



# The Mobile Lawyer's Law Times Newsletter

A FREE Newsletter For Friends & Clients of The Mobile Lawyer

Summer 2008



David McLean  
Chief Mobile Lawyer

Dear Friend,

Welcome to my Summer Edition 2008 of The Mobile Lawyer Newsletter! REMEMBER, I am available to TRAVEL to you or I can meet you at my OFFICE as well. At The Mobile Lawyer, we believe in being flexible to meet your needs.

THE MOBILE LAWYER will be offering some dynamic and exciting New services in the Fall of 2008 including, Wills/Powers of Attorney Seminars throughout the City of Ottawa; an Electronic Legal Document service; and much, much more. Stay tuned and please check out our website at [www.mobilelawyer.ca](http://www.mobilelawyer.ca). Our GOAL is to offer you with rapid, quality service that meets your timelines and convenience.

Have a great Summer,

David McLean, B.A., LL.B.  
Chief Mobile Lawyer

## -Topic of the Month An introduction to Powers of Attorney in Canada

Powers of Attorney are governed by the law of agency, a branch of common law concerned with the delegation of power from one person, generally called the principal, to another, called an agent.

When a person becomes incapacitated, the government or the court often steps in and appoints someone to represent and take any legal decisions that the person would have to take.

One of the methods to avoid government or court intervention, and the appointment of a stranger or a bureaucrat, is the use of a power of attorney.

*Topic of the month continued...*

A power of attorney is a written document stating that one person gives to another the full power and authority to represent him or her. It must be signed by the principal (also called a "donor") and, under some circumstances, by the attorney.

### *Beware of the Differences Between Provinces*

The rules regulating powers of attorneys tend to vary significantly from province to province. For example, it is customary in some provinces to refer to the person giving the power of attorney as the "principal"; whereas other provinces refer to the "donor".

The person receiving and potentially exercising the power of attorney may be called the "attorney", "attorney in fact", "agent" or "donee."

### **Testimonial:**

"I just wanted to express my appreciation for your professional handling of the selling and buying of my properties. I was able to go away on vacation during this period knowing that my business would be efficiently and expediently taken care of, and I was not disappointed".  
-Theodora Baines, Ottawa, Ontario



### Legal Services Offered:

- Real Estate
- Wills
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- Powers of Attorney
- Incorporations
- Shareholder Agreements
- Commercial Agreements
- Notarizations



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From time to time, I include reprints of articles my clients may find interesting. This is especially true of this article by Tim Cestnick, which appeared recently in *The Globe and Mail*.

-David McLean



## PROPERTY

# Consider the drawbacks of your assets being jointly owned

### TIM CESTNICK TAX MATTERS

Tim Cestnick is managing director at WaterStreet Family Wealth Counsel and author of *101 Tax Secrets for Canadians*.  
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As the battle for the Stanley Cup is in full swing, when April rolls around, I tend to spend a lot of time in front of the television keeping my hand on the pulse of the pursuit of Lord Stanley's cup. But I try to be sensitive about the needs of my family, and so I felt it was only fair to ask the question five weeks ago: "Carolyn, is there anything you'd like to say to me before the playoffs begin?"

Speaking of national pastimes, the NHL playoffs come second only to joint ownership. Just about every household has assets that are owned

jointly between spouses, or between parents and kids. This is often a bad thing. Let me explain.

#### THE IDEA

The term "joint ownership" is used to loosely describe one of two common legal relationships: Tenants in common, or joint tenancy with right of survivorship (JTWROS). Tenants in common owners each hold separate ownership interests that can generally be sold or transferred without the consent of the other owners. But JTWROS is more common.

In the case of JTWROS, the survivorship feature means that when an individual dies, the deceased person's interest is automatically distributed to the remaining joint tenants. Think of this as a "winner takes all" game. The asset will pass to the surviving owners outside of the deceased's estate. The result? Probate fees are avoided.

#### THE PROBLEMS

Before you jump to place your investment accounts, home, or other assets into JTWROS,

consider some drawbacks.

**Creditor exposure.** Property transferred will become open to attack by creditors of the person receiving the property (the transferee).

**Ex-spouse exposure.** If you place an asset in joint names with a child, for example, and your child later divorces, half the interest in that property may end up in the hands of your child's ex-spouse.

**Loss of control.** Once in joint names, you won't generally be able to recover the transferred property without the consent of the transferee, and you'll need the transferee's consent to sell the property, or mortgage it.

**Unintended distribution.** If you place an asset in joint names without making clear your intention as to who really has beneficial ownership, the asset may not be distributed in accordance with your wishes upon death.

**Depriving your kids.** You may be in a second marriage and intend to leave some or all of your assets to your children from your first marriage. If you place your assets into

joint names with your current spouse, however, the property will fall outside of your estate and will be distributed in accordance with your current spouse's will, not your will. The kids from your first marriage may end up with nothing. There are ways to meet your current spouse's needs, and still leave the assets to your children (a spousal trust is one example).

**Loss of exemption.** If you place your principal residence in joint names with a child who already owns a home, it's possible that half of your residence will be exposed to tax on a sale later since your child will not be entitled to use his principal residence exemption on the half of your home he owns, if he doesn't ordinarily live in your place.

**Land transfer tax.** Land transfer tax could be payable when real estate that is subject to a mortgage is conveyed to another person.

#### THE COURT

In addition, it has always been a concern that placing an asset in joint names could create

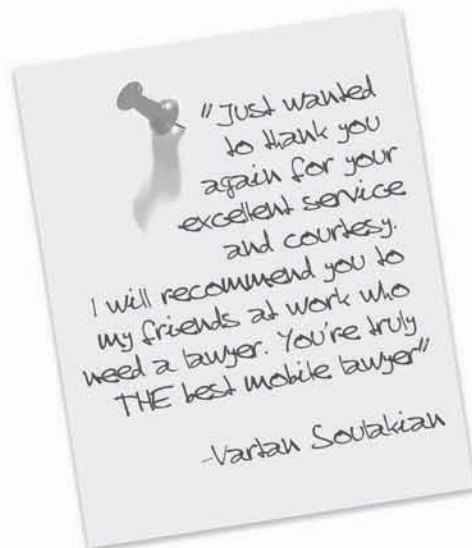
a taxable disposition of that interest transferred. You see, to avoid probate fees, it's been commonly believed that you'd have to transfer beneficial ownership to another person, which also results in a taxable disposition. Now, it's never been a problem when putting assets into joint names with your spouse, but joint ownership with others is a different story.

Interestingly, a recent Supreme Court of Canada decision suggests that this concern can now be laid to rest. In the case *Pecore v. Pecore* (2007 SCC 17), the court made the statement: "Where the transferor's intention is to gift the right of survivorship to the transferee but retain beneficial ownership of the assets during his or her lifetime, there would appear to be no disposition at the moment of the setting up of the joint account."

That is, it appears that taxpayers can now avoid probate fees and a taxable disposition when placing the asset in joint names. It's like having your cake and eating it too.

## Did you know that..?

"Powers of Attorney designate people or a trust company to take over your affairs upon the happening of a certain event (eg. incapacitation, absence from the country, illness, etc.)"



## A Final Thought

With summer here, I hope each of you can take some time to get away to enjoy some summer weather with friends and family. Whatever the case, be safe and have fun!



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