

JOINT TENANCIES IN ESTATE PLANNING

Roger E. Holland and Elizabeth Segal

Two recent Supreme Court of Canada (SCC) decisions released on the same day highlight the need for caution when using joint tenancy as a means of registering assets for estate planning purposes. For most people, estate planning centres on finding ways to ensure as much of an estate as possible goes to the intended beneficiary with minimal loss to provincial probate fees and taxation.

Probate fees are calculated on the value of the assets someone passes on to beneficiaries through an estate, usually by way of a will. By carefully planning the distribution of assets among beneficiaries before death, people can minimize or defer taxes.

Paying some or all provincial probate fees can often be avoided if parents register assets in joint tenancy with one or more of their adult children. The primary advantage of joint ownership is that the interest of the deceased co-owner does not pass through the estate but flows directly to the surviving joint tenant or tenants and so is not subject to probate fees. Further, in passing outside of an estate, parties attempt to ensure that the asset in question will not be affected by claims against the estate pursuant to the *Wills Variation Act*. Typically, when someone transfers assets before death to be held jointly with a spouse or adult children, the transferor intends to retain partial or complete control over the use of the asset until death.

However, the act of registering assets in joint tenancy is only one part of the process. A number of factors can affect whether a joint tenancy is achieved. In British Columbia, for example, there is a presumption imposed by statute that, if the asset is real property and the title does not specify two or more owners as joint tenants, the share of the deceased's asset will become part of the estate and will be included in the calculation of probate fees.

As the two SCC cases—*Pecore v. Pecore* and *Madsen Estate v. Saylor*—show, joint tenancies are not without problems. A transferring owner can, for example, lose control over the property and not be able to change his or her mind over its disposition or succession. In some cases, the property could be exposed to claims made by the new joint tenant's creditors, including family claims if he or she becomes involved in a divorce or separation. And there could be tax implications in the case of real property such as a family home; future growth of the joint tenant's interest in the residence would

be subject to capital gains tax unless the joint tenant is the owner's spouse or the owner's child who is still living at home.

In *Pecore*, an aging father transferred financial assets consisting of bank and investment accounts into the joint names of himself and his daughter, who was one of his three adult children. He had been told by a financial planner that, by this action, he would avoid probate fees and make after-death dispositions less expensive and cumbersome. Because he had been told that the transfers could trigger a capital gain, he wrote letters to the financial institutions holding the accounts stating that he was the 100% owner of the assets and that they were not being gifted to his daughter. The father made all the deposits and continued to use and control the accounts. He paid all of the taxes on the earned income. The daughter made some withdrawals.

The father made out a will in which he left specific bequests, including one to the daughter's ex-husband, but did not mention the particular assets that had been transferred into the joint names. After the father's death, the ex-husband claimed that the daughter held the assets in trust for the benefit of her father's estate (which totalled almost \$1 million) and consequently they should be distributed according to the will. The trial judge found the father intended to give his daughter the ownership of the assets by transferring them into joint ownership. He continued to manage and control them on a day-to-day basis before his death. The SCC found the presumption of resulting trust was the general rule for such transfers and that the onus was placed on the daughter to demonstrate that a gift was intended. The outcome was the same, however, as the daughter did demonstrate the transfer was intended to be a gift and accordingly she retained the assets in question.

In *Madsen Estate v. Saylor*, a father also transferred his investments into joint bank and investment accounts with his daughter. The father used and controlled the joint accounts and paid income tax on all of the income from the investments during his lifetime. The daughter did not make any withdrawals from the joint account during her father's lifetime, although he did give her a power of attorney to allow her to manage his finances.

The value of the joint accounts on the father's death was about \$185,000. He had made all of the contributions to the accounts. The daughter claimed the funds in the joint accounts by right-of-survivorship. But her brother and sister disagreed. Under their father's will, he had directed his estate trustee to divide his estate into two—with one half divided among his three children and the other among his eight grandchildren. The siblings claimed that the daughter was holding title to the joint accounts as trustee for their father's estate. In contrast to the Court's decision in *Pecore*, the Court in *Madsen* agreed with the siblings and ordered the daughter to pay the \$185,000 in the joint accounts back to her father's estate, to be distributed in accordance with his will.

The common law has previously presumed that an asset other than land is owned as joint tenancy. However, *Pecore*, which has been cited with approval in British Columbia, spoke to the common law in three respects:

1. The distinction between joint tenancies in land and personal property has given way to a more modern approach whereby all assets are presumed to be held in trust for the estate.
2. Transfers between parents and adult children, dependent or independent, will be presumed to be for the purposes of holding the assets in trust for the estate.
3. If the presumption is rebutted, even when the deceased retained control over the asset, the transfer will be considered to have vested at the time of the transfer so the asset will not be considered part of the estate and subject to probate fees.

It remains up to the surviving joint owner to rebut the presumption by providing evidence that the asset was intended to be a gift.

While there are certainly occasions where putting property into joint names can be an easy and effective estate planning tool, such a transaction should only be entered into after appropriate advice has been received regarding the possible ramifications. It is also important to note that expenditure due to litigation over an estate is typically considered a cost of estate administration and therefore payable from the estate. As *Pecore* and *Madsen* demonstrate, it is critical not to leave intentions about estates open to interpretation in order to avoid unpleasant financial consequences.