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The Importance of Documenting Gifts

by Jonathon Kappy

Common estate planning techniques include the transfer of assets into joint ownership. While the intention of such gratuitous transfers may be to avoid probate fees, other legal consequences should be considered to avoid unintended results.

Assets can be held jointly with the intention to create an immediate gift of the beneficial interest in property. Alternatively, the gift may only relate to "the right of survivorship". Often, joint ownership is not intended to be a gift at all, only a means to facilitate the management of an asset.

A failure to properly document this intention creates a risk that this intention will not be carried out.

The Gift of the Right of Survivorship

In *Pecore* v. *Pecore*[1], a father gratuitously transferred his various accounts into joint names with his daughter, Paula.

While it could not be denied that Paula took legal ownership of the accounts through the right of survivorship, it was the intention to convey the beneficial ownership[2] that was contested. The court was asked to decide whether the accounts were gifted to Paula or held by her on a resulting trust in favour of her father's estate.

A resulting trust arises when title to property is registered in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner.[3]

In determining the beneficial ownership of a jointly held asset, it is the intention of the transferor that is paramount. However, the common law has created presumptions as a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent is unavailable or unpersuasive. It is important to note that these presumptions are rebuttable based on the specific facts and evidence available.

The court's findings in *Pecore* can be summarized as follows:

1. Upon a gratuitous transfer of property, it will be presumed that the transferee holds the property upon a resulting trust in favour of the transferor's estate;

2. The presumption of resulting trust applies to a gratuitous transfer between a parent and an adult child, but not to a transfer between a parent and a minor child; and

3. The gift of the right of survivorship vests when the joint account is opened, and is *inter vivos* in nature (such that it need not be in proper testamentary form). However, the gift is the account

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balance at the time of the transferor's death, and not of any particular amount.

Gifting the Right of Survivorship in Real Property

While the focus in *Pecore* was the transfer of investment and bank accounts, attention must also be paid to jointly held real property.

In *Bergen* v. *Bergen*[4], two parents added their son to real property as a joint tenant with the intention that he would receive it upon their death. After a falling out, the parents sought to sell the property and retain all proceeds of sale. The son claimed a one-third interest.

The court noted that the analysis related to the gift of the right of survivorship was different as it relates to joint tenancy in land. As any joint tenant in land is at liberty to sever the joint tenancy at any time, this undermined the notion that the son received a full and perfect *inter vivos* gift of the survivorship. The addition of the son as a joint tenant did not necessarily result in the son receiving an immediate gift of that interest, including beneficial ownership. The intention of the parents remained paramount.

As the parents satisfied the court that they had not intended to give up control over the property during their joint lifetimes, the presumption of resulting trust could not be overcome, and the parents were entitled to retain all proceeds of sale.

The Court of Appeal for Ontario in *Kavanagh* v. *Lajoie*[5] reaffirmed that the addition of a non-contributing party as a joint tenant in land is not, by itself, evidence of an irrevocable *inter vivos* gift.

Things to Consider

As the intention to gift is paramount, transferors need to carefully consider what rights are intended to be transferred and whether these rights are intended to be gifts, or are being held on a resulting trust. More importantly, these intentions need to be documented so that no dispute can arise as to their intention at the time the transfer took place.

Deeds of Gift are an easy way to document an intention to gift, whether it is an immediate gift of the beneficial interest in property or a gift of the right of survivorship. Trust agreements should be considered where assets, particularly accounts, are transferred into joint names for ease of management without any intention to gift.

While formal documentation and independent legal advice are the best way to ensure the transferor's intention is carried out, less formal documents, such as a Declaration of Intention, can be equally effective. The intention of the transferor must be proven on a balance of probabilities. If this threshold cannot be met, the legal presumptions will prevail.

Documenting the intention of the transferor not only ensures that the transferor's estate plan is carried out, but also serves as evidence to the Canada Revenue Agency so that probate need not be paid where assets properly pass outside of an estate.

[1] *Pecore* v. *Pecore* [2007] 1 S.C.R. 795, 2007 SCC 17, 2007 CarswellOnt 2752 [*Pecore*], also see *Sawdon Estate* v. *Watch Tower Bible* and *Tract Society of Canada*, 2014 ONCA 101 (O.C.A.) and *Mroz (Litigation guardian of)* v. *Mroz*, 2015 ONCA 171 (O.C.A.)
[2] *Csak* v. *Aumon* (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.)
[3] *Pecore*, para. 20
[4] *Bergen* v. *Bergen* 2013 BCCA 492 (B.C.C.A.)
[5] *Kanavagh* v. *Lajoie* 2014 (O.C.A.)

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