TRANSFERRING
Advice Sheet

The Mysteries and Misconceptions of Joint Ownership

Joint ownership of property is frequently used in estate planning to avoid the probate process and probate fees, particularly in provinces where probate fees are high, such as in Ontario, British Columbia and Nova Scotia. While putting property into joint names may be an easy estate planning tool, without professional advice, it may result in unintended and costly consequences to your estate. So that you can make an informed decision about whether joint ownership is appropriate in your estate plan, we have set out below a brief explanation of the various types of joint ownership and the resulting consequences.

Tenants in Common

Property held jointly may be owned in one of two ways: tenants in common or joint tenants with right of survivorship. As a tenant in common, each person owns a defined portion of the property. For example, one tenant in common may own ⅓ of the property and the remaining ⅔ can be held by another tenant in common. Property held with other owners as tenants in common does not pass on the death of one owner to the surviving tenants in common. If one tenant in common dies, that person's share of the property becomes part of the deceased's estate. For example, Tom, Mary and Rachel own a house together and are registered on title as tenants in common. Tom and Mary each own ¼ of the property and Rachel owns ½ of the property. If Tom passes away, his ¼ share of the house would pass to his estate and would **NOT** flow to the other owners, Mary and Rachel.

Joint Tenancy with the Right of Survivorship (JWROS)

JWROS is another way property can be jointly held. Property held in JWROS is owned by two or more persons in equal proportions with identical interests and an equal right to use the property. On the death of a joint tenant, that joint tenant's share is transferred automatically to the other surviving joint tenants and does not pass to the estate of the deceased owner. For example, if Amy owned a house in JWROS with her brother, Arthur, and her sister, Andrea, on Amy's death her interest in the house would pass automatically to Arthur and Andrea, as surviving joint tenants.

If Arthur subsequently dies before Andrea, his share would pass automatically to Andrea and she will become the sole owner of the house.

JWROS is commonly used to avoid probate fees. Since probate fees only apply to property which forms part of the estate of the deceased owner, no probate fees would generally be payable on the value of the property owned by the deceased owner in JWROS. The potential probate fee savings is best illustrated with the example previously mentioned. If the house owned by Amy, Andrea and Arthur is valued at $400,000 and they each hold ⅓ of the home as tenants in common, on Amy's death her share valued at $133,333 would attract approximately $2,000 ($133,333 x 1.5% in Ontario) of probate fees in Ontario. If Arthur still owned ⅓ of the house as a tenant in common on his death, then his share of the property would also attract approximately $2,000 of probate fees in Ontario. If the house were owned legally and beneficially by Andrea and Arthur in JWROS, no probate fees would be payable until the death of both of Andrea and Arthur.

Limits on Planning with JWROS

Unfortunately JWROS ownership could result in conflict in family situations, particularly in situations where a parent dies holding property in JWROS with one child. In family situations it is common for a parent to transfer assets into JWROS with one child to avoid probate fees or to give that child access to bank or investment accounts to facilitate the payment of bills or to assist with the management of that parent's financial affairs.

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Often, little thought is given to the consequences of transferring property into JWROS. When the parent who has put the property in JWROS dies, the property held in JWROS will pass directly to the surviving child. But what was the deceased's intention? Did the deceased parent intend to gift the property outright to that child or did the deceased parent intend for that child to hold the property in trust for the beneficiaries of the deceased's estate?

This situation came before the Supreme Court of Canada in two cases in 2007. The cases of *Pecore v. Pecore*, 2007 SCC 17 and *Madsen Estate v Saylor*, 2007 SCC 18, highlight the need for caution when using JWROS for estate planning purposes.

Pecore v Pecore

In the *Pecore* case, an ageing father placed the majority of his assets in joint accounts with his daughter, Paula, who was one of his adult children. The father continued to use and control those assets during his lifetime and paid taxes on all of the income. In his will, the father made specific gifts to Paula, her husband and her children, but did not specifically mention the joint accounts. The will provided that the residue of the estate was to be divided equally between Paula and her husband, Michael. Paula and Michael later divorced and Michael argued that the jointly held accounts formed part of the estate of Paula's father and consequently, formed part of the residue and should be distributed according to the will of Paula's father.

