

Trevor Todd
and Judith Milliken QC

The Pitfalls of **Joint Tenancy**



For many years, estate planners have advised their clients to transfer their assets into joint tenancy ownership with loved ones so they may inherit by right of survivorship and avoid paying legal and probate fees.

The rationale has been that the surviving joint owner, by right of survivorship, automatically becomes sole owner of the entire property, including the deceased's share. Thus the asset does *not* fall into the deceased's estate but instead passes to the surviving joint owner. As a result, legal costs and probate fees are avoided. The thinking has been *No muss, no fuss, and what's more, no delays!*

Indeed, for many years joint tenancy arrangements have been used by families and very close friends. Most often they are used for homeownership or for financial assets such as bank accounts and investment accounts. Other than a Will, this type of arrangement is probably the most common form of estate planning.

It is very important to understand, however, that such ownership *can* lead to hotly contested legal disputes. This is particularly the case where only *one*

of the joint owners has contributed most or all of the funds to the investment account or to the purchase of the property.

Fortunately such disputes rarely arise in cases where both joint owners have made substantial contributions to the acquisition of the assets, for example, in the case of joint ownership by spouses who have been long married.

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A relatively common fact pattern, however, involves an elderly parent—let us suppose a mother, who transfers her home into joint tenancy with only one of her children. She may well think she is being prudent in avoiding the payment of probate fees upon her death and may believe the one “favoured” child will do the right thing and share the home with the other siblings.

By the time this mother dies, the favoured child has convinced himself or herself that the other siblings have no claim to the home because mother intended to leave it for him or her alone.

Almost invariably the elderly parent does *not* document his or her intention in writing. Thus the question remains—what was the deceased's intention? To gift the property outright to one child alone? That the one child hold the property in trust for her mother's estate after her death?

Predictably, the disappointed siblings commence a court action claiming the surviving owner holds the property in trust for the estate of their mother. The defendant child denies there was a trust and instead claims that “Mom intended to give me the house outright”—Read: because she loved me more than you.

These estate disputes involving the question of gifts versus resulting trusts are unfortunately becoming all too common.

What is a Resulting Trust as Opposed to a Gift?

Most of us are familiar with gifts, but what is a resulting trust?

Developed by the courts of equity, a resulting trust is a historic legal doctrine for a situation where one person (the transferor) transfers an interest in property gratuitously to another person (the transferee).

In such a case, the transferee will be presumed to hold it in trust for the transferor. The transferee is said to

hold the property on a resulting trust because he or she remains under an obligation to return it to the original owner, the transferor. Although the transferee may have legal title to the property, the transferor remains the real owner or equitable owner.

Thus where a gratuitous transfer of property is made, equity does *not* assume a gift to the transferee; rather, it assumes that the property has been transferred to be held in trust for the transferor.

To establish there has been outright gift of the property, equity requires the transferee to prove there was an intention to gift both the legal title *and* the equitable interest in the property (true ownership includes both the legal and equitable interest).

If the transferee *cannot* prove the transferor intended to gift the property (whether a home, bank account, or other asset), then he or she will be presumed to hold the asset in trust for the transferor.

In other words, the transferor (or upon death, the transferor's estate) will remain the real owner of the property. Even if it is no longer in the transferor's legal name, he or she continues to have an equitable interest in the property.

A historical exception to this presumption of resulting trust involved transfers by a husband to a wife or by a father to his children. In these cases, the opposite presumption applied. That is, the courts presumed the transfer was meant to be an outright gift of both legal and equitable interest, unless and until it was proven otherwise.

This presumption was called the **presumption of advancement**.

The question of whether a transfer was meant as a gift or a resulting trust generally arises in cases where the transferor did *not* properly document his or her intention at the time of the transfer. So, for example, where the transferor signs a deed of gift together with the transfer, his or her intention will be clear.

Unfortunately, such clear declarations of intention are rare.

Often, joint ownership may continue for years before the transferor dies and the litigation begins.

The courts are then left with the difficult task of determining the deceased's original intention at the time of the transfer, many years before.

Two recent decisions of the Supreme Court of Canada have helped clarify some of the legal principles the courts apply in deciding these questions. Reasons for judgment were issued in *Pecore v Pecore* 2007 SCC 17 and *Madsen Estate v. Saylor* 2007 SCC 18 in May 2007.

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1. *Pecore v. Pecore*

On the advice of his financial adviser, a father transferred most of his wealth into joint bank and investment accounts with his daughter. The adviser told him that by doing so, he would ultimately save probate fees. This father also gave his daughter a Power of Attorney allowing her to manage his finances.

In this case, the father had three children. This daughter, however, was the only one with significant financial challenges. She worked at low-paying jobs, was married to a quadriplegic, and often benefited from the financial assistance of her father during his lifetime.

After the transfers, the father's accountant made him aware that the transfers of the investments could trigger capital gains tax. Thus the father wrote to the financial institutions to advise them that he continued to own the accounts and they had *not* been given to his daughter.

The father continued to pay the income tax on all the income from the investments and used the accounts as his own for the rest of his lifetime. His daughter Paula made a few

withdrawals, but she was required by her father to notify him before doing so—in other words, he maintained control of the accounts until his death.

