Planning Matters

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Joint Assets as a Planning Device - Tool or Trap?

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Joint assets are a topic shrouded in misinformation. It has been over a decade since the laws governing their use underwent a seismic shift, yet they continue to be used casually with little appreciation for the risks. Notably, since this shift flowed from the Supreme Court of Canada, all provinces and territories are affected.

Holding a joint asset with another person has historically been heralded as an easy, efficient, and uncomplicated estate planning tool that would help avoid probate costs. In recent years, however, the ease with which joint assets operate has been dramatically reduced. Though their use as part of a comprehensive estate plan remains viable, all Canadians need to be mindful that not all joint assets are created equal.

The Basics

What is a Joint Asset? A joint asset is an asset, such as a bank account, home, or investment where you own the whole asset together with another person(s). No owner is entitled to a specific percentage of ownership of the asset. This contrasts with an asset owned as "tenants in common", which permits the participants to define specific ownership stakes.

Right of Survivorship. The biggest and most well-known benefit of a joint asset was that if one of the joint owners dies, the other owner(s) automatically become the remaining owner(s) of the joint asset. This inheritance mechanism is called the right of survivorship – no muss, no fuss, no probate process or probate fees for that asset.

The right of survivorship is presumed to apply in respect of joint assets between spouses.

Presumption of Resulting Trust. The right of survivorship is *not* presumed to apply between anyone other than spouses, such as between parents and children or between siblings.

Rather, the presumption of resulting trust is the starting point. This means that the individual who was added to the assets as joint owner (most commonly a child) is presumed to hold the asset in trust for the original owner and, when that original owner dies, to hold it in trust for the estate of the original owner (typically a parent).

This occurs because the law presumes that if something is given without receiving value in exchange, the giver does not intend for the recipient to have the item for the recipient's own benefit. Rather, the law presumes that the recipient is only holding it in trust for the giver (and by extension the giver's estate when the giver dies). This can be rebutted by evidence that the original owner intended to give it to the recipient as a gift and it is a 'true' joint asset, with the onus of proof usually lying with the person who was added to the joint asset.

Having these different types of joint assets creates chaos in the event of a falling out between the owners or the death of the original owner, and consequently much litigation. The hot topic is often what type of joint asset was created.

Gift of Right of Survivorship. A decision by the Supreme Court of Canada in 2007 created the ability to gift just the right of survivorship. This type of joint asset is now commonly referred to as a "Pecore" joint asset, flowing from the name of the case.

A Pecore joint asset is, in effect, a hybrid. It avoids the probate aspect because it has the right of survivorship, but the gratuitous owner (i.e., the person who was added to the asset) holds it for the benefit of the original owner during his or her lifetime.

The Trap

The Confusion. Having these different types of joint assets creates chaos in the event of a falling out between the owners or the death of the original owner, and consequently much litigation. The hot topic is often what type of joint asset was created.

The way to avoid these questions is to ensure that if the asset was yours and you have added a joint owner(s), that you properly document your intention as to the type of joint asset being created.

A Gift is a Gift. If you choose to gift the right of survivorship, keep in mind that it is like any other gift - you cannot take it back. Even though the right of survivorship is not triggered until your passing, unlike a Will, you cannot change it.

Loss of Control and Exposure to Creditors, Taxes, and Family Law Claims. The moment someone else's name is on the asset, regardless of the documentation created to evidence the intention as to the type of joint asset created, some control is lost and risk is introduced.

For example:

- If my name is on your bank account as a joint owner, I could empty the account. You may be able to try and recover the money from me, but I may have already spent it and, if I am your child, the damage to family relations is likely permanent.
- If my name is on any asset and I am sued by a creditor (for example, my restaurant goes bankrupt, someone

slips and falls on my sidewalk, or I injure someone in a car accident beyond what my insurance coverage will pay) or my spousal relationship ends, my creditors and spouse may assert a claim to all assets where I am an owner, including your assets where I am a joint owner.

- If my name is on your home as a joint owner:
    - You may have jeopardized part of your access to the capital gains exemption in respect of your home.
    - In certain provinces (for example, BC, PEI, and Ontario), there are land transfer taxes that can add up quickly, and under some of them first time property owners are entitled to an exemption from, or refund on, that land transfer tax. If adding me as an owner to your home was the first time I had owned real estate, I have likely lost my access to the first time owner's exemption or refund for this tax.
    - For other provinces, such as Alberta and Saskatchewan, this will typically be less relevant as their title registration fees and transfer fees, respectively, are relatively low.
    - Before making any real estate joint, it is imperative to talk to a local real estate lawyer to ensure the taxes and exemptions are fully considered.
    - Worse yet, you could not sell or mortgage the property without my signature. I could effectively hold your ability to deal with the property hostage.
    - All the people to whom I owe money (my creditors) may try and claim against your home. The risks of this in connection with land are particularly high since the change in ownership to add me as a joint owner is typically filed with the province's land registry, meaning that the registered ownership is publicly searchable in most provinces.

Tool, But is it the Most Appropriate Tool?

When deciding whether to make an asset joint, ask: What am I trying to achieve?

- Assisting with the management of my assets and financial affairs if I am incapable? The better tool in most Canadian jurisdictions is an Enduring Power of Attorney.

Case study: *Gully v Gully* (2018)

The BC Supreme Court has confirmed that third parties are entitled to rely on what is registered at the BC Land Title Office in *Gully v Gully* in 2018. This case has been, to date, also favorably viewed by the Ontario Court.

In *Gully v Gully*, mom added her son as a joint owner to her home. The addition of the son as an owner was registered at the land title office. The son was <u>not</u> told he had been added (a bad idea even without the outcome of this case!).

The son then had financial difficulties and one of his creditors registered a judgement against the son's interest in the home. The court determined that the creditor was entitled to do this and recover what it was owed against what had been mom's home.

While specific facts can affect the outcome, the consequences can be catastrophic. In a situation like this, it can mean that the creditor could effectively force the sale of the home to service the son's debt; mom might choose to pay the creditor off in order to protect her ability to stay in her longtime home; or, she might go to court to try and defend her ownership of the home.

In any scenario, mom's 'easy' planning of joint ownership jeopardizes her right to the home and puts her in a position where she may have to spend significant money. Further, the gift she intended to make to her son will never actually be enjoyed by him - it will be used to pay his creditors.

- Estate management, such as keeping my affairs private on my death, avoiding probate fees if they apply in my province, and minimizing the risk of my Will being contested? This may work if properly documented. So too may trust planning.

Assessing *why* a joint asset is being considered can assist in determining whether it's the best (or only) vehicle to achieve your goals. If making an asset joint is the right tool for you, then it is crucial to document your intention and your rights in relation to the asset. Undertaking the act of making an asset joint is only one step; to ensure it operates as intended and to protect the original owner, documenting the intention and inserting safeguards is the pivotal next step.

About the author

Rose Shawlee is a Partner with the law firm, Richards, Buell Sutton LLP where as part of the Estate and Wealth Advisory Group, she focuses primarily on assisting families and businesses with their planning, succession, estate, and business needs. She strives to make life's inevitabilities, death and taxes, less daunting a topic for clients while being alert to the complications these raise from a legal, family, tax, probate fee, and cost perspective. She can be reached at RShawlee@rbs.ca.

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