In *Pecore*, the Court found that where there is a gratuitous gift of assets from a parent to an adult child, there is a presumption that the adult child holds the assets in a resulting trust. This means that when assets are held jointly by a parent and an adult child, and the child gave no value for those assets, there is a presumption that the child is holding the assets in trust for the estate of the deceased parent, unless the child can show that the parent intended to make a gift of those assets to the adult child. To determine the intention of the parent, the Court will consider all of the surrounding circumstances, including statements made by the parent to his or her children, the wording used in bank documents, the control and use of the funds in the account, the granting of a power of attorney, the tax treatment of the joint accounts and other evidence subsequent to the transfer.

Madsen Estate v. Saylor

In the *Madsen* case, the father added Patricia, one of his three children, as a joint account holder on his bank and investment accounts. The accounts provided for a right of survivorship. The father retained control of the accounts and the funds were used solely for his benefit during his lifetime. The father also declared and paid all taxes on income made from the accounts. Under the father's will, the residue of the estate was to be divided among the children and grandchildren of the father. Following the father's death, a claim was brought by Patricia's siblings against Patricia, as executor of her father's estate, for failing to include the joint accounts in the distribution of the estate. The result in the *Madsen* case was eight years of difficult and emotional litigation and loss of family harmony.

The Court in *Madsen* concluded that the deceased parent did not intend to make a gift to his daughter and as a result, the accounts in dispute formed part of the father's estate upon his death.

Income Tax Consequences of Registering Assets in Joint Names

The Income Tax Act of Canada treats a gift of beneficial interest to anyone other than a spouse as a disposition of the property at fair market value. For example, if Joe wishes to make his son a joint legal and beneficial owner of his National Bank securities, the Income Tax Act will deem him to have made a gift of ½ of those shares to his son at fair market value. So, if Joe purchased 500 shares of National Bank for $25,000 and he subsequently makes his son joint legal and beneficial owner, Joe will be deemed by the Income Tax Act to have transferred ½ of those shares to his son at fair market value at the date of the transfer. Accordingly, if at the date of transfer the shares were worth $75,000, Joe would be deemed to have realized a capital gain of $25,000 (($75,000-$25,000)/2), one-half of which will be taxable as a capital gain in the hands of Joe.

A word of caution

Often estate planning is done without proper consideration to the overall estate plan. Without proper planning, transferring assets into JWROS may actually thwart your wishes. This problem is best illustrated with an example. Joe and Janet are both in their second marriages and both have children from a prior marriage. Joe and Janet intend to leave the majority of their respective estates to their respective children. Joe has signed a Will giving all of his assets to his children. On Joe's death, the executor of Joe's estate realizes that all of the assets owned by Joe were held in JWROS with Janet. Unfortunately, there are now no assets in Joe's estate to pay the estate debts, liabilities, taxes, and legacies to Joe's children.

When planning for joint ownership, consideration should also be given to the possibility that the joint owner who is expected to survive the transferor may unexpectedly predecease the transferor. For instance, where a parent has transferred assets into joint ownership with his or her child for estate planning purposes, consideration should be given to the possibility that the child may die before the parent.

Also, it is important to note that when gifting legal and beneficial ownership of assets to another person, you are actually giving away your asset and you may be unable to recover that asset. You should ensure that you retain sufficient assets to pay for your future care, maintenance or other unanticipated expenses.

Lessons to be learned:

1. Joint ownership is fraught with perils and without professional planning and advice, may thwart your intentions or result in conflict in the administration of your estate.
2. Professional advice should be obtained before you transfer any assets into joint ownership.
3. If you have decided to transfer your assets into joint ownership, make sure you intentions are clearly stated in writing. You should state in writing whether you intend to make a gift of the joint assets to the surviving joint owner for his or her use exclusively or whether you intend for the joint owner to hold beneficial interest in the asset in trust.
4. With proper planning and advice, joint ownership can be an effective way of fulfilling your estate planning objectives.

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