

# Structuring & Attacking Joint Tenancies

CBA - Friday, November 25, 2016

Presented by:

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# Joint tenancies

- Defined
- Why?
- Pecore
- Bare trust vs. transfer of survivorship interest
- Resulting trust
- Probate avoidance?
- Tax
- Family law
- Elder law
- Litigation attacks
- Conclusion

# Defined

- *A gift of lands to two or more persons in joint tenancy is such a gift as imparts to them, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Megarry and Wade, Law of Real Property, (4th ed. 1975)*
- Distinguishing feature is the right of survivorship - when one joint tenant dies, his or her interest in the property is extinguished and passes to the surviving joint tenant(s)

# Four Unities

- **1. Unity of Possession**
- Each joint tenant has undivided legal possession of the whole property
- **2. Unity of Interest**
- (i) Extent: Although in theory each joint tenant has the whole of the property, the rents and profits of the land are to be divided equally between them
- (ii) Nature: There can be no joint tenancy between those with interests of a different nature
- (iii) Duration: There can be no joint tenancy between those whose interests are similar but of different duration
- **Note** - unity of interest applies to the estate which is held jointly - it does not matter that one joint tenant has a further and separate interest in the same property

# Four Unities (cont'd)

- ***3. Unity of Title***
- Each joint tenant must claim their title to the land under the same act or document
- ***4. Unity of Time***
- The interest of each tenant must vest at the same time

# Why?

- Ease of title transfer
- Low cost (compared to a formal trust, limited partnership or corporate ownership)
- Probate planning
- Note – applies equally to real and personal property (shares, accounts, chattels)

# Pecore

- SCC in *Pecore* and *Madsen* cases clarified certain presumptions that apply when two persons hold property as JTWROS
- If spouses, presumption of advancement applies – upon death of one joint owner the other obtains legal title by operation of law pursuant to the joint tenancy and is presumed to acquire the beneficial interest as well
- If parent and adult child, presumption of resulting trust applies - upon death of parent child is presumed to hold the beneficial interest in the asset on resulting trust for the parent's estate notwithstanding the child obtains sole legal title by operation of law
- Both presumptions can be rebutted

# Joint tenancy – parent to child

- **Option 1:** if parent's intention on making the asset JTWRROS is to immediately gift a beneficial interest to child, creates an immediate disposition for tax purposes in the hands of the parent, triggering any inherent capital gain (based on proportionate interest given away by parent) plus both parent and child must report a proportionate amount of income and gains from the asset in the future while parent is alive



- **Option 2:** No immediate transfer of beneficial interest to child, but intention to pass beneficial interest to child upon parent's death by survivorship
  - child gets beneficial asset on death of parent outright
- **Option 3:** No immediate transfer of beneficial interest to child and no intention to pass beneficial interest to child upon parent's death (child holds interest in trust for parent's estate)
  - asset can be dealt with by child without probate (maybe) and could fund testamentary trusts

- Neither Option 2 or 3 triggers a disposition of beneficial interest during the parent's lifetime and parent continues to report all income and gains during lifetime and upon death
- If Option 2, parent must document the intention to rebut the presumption of resulting trust
- Consider re option 2:
  - 1 - right of survivorship vests on death but is an inter vivos gift (hence can be done by a non-testamentary instrument)
  - 2 – deemed disposition occurs on death of parent for tax purposes

- If Option 3, should have child confirm that she holds her interest in the asset in bare trust for the parent during the parent's lifetime and for the estate thereafter rather than rely on the presumption of resulting trust

- Note – principal residence exemption is still available to transferor on death (but not usually to transferee(s) unless they too ordinarily inhabit the property, much to the surprise and chagrin of many!)
- Applies to the whole gain if option 2 or 3, and the part of the gain related to the retained portion if option 1 (but not to the child's portion if option 1!)