Some time after these transfers, the father drew up a new Will leaving the residue of his estate to this daughter and her husband Michael. In discussing his assets with the lawyer preparing the Will, the father discussed a number of his assets but did not mention the joint accounts.

Further, there was evidence that the father had told a number of people that he intended to look after his daughter Paula after his death but that "the system" would take care of her husband Michael, who was severely disabled.

At the time of his death, the joint accounts worth \$1 million passed to Paula. The issue of their ownership was raised later in divorce proceedings between Paula and Michael. Michael argued the accounts had been held in trust for the estate and, as a beneficiary of the residue, he was entitled to a share in those monies.

In this case, the Supreme Court of Canada upheld the decision by the trial judge that the father had intended to gift the accounts to Paula and those monies now belonged to her.

2. *Madsen Estate v. Saylor*

The facts in this case may seem similar to those in *Pecore*, yet the court reached a contrary conclusion as to ownership.

In this case, Mr. Madsen had three children. He transferred his bank and investment accounts into joint names with his daughter Patricia Brooks. He alone had contributed all the funds in these accounts and he alone continued to have control of the accounts and to pay income tax on the accounts during his lifetime.

There were no statements or declarations by Mr. Madsen as to what his intention was in transferring the accounts into joint names with his daughter. The value of the accounts was \$185,000 when he died.

Patricia claimed the monies as her own as a surviving joint tenant.

She alleged that her father had given her these monies as a gift because he preferred her to her two siblings. Not surprisingly these siblings disagreed and argued that the monies formed part of their father's estate.

The Supreme Court of Canada upheld the decision by the trial judge that the daughter held the monies in trust for her father's estate.

The different results in these cases are explained by the difference in the evidence.

- In one case, the father had made it *clear* he intended to gift the monies to his daughter.
- In the other case, he had *not* done so.

Different findings of fact led to the different results.

These two contrary decisions serve to highlight the continuing challenge for the courts to find the intention of the deceased, in the absence of a clear statement of intention being made at the time of the transfer.

The Supreme Court of Canada did assist by enunciating a number of principles of law that apply in these cases.

1. When there is a gratuitous transfer from either a father or mother to their *infant* child, the law presumes the transfer was a gift. In other words, a presumption of advancement or gift applies. No such presumption applies in the case of an adult child.
2. When there is a gratuitous transfer from either a father or mother to their *adult* child, the law presumes the transfer was a resulting trust and that the child holds the property in trust for the parent or the estate of the parent upon death. In other words, a presumption of resulting trust applies.
3. Both these presumptions are rebuttable presumptions of law. As such, they "provide a guide for the courts in resolving disputes over transfers where evidence of the transferor's intent in making

the transfer is unavailable or unpersuasive."

4. A transfer into joint tenancy, whether by way of a gift or a resulting trust, immediately vests the right of survivorship. Thus the transfer is an *inter vivos* transfer and does not attract probate fees or succession duties.

Indeed, we believe the courts will see more and more litigation involving jointly owned assets.

Conclusion

Every day, people transfer significant assets into joint names with others. Frequently, they do so without properly documenting their intention.

Thus the question remains: Is the transfer a gift of the property or is the property to be held in trust? So, for example, did the parent transfer over that bank account simply for convenience, to permit the child to help the parent with his or her banking, or did the parent intend to gift the account to this one child, to the exclusion of the others?

The Supreme Court has limited the presumption of gift or advancement to cases involving transfers to minor children. Thus in the case of transfers to adult children, the child will be presumed to hold that asset in trust for the estate of the deceased parent. The child will thus bear the burden of proving the transfer was meant as a gift.

In spite of this recent clarification by the courts, these disputes will continue. Indeed, we believe the courts will see more and more litigation involving jointly owned assets. Judges will continue to be called upon to second-guess the deceased's intention long after the initial transfers.

A Word to the Wise . . .

We conclude with two cautionary notes.

1. It is *crucial* to document the transferor's intention in writing.

Where a gratuitous transfer is made, it is *essential* for a legal professional to enquire and document in writing the transferor's intention—does he or she intend an outright gift or does he or she intend the transferee to hold the property in trust?

Failure to make these enquiries and keep such notes *may well* result in potential liability on the part of the legal professional to a disappointed beneficiary.

2. Be sure to consider estate planning tools other than joint ownership, because we have seen the latter can be risky.

Other estate planning tools, such as a trust, may be preferable to joint ownership to ensure an orderly succession upon death.

As well, there may be unintended income tax ramifications to a disposition of property by way of a transfer into joint tenancy to oneself and another.

Other related legal problems that may arise include severance of the joint tenancy, whether under *The Family Relations Act* or by a severance by the other joint tenant who then claims an interest in the property, even before the death of the transferor. ▲

Trevor Todd restricts his practice to Wills, estates, and estate litigation. He has practised law for 32 years and is a past chair of the Wills and Trusts (Vancouver) Subsection, BC Branch of the Canadian Bar Association, and a past president of the Trial Lawyers Association of BC. Trevor frequently lectures to the Trial Lawyers, CLE, and the BC Notaries and also teaches estate law to new Notaries. His Website includes 30 articles on various topics of estate law.

Judith Milliken QC has practised law for 31 years in the areas of commercial law, criminal law, and most recently estate litigation. She practises estate litigation together with her husband Trevor Todd.