THE INTEGRATION OF FAMILY AND ESTATE LAW

TRANSFERS AND JOINT PROPERTY OWNERSHIP UNDER *WILLS, ESTATES & SUCCESSION ACT* AND THE *FAMILY LAW ACT*:

IS IT YOURS, MINE OR OURS? JOINT TENANCIES AND THEIR POTENTIAL LEGAL PITFALLS

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Introduction

Families across Canada hold property in joint tenancy for many reasons - including as a means of simplifying their estate, avoiding probate fees and protecting gifts from challenge under wills variation legislation. However, this is a complex area of law and common conceptions about the rights of joint tenants and the right of survivorship—especially where property is transferred gratuitously—may lead families into muddy waters, with unintended results.

Joint tenancies impact many areas of law including property, trust, estate and family law. This paper will trace the development of the law of joint tenancy and consider recent jurisprudence dealing with the effect of joint tenancies in the context of estates and family law. While the law is complex, this paper will identify relatively simple steps families can take when transferring property into joint tenancy to ensure that their desired goals are achieved.

Shared Ownership of Property - A Brief History

Historically, the common law recognized four types of concurrent ownership: joint tenancy, tenancy in common, co-parcenary and tenancy by entireties. Co-parcenary is a type of ownership where, in the absence of a male heir, land would pass to all of the female children equally: Bruce Ziff, *Principles of Property Law* 5th ed. (Carswell: Toronto, 2010) at 338. Tenancy by entireties is a special form of joint tenancy created when a husband and wife hold land. According to Ziff at 338: "Property held in this way could not be alienated unless both spouses agreed and the entirety could not be severed except through the termination of the marriage. ... Until then, the husband was solely entitled to any income derived from the property." These two forms of ownership are no longer relevant.

Joint tenancy and tenancy in common are the two forms of co-ownership in B.C. There are important differences between these two types of ownership. The most important feature of a joint tenancy is the right of survivorship—the rule that when one joint tenant dies, the surviving tenants become entitled to the deceased's interest in the property. When there are only two joint tenants remaining, the death of one means the other will hold the full interest in the property. By contrast, tenants in common do not have a right of survivorship. When one owner dies, that owner's interest devolves to his or her estate.

In the feudal era, the survivorship device was used for tax avoidance and estate planning purposes. Today, it serves much the same purposes but, according to the British Columbia Law Reform Commission's 1988 "Report on the Co-Ownership of Land" at p. 23, "joint tenancy is of use almost exclusively in the context of family holdings, most frequently ownership of land by a husband and wife".

Creation of a Joint Tenancy

According to Blackstone's formulation, to create a joint tenancy, the "four unities" must exist:

- the unity of interest: the holding of each tenant must be equal in nature, extent and duration;
- the unity of title: the interest must arise from the same act or instrument;
- the unity of time: the interests of the joint tenants must arise at the same time; and
- the unity of possession: the interest must relate to the same piece of property.

The purpose of the four unities is not entirely clear. It may have to do with the legal fiction underlying a joint tenancy—there is only one tenant and there are no distinct shares held by anyone: Ziff at 336. According to the Latin maxim, *totem tenet et nihil tenet*—each holds the whole and yet holds nothing: Ziff at 336. Canadian courts have treated the four unities as essential:

> [4] One of the essential features of a joint tenancy is that the owners share the whole of the property. Their interests are identical. The interest of each joint tenant is the same in "extent, nature and duration". The joint tenants may have separate rights but they are equal in every respect (see Megarry and Wade, The Law of Real Property, p. 391). The title sought by the applicants is a joint tenancy of a parcel of land with the interests of the parties varying in extent. One party is to own 71/100 interest as a joint tenant and the other 29/100.
>
> [5] Counsel for the registrar contends, and I agree, the title the applicants seek to create is a monster unknown to the law.
>
> *Re Speck*, (1983) 51 BCLR 143.

Where the four unities are present, determining whether property is held in joint tenancy or tenancy in common depends on the intention of the transferor. Traditionally, where the interest was not clear, the common law presumed that the property was held in joint tenancy "presumably because of its effect on feudal rights, the convenience it provided for trustees, and the usefulness of survivorship in simplifying the state of title": Ziff at 339. However, the law's position evolved in response to a concern that some joint owners might be unaware of the survivorship rule: Ziff at 340. Accordingly, the courts were quick to determine property was not held in joint tenancy when certain "words of severance" were present. Words of severance included, for example, "equally", "between", "amongst" and "share and share alike". The rationale was that such words indicated a desire to create separate shares which is inconsistent with joint tenancy.

