

# ALL IN THE FAMILY: Various Issues in Family Transfers

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# Joint Tenancy/Tenancy In Common

## JOINT TENANT

- *The Real Property Act* (R.S.N.S. 1989 c. 385 s.5) provides that unless the Deed states it is a joint tenant, it creates a tenancy in common. A joint tenant Deed applies to two or more persons and on a death of one of the parties passes to the survivor.
- Joint tenancy, with its associated right of survivorship is a common law doctrine and one of the oldest forms of non-probate transfer. A joint tenancy is a form of property ownership whereby two or several parties own the property in question; each holder has a legal title to the whole at any one time and each has a right of survivorship.
- Upon the death of one party to the joint tenancy, his or her interest is extinguished leaving title in the surviving joint tenant. When the joint tenant dies, the final survivor takes the property absolutely. The deceased joint tenant has no interest in the property that can fall to probate since the joint tenants owned the property in whole from the outset.
- Joint tenancy with the right of survivorship constitutes an effective will substitute, if there has not been any act which constituted a severance of the joint tenancy into a tenancy in common. However, joint tenancy is not without its perils.

## TENANT IN COMMON

- If the Deed is silent, the tenancy will be a tenant in common. On the death of one of the parties, the interest of the deceased party will go to their estate.



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# Why Add Children, Spouses and Others to Property?

- Clients typically have five (5) objectives in planning for their property:
  - keeping the property in the family;
  - reducing tax;
  - avoiding conflict within the family;
  - being fair to all; and
  - protecting against creditors, including spousal creditors.

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# Tax Alert!!!

- Capital Gains Tax must be considered on every transfer
- 50% of the gain is taxed by being added to the income of the transferor in the year of transfer
- $\text{Gain} = \text{Fair Market Value} - \text{Adjusted Cost Base}$
- $\text{ACB} = \text{cost of purchasing property} + \text{costs of capital improvements} + \text{costs of disposition}$
- Gifts are deemed dispositions



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# Transfer Options for Recreational Property

- Ultimately the options for transferring a recreational property are as follows:
  - making an *inter vivos* gift, as joint tenants or tenants in common;
  - making a gift by will, as joint tenants or tenants in common;
  - gifting a remainder interest;
  - transferring the property into joint tenancy with the client and one or more persons;
  - transferring the property to a trust;
    - Alter ego trust/Holdings Trust/Bare Trust/Testamentary Trust
  - selling the property; and
  - including a clause in one's will defining rights and obligations.

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# Transferring Property to a Trust

- Alter Ego Joint Partner Trusts
  - Over 65
  - Tax neutral
  - Control of ultimate disposition
- Holdings Trust
  - Taxed on the way in unless principal residence exemption applied
- Bare Trust
  - Used to control whether a disposition and associated tax
- Testamentary Trust on Death
  - Can be time limited
  - Can have estate pay expenses
  - Can direct that children to agree on disposition or sell



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# Deed of Conveyance

## Warranty Deed/Quit Claim Deed

### WARRANTY DEED

- Section 15 (2) of the *Conveyancing Act* (R.S.N.S, 1989 c.97 s.15 (2)) sets out the covenants which must be included in a Warranty Deed, which provide for quiet enjoyment, good title, right to convey, free from encumbrances and further assurances.

### QUIT CLAIM DEED

- A Quit Claim Deed is intended only to pass any title or interest which the Grantor may have in the property without any assurance of a valid title. A Quit Claim Deed is effective in conveying the fee simple, provided the Grantor has good title to the property, but there are no warranties or covenants of title.



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# Deed Transfer Tax

## Deed transfer tax exemptions

- 109 (1)** Where a deed transfers property
- (a) between persons married to one another;
  - (aa) to a municipality;
  - (b) between persons formerly married to one another, if the transfer is for the purpose of division of marital assets; or
  - (c) by way of gift, notwithstanding that
    - (i) the deed transfers property subject to an encumbrance, including a mortgage or a tax lien, and the Grantee assumes the amount of the encumbrance, including interest and expenses, or
    - (ii) there is a nominal consideration therefore; it is exempt from deed transfer tax.
- (2)** Where
- (a) a deed merely confirms, corrects, modifies or supplements a deed previously given;
  - (b) there is no consideration beyond one dollar; and
  - (c) the deed does not include more property than the deed previously given.



