JOINT PROPERTY
CANADIAN BAR ASSOCIATION BAR REFRESHER 2012
JANUARY 27, 2012

1. Types of Property Ownership

a. Manner of holding property and considerations for holding title

Joint Ownership

Joint ownership is often considered to mean the ownership of an asset by two or more persons with the right of survivorship. The owners have an equal, undivided interest in the property. Upon death of one joint tenant, the other(s) are vested with the ownership or title of the deceased person. However, the law of joint ownership is more complex than the simple recording of names on a document to represent the legal and beneficial ownership of the asset. Today we will delve into the law of joint property and the challenges lawyers face in the estate planning context.

There are various methods to hold title to real property among two or more owners. This is called "manner of tenure". Title to personal property may be held in a single name or multiple names with the right of survivorship less clear than real estate held in joint tenancy. Recently the courts have commented on the separation of legal title and beneficial title with respect to real and personal property, regardless of it's registration or record of ownership.

The following will set out some of the basic principles regarding joint ownership of real property and personal property.

Joint Tenancy-Real Property

There are four unities which must be present when a joint tenancy is created:

1 unity of title;
2. unity of time;
3. unity of possession; and
4. unity of interest.

The practice note to take from this is that the same deed must create the ownership for all joint tenants, in order to have unity of title, time and interest. Unity of possession is assumed unless the document creating the right limits the right of possession to any part of the property. (See Ramnarine v. Ragoo [2011] O.J. No. 3346)

In the recent case of Royal & Sun Alliance Insurance Co. v. Muir [2011] O.J. No. 1688 P.M. Perell J. described the four unities required for a joint tenancy and defined tenancy in common:

> *23 Under a joint tenancy, the co-owners are called joint tenants. A joint tenancy is distinguished by what are known as four unities: (1) unity of title, the co-owners take under the same instrument; (2) unity of interest, the co-owners take an equivalent interest; (3) unity of possession; and (4) unity of time, the interest of all the co-owners vests at the same time. Joint tenants have identical undivided interests in the same*

property. Each joint tenant holds "totum tenet et nihil tenet" or "per mie et per tout" which means each holds everything and yet holds nothing. The most important feature of a joint tenancy is the jus accrescendi, the right of survivorship. When a joint tenant dies, unless he or she is the last surviving owner, his or her share accrues to the other co-owners.

24 Under a tenancy in common, the co-owners are called tenants in common. The only unity is the unity of possession. The distribution of ownership of tenants in common need not be equal. In other words, one tenant in common might have a 75% interest over the whole and the other co-tenant would have a 25% interest over the whole. The interest of each is "undivided" in the sense that it is an ownership in all of the property.

25 A joint tenancy can be converted into a tenancy in common. A joint tenant has the right to end the joint tenancy, which is known as a severance of the joint tenancy. Severance involves disrupting the continuance of the unities of title, interest, and possession. (The unity of time refers to the initial creation of the joint tenancy and cannot subsequently be affected.) If a joint tenant wishes to sever the joint tenancy, he or she must do so before he or she dies. In other words, it is too late to sever by testamentary disposition because with the death of the co-joint tenant, the right of survivorship would have already vested the property in the survivor.

26 There is at least one circumstance where a third party can sever a joint tenancy. Severance may occur when an execution creditor takes sufficient steps to execute the judgment against the debtor's interest in the property, although the filing of a writ of execution does not by itself result in a severance: Power v. Grace, [1932] O.R. 357 (C.A.); Sirois v. Breton [1967] 2 O.R. 73 (Co. Ct.); Maimets v. Williams (1997), 11 R.P.R. (3d) 276 (Ont. C.A.).

Also, in the recent case of Herunter v. Kostiuk [2011] A.J. No. 790; 2011 ABQB 452, K.D. Yamauchi J. nicely described the basic law of joint tenancy and stated at para 90 et. seq:

90 As is noted by Professor Ziff, a key feature of a joint tenancy is that the joint tenants are 'virtually perfectly equal'. MacKinnon, J. in Speck (Re) (1983), 51 B.C.L.R. 143 (B.C.S.C.) succinctly explains this as:

> *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 ... [Citation omitted.]*

91 That equality is reflected in the 'unity of possession' and 'unity of interest'. Unity of possession means joint tenants can equally use and have access to the whole of the property. It can only exist where "... each joint tenant is entitled to undivided seisin or possession of the whole of the property and none holds any part separately to the

exclusion of the others": Murdoch v. Barry (1975), 10 O.R. (2d) 626 at para. 14, 64 D.L.R. (3d) 222 (Ont. H.C.J.).

