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# Joint Tenancy Update: 2007



## Parents often set up bank accounts in *joint tenancy* with a child.

In other words, they add the child *as joint tenant* on the account. Two common reasons are to avoid probate and for banking convenience.

For banking, a mother might register her accounts jointly with a daughter “Mary,” so Mary can sign cheques. But Mom does not want Mary to keep the money in the accounts after she dies; she wants Mary to share the money with her sisters.

People set up bank accounts in joint tenancy for other reasons, however. For example, a father might register his bank accounts jointly with his favourite son Joe, expecting all the money to pass to Joe after he dies. Unlike Mom in the previous example, Dad does not want Joe to share the money in the account. On the contrary, Dad is trying to “cut out” Joe’s brothers.

Joe’s father has used joint tenancy for a very different purpose than Mary’s mother, intending different results—but the account records at the bank give no clue as to their respective intentions.

Increasingly, families are asking the court to investigate joint accounts. This might happen if Mary is dishonest and tries to keep all the money that was in Mom’s accounts, forcing

an application by the sisters for a declaration that Mary should share with them.

But what is the court to do? Because people use joint tenancy for various reasons, the results can be more than a little confusing—and the end result is unfair at times.

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### Proper Use of Joint Tenancy

Joint tenancy was created under English law to give *right of survivorship* to the persons named on title to property, such as a bank account or land. If one joint tenant died, the survivor inherited the whole interest in the property. In other words, joint tenancy creates a type of property right called *right of survivorship* or *survivorship rights*.

In fact, the traditional use of joint tenancy was to keep property intact as it passed between parents and children. If we apply the traditional rule to the examples above, the results would be the following.

- In Mary’s case, she could keep all the money after her mother died, contrary to Mom’s wishes.

- In Joe’s case, he could also keep the money, fulfilling Dad’s wishes.

Trouble begins when people use joint tenancy for purposes other than the purpose for which it was designed, thereby creating property rights they did not intend. Mary’s mother should simply have added Mary as a *signing authority* on her account, or given her *Power of Attorney* to operate the account.

To name her as a joint tenant was inappropriate if she did not intend to give survivorship rights to Mary.

### Trust Complications

There are different ways to hold property.

- For example, a bank account can be registered in Mom’s name alone and, when she dies, it forms part of her “estate” and goes under her Will to the beneficiaries named. No confusion!
- Or, as we have seen, an account can be registered in joint tenancy. In this case, after death it normally passes by right of survivorship to the survivor named on the account.

When trusts are introduced, however, it gets more complicated. Trusteeship arises when the *legal* ownership of property is separated from *beneficial* ownership. The legal owner is deemed to hold the property for the *benefit* of others—the *beneficial owner* or *beneficiaries*.

Take the case of Mary and her mother. The mother contributed all the money in the bank accounts and is, therefore, *beneficial owner*. Mary was named on title but, since she was not the beneficial owner nor intended to take beneficial ownership after Mom's death, trust law would limit her to *legal* ownership only and stipulate that Mary holds the money for the *intended beneficiaries*, her sisters.

If Mary tries to cheat the sisters, they can argue Mary is really a *trustee*, the money is really trust money, and by keeping it Mary is in breach of trust.

And it is by applying trust law that the courts often resolve difficulties arising from joint tenancy registrations. If right of survivorship would create unfairness, they deem a surviving joint tenant to be a trustee, holding the money in trust for the benefit of others. Right of survivorship is nullified.

### Recent Cases

Two recent cases from the Supreme Court of Canada have taken the law governing joint tenancy far away from its original purpose. The court laid down a new principle: Whenever a parent gratuitously registers property (bank account, house, and so on) in joint tenancy with a child, *it is presumed* that the child holds the property in trust.

Therefore, as between parent and child, joint tenancy is no longer joint tenancy. (Somewhat ironically, the traditional rule will apparently still apply in registrations with nonchildren.)

From now on, it will be *presumed* that when a parent has put a bank account or other property in joint tenancy with a child, it was for a purpose *other than* passing it intact to the child after death.

Therefore, the child will hold the funds or property *as trustee* for the benefit of the estate after the parent dies. This presumption can be rebutted, but the onus will be on the surviving child to prove he or she should not be treated as a trustee.

Applying the new rule to the examples given earlier,

- in Mary's case, Mom's intentions will be fulfilled,
- but in Joe's case, the father's wishes will be defeated unless Joe can rebut the presumption of trust.

It is plain to see the Court felt it necessary to recognize the prevalent use of joint tenancy for purposes unrelated to its original purpose.

One of the undesirable consequences is that parents now need to prepare additional documents when they want joint property to pass intact to a child after death. "Deeds of gift" are advisable, even if the joint tenancy was set up years ago. *This is important* so that the parent's wishes are not overturned by the presumption of trust.

Furthermore, if the intent of a registration in joint tenancy was to avoid probate fees, this purpose is defeated where it is necessary to apply for probate of other assets. Because the estate has beneficial title to the property, it should be disclosed as part of the probateable estate and probate fees paid as usual.

*Please note: The information contained here is by necessity general in nature and cannot take the place of an individual consultation with a qualified legal advisor. ▲*

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