# BUT

Consider re option 1:

1. Loss of control by original owner
2. Potential exposure to joint owner's creditors
3. Disputes among owners over intentions
4. Unexpected order of death of owners
5. Tax implications

# Bare trusts

- A true bare trust involves transfer of legal title of an asset by one person (the owner) to another person or persons (the trustee(s)) while retaining beneficial interest in the asset
- But can arise in the context of making an asset JTWROS between owner and trustee(s)
- For probate purposes, legal title in that asset is transferred to the trustee(s) and it is therefore not probateable in the owner's estate upon the owner's death

- Trustee signs a declaration of bare trust confirming intention not to obtain any beneficial interest in the asset
- Trustee is holding the asset in trust for the owner during her lifetime and then for her personal representatives (executors) after death
- Bare trusts can be used for investment accounts, bank accounts, private company shares and real estate

- **One major drawback – if any asset needs to be probated, then generally all assets beneficially owned by the deceased need to be probated notwithstanding legal title may be held in bare trust (see ss. 87(2) of the Probate Act)**
- **Extreme caution must be used to ensure all assets are outside of probate one way or another!**
- Note – this is not the same if option 2 intended (no probate required)
- Bare trust arrangements should always be documented clearly in writing by a declaration of bare trust signed by the trustee



# Do bare trusts sever joint tenancies?

- Concerns expressed in relation to unities of interest and title
- But possible to hold legal title to property in joint tenancy even if equitable/beneficial title is held in another form of ownership (i.e. sole or tenancy in common)
- The mere fact that a bare trusts exists which separates beneficial and legal title does not, in and of itself, alter the unity of interest or title that exists among the two or more persons who hold the legal title as joint tenants
- See detailed discussion in accompanying paper



*"Well, we've licked taxes—that just leaves death."*

# Family law

- Property held jointly by spouses generally divisible (subject to a marriage contract) on marriage breakdown or death
- Property held by one spouse jointly with one or more third parties MAY be divisible
- Depends on whether is legal title only OR spouse has a beneficial interest
- Then consider if is a “matrimonial asset” under s.4 of MPA

- **MPA ss. 21 (1)** The rule of law applying a presumption of advancement in questions of the ownership of property as between husband and wife is abolished and in place thereof the rule of law applying a presumption of a resulting trust shall be applied in the same manner as if they were not married, except that
- **(a) the fact that property is placed or taken in the name of spouses as joint tenants is *prima facie* proof that each spouse is intended to have on a severance of the joint tenancy a one-half beneficial interest in the property;** and
- **(b) money on deposit in a chartered bank, savings office, loan company, credit union, trust company or other similar institution in the name of both spouses shall be *prima facie* proof that the money is on deposit in the name of the spouses as joint tenants for the purposes of clause (a).**

# Elder law and related issues

- What is the capacity required to transfer a title from sole to joint tenancy?
- Same as capacity to gift:
- “The question is whether the person making it was capable of understanding the effect of the deed when its general purport had been fully explained to him.”
- “That the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument and may be described as the capacity to understand the nature of that transaction when it is explained.”

***Re Beaney [1978] 1 WLR 770***

- Note – the more significant the gift is as a part of the deceased's estate, the more necessary it is to consider the *Banks v Goodfellow* test for testamentary capacity
- Onus on person alleging was a valid gift of beneficial interest to show maker had capacity
- Rebuttable presumption of capacity that is affected by the circumstances/evidence

# Other grounds of attack

1. Undue influence – where a person exerts sufficient influence such that the gift/transfer is not independent
  - equitable doctrine
  - onus of proof on attacker on civil standard
  - can be actual or presumed (by “special relationship” of dependency – onus once relationship proved is on defender of gift)
2. Fraud – rare but a joint tenancy can be procured by a fraudulent representation the causes transferor to act

3. Coercion – very rare (means duress amounting to compulsion of the will)



# Rebutting the trust presumption

- If no express documentation, need to rebut presumption of resulting trust for gratuitous transfers
- Fact specific enquiry on a case by case basis
- Consider factors noted by Rothstien, J. in *Pecore*:
  1. Evidence subsequent to the transfer – evidence related to the intention of the transferor at the time of the transfer is relevant, even if that evidence arises subsequent to the transfer, such as by a subsequent statement or declaration by the transferor
  2. Bank documents (if applicable) – statements in banking documents that suggest the transferor’s intent with respect to the beneficial interest in the account (these are usually not determinative by themselves)

3. Control and use of the funds in the account – evidence relating to who uses and controls the account during the transferor’s lifetime was held to be of marginal assistance to the Court
  - Rothstein held that “... the fact that a transferor controlled and used the funds during his or her life is not necessarily inconsistent with an intention at the time of the transfer that the transferee would acquire the balance of the account on the transferor’s death through the gift of the right of survivorship” (para. 66)