92 Unity of interest means each joint tenant has the same interest in a property. In Speck, Justice MacKinnon, when confronted by an attempt to create a joint tenancy with unequal shares, concluded "... what the applicants seek to create is a monster unknown to the law" (at para. 5).

93 Recently, Justice Moen, in Lemoine v. Smashnuk, 2008 ABQB 193, 166 A.C.W.S. (3d) 979, commented on the four unities. In her case, like this one, she had no issue with the unity of time and unity of title. She concluded that no 'unity of possession' exists where only one 'joint tenant' lived in a home and the other never had any plan to occupy that residence (at para. 31). Significantly, Moen, J. also determined that different ownership interests disrupted the 'unity of interest.' She said:

> *32 As to unity of interest, "there can be no joint tenancy between those with interests of a different nature": A. J. Oakley, Megarry's Manual of the Law of Real Property, 8th ed., (London: Sweet & Maxwell Ltd. 2002).*
>
> *33 Although Smashnuk's name appears on the title he has paid nothing for the Property ... He has contributed nothing to the Property. There is nothing in writing except the loan and the Certificate of Title that suggests that he is entitled to any interest in the Property.*
>
> *34 As to contributions to the Property, that is the renovations to the basement, ... Smashnuk cannot claim both payment for the renovations under contract and an interest in the Property because of those renovations.*
>
> *35 He has put himself personally at risk through the CMHC insurance on the loan as discussed above and he is entitled to be protected as to that interest but that does not create a unity of interest as required for a joint tenancy. This means that his interest in the Property is different than that of Lemoine.*

In this case — state facts.

For another recent case on the issue of the four unities which upheld the joint tenancy, see the case of Ramnarine v. Ragoo [2011] O.J. No. 3346 which held that a joint tenancy was not severed by the acts of the deceased and title did pass to the survivor.

State recent NS case re sever JT.

The courts therefore look to the actual facts and the four unities to determine if a joint tenancy exists. The “registered” legal interests and the beneficial interests are not always one and the same. Until challenged however, the registration of the legal ownership is the assumed

beneficial ownership with respect to real property ownership.

Need case here to confirm donees take as joint re personal property

The common law rule for both real and personal property is that the donees of property take as joint tenants. Legislation may override this rule and does in Nova Scotia with respect to real property.

The Real Property Act, R.S.N.S. 1989 c. 385 s 5(1) states:

> *5(1) Every estate granted or devised to two or more persons in their own right shall be a tenancy in common unless expressly declared to be in joint tenancy but every estate vested in trustees or executors as such shall be held by them in joint tenancy.*

This rule confirms the legal ownership of property owned by two or more person is tenants in common unless expressly declared otherwise, such as on a deed using the words "as joint tenants and not as tenants in common", or for personal property by using the words "with right of survivorship (WROS)".

Tenancy in Common- Real Estate

As stated above, another form of shared ownership is tenancy in common, where each owner has a defined share in a property. If the proportionate share is not stated on the deed, the share is deemed to be equal to the other joint tenants.

During life, a tenant in common can pass his or her title to another unless by agreement he has agreed to pass it to another person. A right of first refusal agreement would require a tenant in common who intends to sell his or her share to offer it to the other joint tenants prior to selling to a third party.

When a tenant in common dies, the deceased person's share in the property becomes part of their estate which is then transferred according to their will or under the intestacy legislation.

The number of owners of a property may expand over time if tenants in common further divide the share amongst others. Depending on the nature of the property, problems of possession and ownership can arise.

Mixture of Joint Tenancy and Tenancy in Common

Real estate may be held in combination of joint tenancy and tenancy in common. For example, two couples may decide to purchase real property in all four names. However, each couple may, between themselves, wish that the share of his or her spouse pass by right of survivorship to the surviving spouse and not to either of the other two (couple) owners.

