforceable pursuant to its terms as to the questions answered and pursuant to the common law as to any unanswered question or ambiguities, with the purpose of effectuating the intent of the parties.

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Statutory Joint Account Act (MCL 487.711 et seq) (cont.):

- MCL 487.719 in pertinent part:  
Upon the death of a person who in his or her lifetime owned the deposits in a statutory joint account, to the extent of the decedent's ownership immediately before his or her death, the rights of the owners of the deposits after the death shall be subject to the right of recovery by the estate of the deceased person to the extent that the assets of the estate are insufficient for the payment of the widow's allowance or allowance for dependent children ordered by a court of competent jurisdiction; or in an intestate estate or where the widow exercised her right to take against the will, the assets of the estate are insufficient for the payment of the widow's share of the estate if the deposits were included as part of the estate.

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Statutory Joint Account Act (MCL 487.711 et seq) (cont.):

• MCL 487.718 in pertinent part:

If in his or her lifetime, a deceased person was an owner of a statutory joint account, the estate, in event of its insolvency, may recover from the surviving owner so much of the deposits as were owned by the deceased person immediately before the deceased person's death to the extent required to satisfy claims against the estate.

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Credit Union Multi-Party Accounts Act

• MCL 490.54 in pertinent part:

In the absence of satisfactory proof of the net contributions, those who are parties from time to time shall be presumed to own a multiple-party account in equal undivided interests

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Credit Union Multi-Party Accounts Act (cont)

• MCL 490.56 in pertinent part:

*A multiple-party account payable to 2 or more persons, jointly or severally, which does not expressly provide that there is no right of survivorship, though there is no mention of survivorship or joint tenancy, is presumed to be a survivorship account. At the death of a party, sums on deposit in a survivorship account belong to the surviving party or parties as against the estate of the decedent. Where there are 2 or more survivors, their respective ownerships shall be in proportion to their previous net contributions augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death, plus the proceeds of insurance on decedent's life paid to the account. The right of survivorship continues between survivors.*

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Credit Union Multi-Party Accounts Act (cont)

- MCL 490.58 in pertinent part:

The presumptions stated [in this act] are based upon inferences of the intention of parties to multiple-party accounts arising from the form of the account and the usual expectations of people using these accounts. *The presumptions are rebuttable by clear and convincing evidence of a different intention. The presumptions of survivorship are not subject to change by will but may be rebutted by a written order received by the credit union to change the form of account or directing that payment not be made in accordance with the account which is signed by a party and is received by the credit union during the party's lifetime.*

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Rebuttable Presumption: Bank Accounts

- For bank or trust company deposits the presumption with joint accounts is that the decedent intended for the assets to pass to the surviving joint owner.
- This can be rebutted by "reasonably clear and persuasive proof" for bank or trust company accounts.

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Rebuttable Presumption: Credit Union Accts.

- The presumption for Credit Union joint accounts is also that the decedent intended to vest the account funds in the surviving joint owner following the death of the decedent.
- This presumption can be rebutted but only by "clear and convincing evidence."

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**Enforceability: Oral Wills**

- A Will must be in WRITING. MCL 700.2502(a).
- As such oral wills are not enforceable.

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**Cons/Pitfalls: Tax Consequences**

- Income tax all attributable to eldest child A.
  - IRA (all taxable)
  - Higher tax bracket for eldest child A.
- Gift tax
  - Annual Gift Tax Exclusion.
  - Borrowing from lifetime exclusion vs. paying the tax.
  - Who pays the tax.
- Loss of Step Up in Basis
  - How mechanically to determine/establish basis.
  - Can you rely on 1099 or other tax documents.

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**Possible Fixes for botched estate plan:**

- Litigation
- Working with eldest child to divide equally if agreeable and to share in income tax (taking off the top).
- Spreading shared distributions with siblings (spouses) over time to utilize annual gift tax exclusions.
- What about loss of step up in basis?

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**Better Alternatives**

- Trusts
- Use of transfer on death (TOD) or beneficiary designations naming all children.
- Use of TOD or ladybird deeds.
- Use of TOD bills of sale for personal property.
- Using the foregoing coupled with a durable power of attorney to address incapacity.
- Facing probate – it doesn't have to be as scary as it sounds.

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