4. Granting power of attorney – prior to *Pecore* it was often felt that a transferor was more likely to have intended to gift the beneficial interest in an account if the transferee also held a power of attorney which would have otherwise allowed the attorney to access the account for the donor’s benefit
- Rothstein J. concludes that this is a factor that the trial judge can consider in determining the transferor’s intention, but notes that it is “... entirely plausible that the transferor granted power of attorney and placed his or her assets in a joint account but nevertheless intended that the balance of the account be distributed according to his or her will” (para. 68)

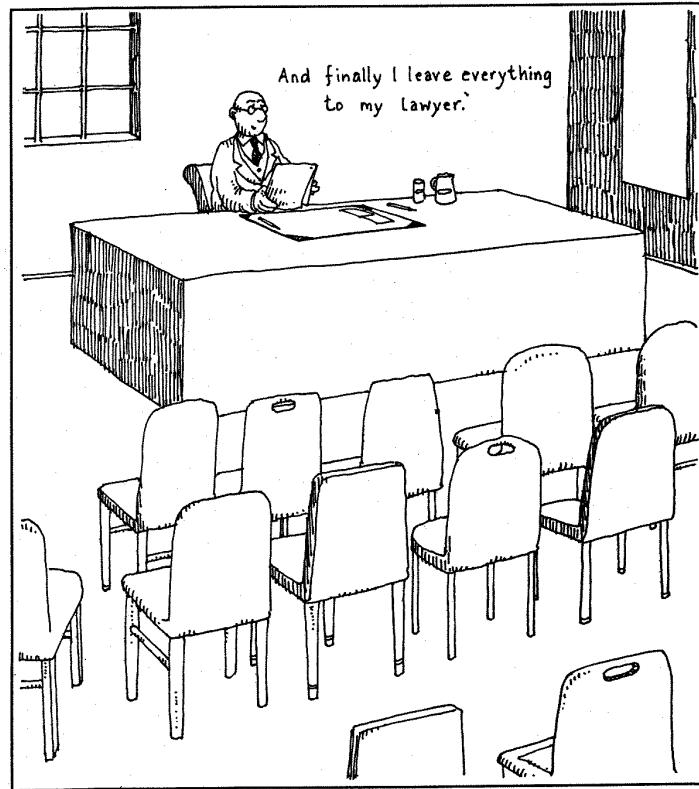
5. Tax treatment of joint accounts – whether the transferor intended to pay taxes on the income earned in the joint account during his or her lifetime is not determinative absent other evidence, but is a factor to be considered
- The Court also held there was no inconsistency with the transferor continuing to pay tax but still intending to make a gift of the residual interest in the account given that the nature of the gift is a gift of the residual interest and not an immediate gift of the equitable interest which would trigger a disposition for tax purposes at the time the transferee is added as joint account holder

# Severance of the joint tenancy

- Joint tenancies can be severed in three ways (*Smith v Lister*, 2015 ABQB 420):
  1. Unilateral destruction by one joint tenant of one of the four essential unities;
  2. Severance by mutual agreement; and
  3. By any course of dealing such that the interests of all of the parties were mutually treated as a tenancy in common.

# Practical issues with bare trusts

- Consider granting a limited power of attorney back to transferor by transferee(s) to avoid requirement for transferee(s) to sign deed if transferor wishes to sell or mortgage the property during lifetime
- Title to successor assets must be taken jointly as well (land, bank accounts and investment accounts)
- Consider contingent beneficiary designations for registered assets/insurance – can throw off the probate plan



# Conclusion

- Very powerful tool
- Simple, inexpensive and understandable
- But not the panacea many believe
- **DOCUMENT INTENTIONS!**
- Best practice is to clearly document transferor's intention at the time an asset is made joint (by deed of gift or declaration of bare trust) or in transferor's will
- Q - Is an inter vivos trust a better way to achieve the client's goals?



# Reference Sources

- John Poyser, *Capacity and Undue Influence*, (Toronto: Carswell, 2014)
- *Sawchuk Estate v. Evans*, 2012 MBQB 82 (CanLII) at para 53

# Questions

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