This mixture of Joint Tenancy and Tenancy in Common must be described in the deed to the

parties. There is requirement under the Land Registration Act to reflect the Manner of Tenure in the parcel register for all types of ownership or any combination thereof.

Here is an example of the wording that may be used for a mixture Joint Tenants and not as Tenants in Common:

> **John Martin Land** of Halifax, in the Halifax Regional Municipality, Province of Nova Scotia, **Sally Elizabeth Land**, of Halifax, aforesaid, **Brian James Rivers** of Halifax aforesaid, and **Joan Louise Rivers**, as Tenants in Common, with John Martin Land and Sally Elizabeth Land being joint tenants as between the two of them and Brian James Rivers of Halifax aforesaid, and Joan Louise Rivers being joint tenants as between the two of them.

Joint Ownership- Personal Property

Joint ownership of personal property does not have the same concepts of tenancy (or use) as does real property. There is not much legislative direction on the matter and hence, the principles of common law prevail.

As indicated above, personal property owned by more than one person may have a record of ownership that is not matched with the intended beneficial ownership. When disputes arise over beneficial ownership, we look to the various legal principles to determine this. Peter Rumscheidt's paper will focus on the principles stated by the Supreme Court of Canada in the Pecore case.

When disputes arise between married couples, there is guiding legislation. The Matrimonial Property Act provides the rules of division of real and personal property amongst spouses. I will be discussing the rules a bit later.

Personal belongings or possessions, being material things, (or stuff as we call it) for the most part, are not registered in any public registry. Possession and ownership can become confused and is often the subject of litigation, most often between separated spouses and families after death of one or more parents.

The ownership of vehicles and some boats are registered in a public registry. On the face of the record, in such registries, there is no distinction as to whether the co-ownership is joint with right of survivorship or not. However, these registries treat the ownership as joint with right of survivorship and will transfer ownership on their records with the presentation of a death certificate.

Similarly, financial institutions record ownership of bank accounts and investments as joint and by their agreement they state that they treat joint accounts as having a right of survivorship so that they are not liable to third parties who may claim an interest in the account. The account agreement and websites contain these statements which are, in my opinion rarely read by an account owner. he law, however treats beneficial ownership as something broader that what is

shown on the face of the record.

Here is an example of what can be found on the Royal Bank of Canada`s website regarding joint bank accounts:

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The law of joint ownership has been decided by the Supreme Court of Canada in Pecore v. Pecore.(add citation**) The Pecore decided that the beneficial ownership, as opposed to legal ownership, may not be the same due to the application of the doctrines of resulting trust and presumption of advancement.

This paper and the paper of Peter Rumscheidt being given together will focus on the effect of joint property and how the doctrines of resulting trust and presumption of advancement can provide different results in different cases, regardless of the legal registration of ownership that is joint with another.

Let's define what is meant by resulting trust and presumption of advancement as these concepts are critical to understanding the true effect of joint ownership. Keep in mind, each case may depend on it's own facts. Although we have general principles to apply, the facts can affect the outcome.

Resulting Trust

Defined by Chief Baron Eyre in Dyer v. Dyer (1788), 2 Cox 92, 30 E.R, 42 at 43:

> *The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the name of the purchaser and others jointly, or in the names of others without that of the purchaser; whether in one name or several, whether jointly or successive, result to the man who advances the purchase- money.*

The theory behind the doctrine is that equity presumes bargains, and not gifts. Therefore, the person who receives the title to property gratuitously has the burden of proving that a gift was intended. The gift is not presumed. The presumption of that a gift was not intended unless proven otherwise. The key is show the gift was intended and thus intention is crucial.

Presumption of Advancement

The presumption of advancement is the opposite to the presumption of resulting trust. That is, a gift is presumed under this doctrine. Historically, this presumption was applied much differently prior to the Pecore case decided by the Supreme Court of Canada in 2007. This presumption now applies in the case of joint ownership with a minor child as the law presumes a parental obligation to a minor child.

