Joint Ownership of Assets

Forms of Joint Tenancy

While our focus is on joint tenants with rights of survivorship (JTWROS), it is helpful to first discuss the two types of joint ownership, JTWROS and tenants in common.

With tenants in common, each owner has a distinct ownership interest which can be sold, bequeathed, used, and encumbered without the other owner's permission. Thus, if two sisters equally own a family cottage as tenants in common, and one sister dies, the surviving sister is free to leave her half interest to her children.

With rights of survivorship, upon the death of one owner, their interest is automatically split between or transferred to the surviving owner(s). There is no ability to leave a share of this type of property to a beneficiary through a will. The last surviving owner will have a 100% interest and they are then free to make the property a gift through their will. Additionally, no single owner may encumber (i.e. mortgage) or sell their interest without the approval of the other owner(s).

For the remainder of this discussion, any reference to joint tenants will refer to JTWROS, unless otherwise stated.

Creating a Joint Ownership

There are many reasons why someone may find themselves holding an asset in joint legal name with another individual. Perhaps the most common is two spouses who jointly purchase the family home. The home is purchased with family money and it is desirable that, upon the first death, the property would become fully owned by the survivor. The features of JTWROS discussed above would seem to do a very good job of reflecting the desires and intentions of the owners.

A second situation may arise where the ownership is created purely for testamentary purposes. In other words, one owner doesn't intend for the joint owner to have access to the property; they merely want to take advantage of the "rights of survivorship" component. This may occur where, for example, a grandfather has owed a family cottage for years and decides to put his granddaughter, his only heir, on the title as a joint owner, with rights of survivorship. This is more typical in provinces such as Ontario and British Columbia, which have high probate fees. This is because assets which pass by way of JTWROS ownership do not form part of the deceased's estate and are thus not subject to probate.

A more complicated situation may arise if we look at another common situation. An elderly parent adds her son on to her bank account as a joint tenant because he helps her pay her bills and does some of her shopping for her. As a joint tenant, the son is free to withdraw funds from the account, making this arrangement convenient. We will return to this example in a minute to examine some of the potential pitfalls with joint tenancy.

Determining Ownership

Any discussion of ownership must first make the distinction between nominal and beneficial ownership. Nominal ownership is likely what most of us think of when we consider ownership. It refers to the person(s) whose name(s) is/are on title for the asset. Who are the registered owners of the real estate, whose names are on the joint bank account? Beneficial owners, by contrast, are the individuals who have the beneficial entitlement to the property, regardless of who is on the title. The Supreme Court of Canada said the following regarding a "beneficial entitlement" to an asset:

> *The real owner, the person "beneficially entitled" to [the property], can require the nominal owner to let him use or have possession of the property, or to give him the income from it, or otherwise to let him have the benefit and enjoyment of it. He usually can require the nominal owner to convert the property into another form or to transfer the legal title to some other nominal owner. Above all, he is able, unless restricted by the terms of a specific trust, to call on the nominal owner to convey the property to him and to transfer its legal title to him, the real owner. If he does so, he will then fully acquire the property by achieving full ownership and will cease to be merely beneficially entitled to it.* [1]

Let's look at our three examples above to help understand the difference. With our spouses and their family home, it seems pretty clear that the nominal and beneficial owners are the same -- the two spouses. Both of their names are on title and both have an interest in the property.

With the grandfather and granddaughter, both parties are again legal owners, but is the granddaughter also a beneficial owner? We may not have enough information to answer that. It would appear that granddad is the only beneficial owner, but there may be facts we are unaware of. What if the granddaughter has taken over the maintenance and property taxes for the cottage? What if she now has full access to the cottage when she did not before? What if, with granddad's knowledge, she took out a mortgage on the property to help finance her own business? All of these factors (plus others) could lead to a conclusion that the granddaughter is also a beneficial owner.

Finally, with our third situation involving the joint bank account, it appears that, as described, mom would be the only beneficial owner. If all of the money was contributed by her and the funds are only used for her benefit, it could be said that while the son is a legal owner, he is holding his ownership in trust for his mother.

[1] Cowan v. Minister of Finance, N.S. (1978), 89 DLR (3d) 426, at 433-34 (NSSCAD).