More importantly, in some provinces including B.C. the common law presumption has been reversed by statute. See the *Property Law Act*, RSBC 1996, c 733 at s 11:

> Tenancy in common
>
> 11 (1) In this section, "transferred" includes a vesting by declaration of trust or order of court.
>
> (2) If, by an instrument executed after April 20, 1891, land is transferred or devised in fee simple, charged, or contracted to be sold by a valid agreement for sale in which the vendor agrees to transfer the land to 2 or more persons, other than personal representatives or trustees, they are tenants in common unless a contrary intention appears in the instrument.
>
> (3) If the interests of the tenants in common are not stated in the instrument, they are presumed to be equal.

As a result, an intentional act is now required to create a joint tenancy in land. Importantly, the statute does not reverse the presumption for personal property; the common law presumption continues to apply to personalty. Further, the statute does not necessarily cover all interests in realty. See, for example, *Robb v. Robb*, (1993) 79 BCLR (2d) 7 where the section was read narrowly to exclude its application to an assignment of a lease.

To summarize, the creation of a joint tenancy in land requires the existence of the four unities and a clearly stated intention to hold as joint tenant.

Severance of a Joint Tenancy

Given the four unities and the unity of interest in particular, all joint tenants have equal rights to the use of the property. However, the need for perfect equality among joint tenants means that the joint tenancy may be severed by certain types of dealing. Ziff notes at 342 that there are three ways in which joint tenancies may be severed: by unilateral action, by mutual agreement, and by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.

Since any act that destroys one of the four unities is sufficient to end a joint tenancy, certain types of actions like conveying property to oneself severs a joint tenancy. Section 18 of the *Real Property Act* specifically permits the transfer of land held in joint tenancy to oneself. Since this action destroys the unity of title and the unity of time, this is a clear and simple means of ending a joint tenancy without the consent of the other tenants. In the recent decision in *Zelig v. Janes*, 2016 BCCA 200, the Court of Appeal upheld the trial judge's finding that a joint account holder severed the joint tenancy by transferring the proceeds of sale of a jointly owned property to herself and her husband.

Similarly, conveying an interest in property to another party ends the joint tenancy as between that party and the remaining joint tenants. Importantly, however, the joint tenancy continues as between the remaining joint tenants.

Mortgaging may sever a joint tenancy if one of the unities is affected. Where the mortgage transfers title to the mortgagee, the unity of title is affected and the joint tenancy is severed. In B.C. a mortgage is treated as creating a charge on the property and title is not transferred: *Real Property Act* at s 30.

Following the same principles, any agreement or course of conduct which shows an intention to deal with jointly owned property as if there were distinct shares may result in severance.

Legal Consequences of Owning an Asset as Joint Tenants

Control and ownership

Typically, all joint tenants are entitled to possession of the property and may deal with their interest in that property according to general principles. Where, however, the owners' contributions to the acquisition of the property were uneven or where there was a gratuitous transfer of an interest, it is necessary to establish the state of beneficial ownership in order to determine the beneficial rights of the joint tenants to control and ownership of property.

The state of legal title will often be unambiguous. However, as noted in *Pecore v. Pecore*, 2007 SCC 17 at para 4, "Equity … recognizes a distinction between legal and beneficial ownership. The beneficial owner of property has been described as the 'real owner of property even though it is in someone else's name'" [citations omitted]. While the person who holds legal title frequently also holds beneficial title, there are numerous situations where the state of legal title and beneficial title are not aligned, and the legal owner is not the beneficial owner. One example is a property which is held on resulting trust for the transferor.

As a consequence of the decision of the Supreme Court of Canada in *Pecore*, the transfer of title into joint tenancy has three potential legal consequences:

> (a) an immediate gift of both legal and beneficial interest in the property;
>
> (b) a transfer of legal title only so that the transferee holds the property on resulting trust for the transferor's estate; or
>
> (c) a transfer of legal title with the right of survivorship in the asset, but a transfer of beneficial title only upon the death of the transferor.