In the case of presumption of advancement, any gift to a minor child or a registration of ownership with a minor child (which has other detrimental issues) is presumed to be an advance of that child's eventual inheritance or in furtherance of the parent`s obligation to support the child.

How to hold title - Considerations for use of various type of ownership

When advising clients, we are often consulted regarding the best method of holding title and the effect of same. Or, we are advising clients how to best hold title to achieve the property gifting on death. The advice will differ depending on the circumstances including the client's family and financial relationship with the other owners.

a. Spouses

Most spouses in their first relationship hold title to real and personal property in both names, unless one of the spouses is subject to risk of claims by creditors or professional negligence. When holding title in both names, the most common registration is that of joint ownership. The beneficial reasons to hold title in both names are as follows:

i) the right of survivorship intended and desired;

ii) probate of the asset will not be required on the death of one joint owner. This saves Probate taxes, legal costs of Probate, smooth transfer of ownership on death.

iii) In the case of real property, claims of creditors against the deceased spouse made after death will not attach to the property . It is important to remember that creditors who have registered judgments against one spouse prior to death of that spouse is not released. Under the Land Registration Act, the lawyer for the surviving spouse must do a judgment search against the deceased spouse before recording a Form 21 to change the registered interest in the parcel register to the name of the surviving spouse.

iv) the asset is removed from the estate making claims by dependents under the Testator`s Family Maintenance Act difficult;

The financial institutions tend to recommend joint ownership of personal property, namely bank accounts, guaranteed investment certificates, mutual funds and other forms of investment. This may be beneficial in some situations but not in others. Most lay persons do not understand the issues and consequences of joint ownership and it appears that many banks only know banking law. As lawyer, we must advise and educate our clients in this area as it is one that causes a great deal of misunderstanding, confusion and litigation.

Spouses married for a second (or third etc.) time may consider holding title to real property as tenants in common or in the name of one spouse only depending on who provided the purchase money and based on the parties wish to maintain separation of property after marriage. A marriage contract is required in such situations where the spouses do not wish the provisions of

the Matrimonial Property Act to apply to them, that is, a prima facie equal division of assets or the designation of a home as a matrimonial home. The said Act applies on separation, annulment, divorce or death.

Spouses married for a second (or third etc.) time may consider holding their financial assets in their individual names, providing the ability to fund their estate to be distributed by their Last Will and Testament. When parties have children from other relationships, the ownership of their real and personal property requires a thorough analysis of the family dynamics, and their assets, to ensure that there are sufficient assets in their estate to fulfill their obligations to children and spouse and, importantly to reflect true intentions.

The Matrimonial Property Act (MPA) and the common law determines the ownership between spouses for personal property. The MPA also defines the rights of spouses to real property depending on whether the property is a matrimonial home or not.

Further on, I will discuss how s. 21 of the MPA deals with the presumptions of resulting trust and presumption of advancement in relation to personal property of the spouses which is jointly registered.

Non Spouses- Joint ownership

Family members may own real or personal property together. The ownership of the real property is defined in the deed as joint tenancy or tenancy in common. If the deed is silent as to manner of tenure, it is tenancy in common as noted above.

Some of the considerations to ask when determining how to own real estate within a family situation (think cottage) are:

1. If a joint tenancy is chosen:
   a) Whether the parties intend and intend the right of survivorship to apply
   b) Does the family understand that eventually, one surviving owner taking all. One family will be able to pass that family cottage to his or her children but the cousins who lost their parent earlier lose out. This is not necessarily a bad thing. Life is simpler with fewer owners.
   c) the ability of the parties to cooperate and work together,
   d) the financial ability of the parties to maintain the property,
   e) the resolution of disputes;

2. If tenancy in common is chosen:
   a) whether it is reasonable or practical to permit a family member to transfer his or her interest during life or on death to others, with or without an agreement regarding such transfer,
   b) the ability of the parties to cooperate and work together,
   c) the financial ability of the parties to maintain the property,

d) the use of the property by successors;
e) the resolution of disputes;

Regarding ownership of personal property whether it should be joint or solely held, these are some of the factors to consider:

1. Does the donor intend to make an immediate gift of the asset?
2. Does the donor intend to make a gift on death?
3. What are the relative contributions of the parties to the assets held in joint ownership- in other words, who paid the purchase money
4. Saving of Probate taxes, legal costs of Probate and ease of transfer on death

Non spouses- business partners or joint venture

Under the Partnership Act, where land is partnership property, it is treated as personal property:

> *25. Where land or any interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners, including the representative of a deceased partner, and also as between the heirs of a deceased partner and his executors or administrators, as personal or movable and not as real estate. R.S., c. 334, s. 25.*

Most partners will maintain separate accounts for their partnership property for business efficacy. The account often has a business name associated with it to distinguish it from other personal accounts.