Taxation

So how, exactly, are joint accounts taxed? The answer is: it depends. Taxation in this respect is typically based around beneficial ownership, rather than nominal ownership. Once there is a change in beneficial ownership, there will likely be a deemed disposition for tax purposes, resulting in a taxable gain (or loss) for the original owner. For example, a change in beneficial ownership may occur if an individual adds a joint owner to title on an existing asset. For an income-producing asset such as an investment account, taxation would be allocated according to proportional beneficial ownership. If it sounds complicated, that is because it is. For our purposes, what is important is that changes in beneficial ownership can result in tax, and each beneficial owner is responsible for a specific portion of any taxable earnings or gains from the time they acquired an ownership interest. Tax attribution of future income and gains may also apply where partial ownership of the asset is simply given to a spouse or other related party. An accountant should be consulted before adding someone as joint owner to an existing asset to ensure the tax treatment is properly understood.

Issues Surrounding Joint Ownership

While joint ownership can be an expedient and effective way of owning certain assets (in many cases, it is the only form that makes sense), there are also potential pitfalls. Assets jointly owned may be exposed to the creditors of any owner. Additionally, in the event of marital breakdown, they can form part of net family property. Either of these cases could result in protracted litigation to determine whether someone was a nominal or beneficial owner. Further, adding someone as a joint owner on, for example, a bank account exposes the account to the other owner to be used for their purpose. Again, this could result in litigation over who was a beneficial owner and what rights each party had to the asset.

Looking at our third example, the bank would have no ability to stop the son from emptying his mom's account and spending the money on himself. The mother may have a cause of action against her son, but the process would be lengthy, expensive, and there is no guarantee that there would still be money available to satisfy any judgement (people who steal from their parents are not typically known to have vast reserves of personal wealth).

Joint Ownership and Estate Planning

It is not unusual for people to consider the use of joint accounts as part of the estate planning process. Not only do assets which pass through rights of survivorship avoid probate fees, they are also free from delays on the death of an owner. Assets which are part of an estate can be tied up for weeks or even years as part of the probate and estate management process; not so with joint assets. In those cases, the surviving owner never loses access to the asset.

This strategy is not free from dangers, however. In addition to the concerns above, there can be a very real question of what is supposed to happen to assets upon an owner's death. Let's return to the son and his mother. In our example, he was placed joint on her account to help her do her shopping and pay her bills. Does that mean that she also intended for her son to inherit the account after she died, or was it supposed to be distributed as part of her estate?

It seems that the answer should be straight-forward; assets held joint with rights of survivorship pass to the surviving owners on one owner's death, right? Not necessarily. In the Pecore decision[2], the Supreme Court of Canada instituted for the first time a presumption of a trust in these circumstances. The assumption is that the son would be holding the funds in trust for the mother's estate and would need to turn the funds over to the estate to be distributed as per her will. This is not, however, an absolute rule. The presumption can be rebutted by offering evidence such as the actual use and intention of the deceased. The simplest thing any testator can do when making someone joint owner of an asset is to create a letter specifically stating whether the asset is to form part of the estate or pass directly to the co-owner. Raymond James can provide a statement of intention to gift assets for a joint investment account. Absent such direct evidence, it is possible that it will be left to a court to determine if there is enough evidence to rebut the assumption of a resulting trust. Even if the deceased's original intention ends up being carried out, it may only be after an expensive and likely acrimonious legal battle.

Conclusion

JTWROS can be a powerful tool if used properly. In many cases, it is the only appropriate way to own an asset. It is also something that is deceptively simple to implement but can carry with it far-reaching complications for taxation, creditor protection, rights of use, and even estate planning. Adding someone as a legal owner to an asset where they do not have a beneficial right to that asset should only be done in consultation with tax and legal professionals. The beneficial owner should be clear about their ultimate intention regarding the testamentary disposition of the asset. They should also be sure that whatever issue they are trying to solve is worth the potential risks and pitfalls and that this is the most appropriate method of solving the problem. In some circumstances, the same or better result could be achieved through another method such as a limited power of attorney or a trust. It is common because it is simple to implement, but it rarely is a simple solution.

[2] Pecore v. Pecore, [2007] 1 S.C.R. 795, 2007 SCC

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