As recently explained by Madam Justice Adair in *McKendry v. McKendry*, 2015 BSCS 2433(discussed below):

> [109] The legal principles applicable when considering a gratuitous transfer into joint tenancy are not in dispute. The basic question is whether the transferor

> intended to make a gift, or whether the transferee holds the property transferred on a resulting trust.

The law is clear that it is the intent of the transferor at the time of the transfer that governs whether legal and beneficial ownership were in fact transferred.

A resulting trust arises when one person holds legal title but because he or she did not contribute to the acquisition of that property, is under an obligation to return it to the original owner: *Pecore* at para 20. Accordingly, a gratuitous transfer of property by A to A and B as joint tenants does not result in an immediate transfer of beneficial ownership to B (unless the presumption of advancement applies, as discussed below). As explained in Waters, Gillen and Smith, *Law of Trusts in Canada* (4th ed., 2012) at 405:

> If A supplies the purchase money and conveyance is taken in the joint names of A and B, B during the joint lives will hold his interest for A. B will also hold his right of survivorship – again by way of resulting trust for A's estate, because that right is merely one aspect of B's interest. In other words, the starting point is that B holds all of his interest on resulting trust for A or A's estate.

Since legal title, by itself, has no real value, if the transferor intended to gift the beneficial interest, he or she should make that intention known with sufficient clarity at the appropriate time. In *Pecore*, the court noted property may be placed into joint names for convenience—it may have been done in order for the transferee to help manage the property for the transferor. Accordingly, where a gift is intended, a deed of gift will ensure that the transferor's intention is clearly recorded. Where the intention of the transferor is uncertain, the presumption of resulting trust will apply and, upon the death of the transferor, the transferee joint tenant will be presumed to hold the transferor's interest in trust for the transferor's estate.

However, the presumption of advancement holds that that when a gift is made by one spouse to another, or from a parent to a minor child, a gift was intended and so for those situations, the evidentiary burden is shifted to the party who seeks to argue that a gift was not in fact intended, and the recipient holds the gift on a resulting trust. It is unclear whether the presumption applies between unmarried spouses. As noted, however, in the recent B.C. Ministry of Justice Discussion Paper *The Presumption of Advancement and Property division under the Family Law Act*:

> The presumption of advancement is a common law principle which operates in several areas of the law including trust, contract and family law. In the context of family law the common law principles provides that, absent evidence to the contrary, a transfer of property between married spouses constitutes a gift of the beneficial interest of that property from one spouse to the other. In other words, the spouse who receives the transfer becomes the beneficial owner of the

> property. Historically the presumption has applied to married spouses only, although there is a discussion in one BC case to the contrary (noted below).
> …
> In BC, the BCSC decision in *J.B. v. S.C.*, 2015 BCSC 2136, (November 2015), (decided prior to the BCCA decision in *VJF*), addressed the issue of whether the presumption of advancement applies to married and unmarried spouses. Although the Court did not find it necessary to adjudicate on the issue because it followed the BCSC cases which held that the presumption did not apply in BC, it commented that if the presumption did apply it should apply to both married and non-married spouses in the same way.
>
> (p. 3 to 8)

While the presumption of advancement and the presumption of resulting trust are evidentiary presumptions, if the evidence of intent at the time of transfer is less than fulsome, they are frequently of significant importance in litigation.

Law of gifts

A gift requires three elements: an intention to donate, acceptance, and delivery. Unless all three elements are present, a gift is not complete and a court will not perfect an imperfect gift. However, once a gift is perfected, it is irrevocable.

The first two elements are relatively straightforward—delivery is the critical component. The delivery requirement allows donors to change their mind and provides tangible proof of a gift. In certain cases, delivery may be cumbersome and symbolic delivery (such as handing over a key) may suffice.

The key question is whether the donor has done all he or she could to effect delivery: *McKendry* at para 139. In *McKendry*, the court found that a Form A transfer was not sufficient to perfect a gift of survivorship interest in a house because at the time the Form A transfer was completed, the transferor did not intend to make a gift. The court held that the transferor "would have been required to execute a written deed of gift under seal (obviating the need for consideration), confirming an immediate gift of survivorship interest" in the property: at para 140. [Note: *McKendry* is being appealed and is scheduled to be heard by the Court of Appeal on November 4, 2016.]