On the death of a partner, the account usually remains intact with a change of name of partners filed with the bank and at the Registry of Joint Stock Companies. The partnership agreement, if one exists, will determine the rights of a deceased partner to his or her share of the funds in the account.

Alternatives to holding property jointly.

During one's lifetime, there are alternatives to holding property jointly when a gift is intended. The most common are:

1. Alter Ego (AE) and Joint Partner (JP) Trusts-
   describe AE Trust here
   the settlor must be at least 65 years of age;

2. Intervivos Trust not qualifying as AE Trust or JP Trust
   describe trust here
   describe tax issue with highest marginal tax rate
   minors, kiddie tax

3. In trust accounts
describe that they are not real trusts
child can get at age 19
invest in capital assets to avoid tax until money can be paid out after age 18 (income tax act age)

Other than a Will, there are alternatives to holding property jointly which provide for a gift on death.
The most common are:

1. Beneficiary Designations:
a) Registered Retirement Savings Plans (RRSP) or Registered Retirement Income Fund (RRIF);
b)Tax Free Savings Accounts (TFSA)
c) Life Insurance with designated beneficiary or insurance trust;
d) Personal wish list;

Beneficiary designations:
Beneficiary designations gift property outside of a person`s estate and therefore, do not form part of the estate in probate. The beneficiary is designated in the plan itself or the Will may contain the designation. Section 6 of the Act states:

> *Will*
> *6 Where a designation is contained in a will, the designation, notwithstanding Section 23 of the Wills Act, has effect from the time of its execution. R.S., c. 36, s. 6.*
>
> *Invalid will*
> *7 A designation contained in an instrument purporting to be a will is not invalid by reason only of the fact that the instrument is invalid as a testamentary instrument, and it may be revoked or altered by any subsequent designation. R.S., c. 36, s. 7.*
>
> *Revoked will*
> *8 Where a designation is contained in a will and subsequently the will is revoked by operation of law or otherwise, the designation is thereby revoked. R.S., c. 36, s. 8.*

The types of plan that are covered by this Act are defined in section 9(1) *:*

> *Savings plan*
> *9 (1) In this Section,*
>
> *(a) "plan holder" means a person who has entered into a savings plan;*
>
> *(b) "savings plan" means a retirement savings plan, a retirement income fund, a tax-free savings account or a home ownership savings plan as each is defined in the Income Tax*

Act (Canada).

3. Spousal Claims
   a. on jointly owned property after death of spouse joint owner
   b. Limits on Testamentary Freedom
   c. s. 21 MPA resulting trust and Pecore case
   Presumption of advancement abolished in Nova Scotia by s. 21 of the Matrimonial Property Act, R.S. N.S. 1989, c. 215, s. 21(1) which states

Presumption respecting ownership between spouses

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).

Application of subsection (1)
(2) Subsection (1) applies notwithstanding that the event giving rise to the presumption occurred before the first day of October, 1980. R.S., c. 275, s. 21.

   d. TFMA

4. Tax Implications of owning joint property

-deemed realization of all capital assets at fair market value by reason fo the death of the owner unless there is a tax-free transfer (deferral) to spouse or there is an exemption for the asset, the principal residence or the shares of a small business corporation or farm, fishing licence or woodlot.

-tax payable by estate of deceased out of estate assets in probate, namely those which pass to executor, not payable by surviving joint tenant

a. Spousal rollover
b. Primary residence
c. International Exceptions-US Property

The Testator`s Family Maintenance Act provides a possible remedy for a child or spouse who has been left out of a will or has been given less than expected. These will be expanded on further later on.