Consequences for the estate

If property is effectively transferred into joint tenancy, the transferee will acquire the right of survivorship. Accordingly, upon the death of the transferor, the transferee will receive the full interest in the property without the need for further legal steps. Done properly, a transfer of property into joint tenancy will be an *inter vivos* gift and, as such, will not fall into the estate of

the transferor. This has the effect of avoiding probate and the gift cannot be challenged under wills variation statutes.

In order to achieve these effects, it is essential that both legal and beneficial title be transferred into joint tenancy. Where only legal title is transferred (such as when a resulting trust arises), the beneficial interest may form part of the estate of the deceased joint tenant and be subject to wills variation actions and probate fees.

If the owner's desire is to keep beneficial ownership during his or her lifetime, one possible workaround may be to transfer only the legal title into joint tenancy. Following *Pecore*, it appears to be possible to transfer only the legal title into joint tenancy and gift the right of survivorship independently of joint beneficial ownership during the transferor's lifetime.

Pecore v. Pecore and the right of survivorship

In *Pecore*, a father transferred certain investments and savings accounts into joint names with one of his daughters, Paula (and not his other two children). The father was the only contributor to the account. He continued to use and control the accounts after they were transferred into joint names. In order to avoid a possible deemed disposition under tax law, the father wrote letters to the financial institutions stating that he was "the 100% owner of the assets and the funds are not being gifted to Paula". When the father died, his estate paid tax on the basis of a deemed disposition of the accounts to Paula immediately before his death.

Since the father, under his will, divided the residue of his estate between Paula and her husband Michael, when Paula and Michael divorced, Michael challenged the ownership of the accounts and argued that they formed part of the father's estate.

The court was called upon to decide the nature of Paula's ownership of the accounts and in the process clarified the roles of the presumption of resulting trust and the presumption of advancement. Since Paula did not contribute to the accounts, the court confirmed that the presumption of resulting trust arose and would have to be rebutted by Paula. The court then considered the role of the presumption of advancement at para 27:

> The presumption of resulting trust is the general rule for gratuitous transfers. However, depending on the nature of the relationship between the transferor and transferee, the presumption of a resulting trust will not arise and there will be a presumption of advancement instead.

Advancement is essentially an *inter vivos* gift. Traditionally, advancement had been presumed in transfers between a father and child and between husband and wife. The presumption of advancement means that where the intention behind a transfer of property is uncertain, given the relationship between the parties, it was appropriate to presume that a gift had been intended. The court clarified that the presumption of advancement continues to apply to transfers between *parents* (not just fathers) and *minor children*, and between spouses. The

court declined to hold that the presumption applied between parents and adult dependent children. Accordingly, even though Paula was financially dependent on her father, the presumption of advancement did not apply.

As such, it was necessary for Paula to rebut the presumption of resulting trust. The court agreed that there was sufficient evidence to rebut the presumption and that her father had intended to gift the right of survivorship.

The court acknowledged that there was a conceptual difficulty in that the beneficial interest of the transferee appeared to arise only on the death of the transferor and this may cause some to conclude that the gift of survivorship was testamentary in nature. However, the court held that "the rights of survivorship, both legal and equitable, vest when the joint account is opened and the gift of those rights is therefore *inter vivos* in nature": at para 48.

Before *Pecore*, it was widely believed that the right of survivorship was "part and parcel" with joint tenancy. That is, it is not an independent property right. *Pecore* seems to suggest that the right of survivorship must be independently gifted and that the transfer of property into joint tenancy is not sufficient to establish an intention to gift the right of survivorship.

The right of survivorship had always been a thorny issue. As discussed, survivorship can lead to iniquitous results, which was one of the reasons that equity was quick to find severance of joint tenancies. Similar concerns seem to underlie the court's holding in *Pecore*. While addressing the presumption of advancement, the court noted that children are frequently "put on" bank accounts and other assets so that the child can manage the assets of the parents. In such situations, it would be dangerous to assume that the parent is making a gift. Separating the right of survivorship from the joint tenancy may also afford better protection for parents and others with an interest in their estate. In the case of a joint bank account, the court in *Pecore* held "[t]he gift in these circumstances is the transferee's survivorship interest in the account balance—whatever it may be—at the time of the transferor's death, not to any particular amount": at para 50. Further, the presumption of resulting trust means that the "surviving joint account holder [must] prove that the transferor intended to gift the right of survivorship to whatever assets are left in the account to the survivor": at para 53.

These points are equally valid in the context of real property. In *McKendry*, the issue was whether the mother, Mary, intended to make a gift of her home to her son, John, when she transferred the property into joint tenancy with him. The court found that at the time of the transfer, a gift of survivorship was not intended. Rather, John was added as a joint tenant in order to allow him to access the equity in the home in order to make certain investments. Even though Mary may have intended to gift survivorship at a later time, she did not take the necessary steps to perfect the gift. The court held that Mary would have been required to execute a deed of gift under seal to confirm an immediate survivorship interest in the home: at para 140. Accordingly, even though John was the sole surviving joint tenant, he held the property in trust for Mary's estate.

Family law consequences

The effect of gifts between spouses and the role of the presumption of advancement under the *Family Law Act*, SBC 2011, c 25 (the "FLA") is a very current and contentious topic.

Two divergent lines of authority developed at the trial court level. One held that the FLA is a complete code and that on marriage breakdown the property rights regime under the FLA displaced common law and equitable rules. The other line of authority held that the common law and equity continued to apply under the FLA. This distinction is critical to characterizing assets as family property or excluded property.

Under the former approach, following the case *Remmem v. Remmem*, 2014 BCSC 1552, the presumption of advancement would not apply when dividing property at the end of a spousal relationship. In *PG v DG*, 2015 BCSC 1454, for example, the husband transferred a house that he had brought into the marriage into joint tenancy with the wife. The court held that the transfer was not a gift. Finding that such a transfer was a gift, the court found, would be contrary to the excluded property regime under the FLA.

The latter approach is best demonstrated by *Wells v. Campbell*, 2015 BCSC 3. In this case, the court found that when the husband transferred a property he had brought into the marriage into joint tenancy with his wife, he did so as a gift (at paras 30-32). The husband did not plead a contrary intention and, accordingly, the presumption of advancement applied.

At the date of writing this paper, the BC Court of Appeal has released two decisions which impact upon the appropriate interpretation of the division of property provisions of the *Family Law Act*.

The first Court of Appeal decision was *Cabezas v. Maxim*, 2016 BCCA 82. In that case, the Court upheld the trial judge's finding that payments on a mortgage by Mr. Maxim's parents registered against a property held in joint tenancy by the parties did not render the proceeds on sale excluded property. The trial judge found that the payments were gifts to both spouses based on the mother's intention at the time the payments were made, despite her later decision to treat the payments as an advance on Mr. Maxim's inheritance. It was her intent at the time that was critical.

The recent British Columbia Court of Appeal case *VJF v. SKW*, 2016 BCCA 186 built upon the Court's analysis in *Cabezas*. The court held at para 74:

> the new FLA scheme does not constitute a "complete code" that "descends as between the spouses" and eliminates common law and equitable principles relating to property. Rather, the scheme builds on those principles, preserving concepts such as gifts and trusts, and evidentiary presumptions such as the presumption of advancement between spouses.

This case confirms that gifts between spouses are possible under the FLA "as they have been through the ages": at para 75. Although there was no joint tenancy issue in this case (rather, a transfer into the other spouse's name), it is now clear that the holding in *Remmem* that the "property provisions of the FLA are intended to be a complete code so that there is no need to examine the intention of the parties at the time of a transfer of excluded property into joint tenancy" is supplanted and the transfer of excluded property into joint tenancy may be construed as a gift under the FLA.

Note, however, that leave to appeal to the SCC is being sought in *VJF*.

The court noted in VJF that there are means by which a spouse can protect against losing excluded property when it is transferred into joint names by, for example, requiring the transferee to acknowledge that no gift of the excluded property is intended: at para 78. This would be done by way of a marriage or cohabitation agreement. The presumption of advancement is only relevant where the intention behind the transfer is not clear.

Accordingly, the intention of the spouses when transferring property between themselves may be critical to their characterization upon relationship breakdown.

Conclusion

As these recent cases make clear, the law of joint tenancies is complex and the right of survivorship far from automatic. Placing property into joint tenancy can not only affect current control and ownership but may have important consequences in estates and family law. Parties should account for the presumptions of advancement and resulting trust and ensure that their intentions are recorded with sufficient clarity such that a court will not need to rely on one or the other presumption to decide ownership issues that may arise. A little bit of diligence and planning at the time of transfer may save costly legal battles down the road.