# Joint Tenant Issues

- 1) The loss of control over the property;
- 2) The unilateral severance of a joint tenancy that can result in several unwelcome outcomes, such as becoming a co-owner with a stranger;
- 3) The potential of defeating the client's intentions with regard to the distribution of his or her estate;
- 4) Unfair treatment among multiple joint owners, as only the surviving joint owner and his or her heirs ultimately benefit;
- 5) Equal ownership interests, may give rise to disagreements regarding the payment of expense and the use of the property;
- 6) The potential matrimonial property implications;
- 7) The potential exposure to claims of creditors of the new joint owner(s);
- 8) The surviving joint owners may have to apply to court for a partition and sale application if they are unable to agree on the use of the property and there is no co-ownership agreement in place; and
- 9) Tax implications.



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# Severance of Joint Tenancy

The three most common ways to sever a joint tenancy are:

1. Transfer by one of the parties to a third party. For persons who are married there must be compliance with the *Matrimonial Property Act*.
2. By an agreement between parties.
3. In the absence of an Agreement, one of the parties who own the land can apply to the court under the *Partition Act* (R.S.N.S. 1989 c.333).

## Land subject to a partition

4. All persons holding land as joint tenants, co-parceners or tenants in common, may be compelled to have such land partitioned or to have the same sold and the proceeds of the sale distributed among the persons entitle, in the manner provide in this Act. R.S., c.333. s.4.

## Right of action

5. Any one or more of the persons so holding land may bring an action in the Trial Division of the Supreme Court for a partition of the same, or for a sale thereof, and a distribution of the proceeds among the persons entitled. R.S., c. 333, s.5.



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# Presumption of Advancement v. Presumption of a Resulting Trust

- The courts have traditionally relied on certain presumptions and use them as guides when insufficient evidence exists to definitively ascertain the deceased's intentions. Historically, the *Presumption of a Resulting Trust* and the *Presumption of Advancement* are two competing presumptions that come into play when money held in a joint account is being fought over.
- The *Presumption of a Resulting Trust* stems from the idea that people make bargains, they do not make gifts. Based on this presumption, unless the evidence proves otherwise, the court's starting point is that if "A" deposits all the money into a bank account held jointly with "B" then the court assumes that "B" would not keep the money when "A" dies. The court presumes that "A" intended that money to be held in trust for "A's" estate.
- The *Presumption of Advancement* stems from the idea that people give gifts to their children. So that when "A" deposits money into a joint account with "A's" child the court presumes it was with the intention that "A's" child should receive that money when "A" dies. This presumption is based on the idea that Parents recognize an obligation to the support children and advance monies to them. Based on this presumption some courts have held that, unless the evidence proves otherwise, if Dad deposits all the money into a bank account held jointly with his child then the court would presume that he intended that money to belong to that child when the father died.



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# Court Treatment of Jointly Held Assets

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

- An aging father gratuitously placed his mutual funds, bank account and income trusts in joint accounts with his daughter. Upon his death, a balance remained in the accounts. It was not disputed that the daughter took legal ownership of the balance of the accounts through the right of survivorship. The question was whether the father intended to make a gift of a beneficial interest in the accounts to the daughter alone or whether he intended that his daughter hold the assets in the accounts in trust for the benefit of this estate to be distributed according to his will. As expected, the daughter on the accounts with the decedent saw it one way, the heirs under the estate saw it another way. The Supreme Court agreed with the lower courts that the father intended a gift and held that his daughter could retain the assets in the accounts concluding that there is a presumption of resulting trust, but the presumption was rebutted.

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# Courts Now Apply *Pecore* to Real Property

*Mroz v Mroz*, 2015 ONCA 171

- In *Mroz* an elderly mother transferred title to the family home jointly to herself and her daughter, at the same time executing a Will that said the gift of the house was contingent on the “co-owner” selling it within a year of the testator’s death and using the proceeds to pay bequests to the deceased’s grandchildren. The “co-owner” sold the house and kept the proceeds. Applying the Supreme Court of Canada’s *Pecore* decision, the Ontario Court of Appeal found that the co-owner had to rebut the presumption of a “resulting trust” on gifts to an adult child. A transfer into joint ownership is a form of gifting, and the presumption of resulting trust means that an adult child co-owner is deemed to hold the gifted property in trust for his or her parent. The court decided that execution of the Will was compelling evidence that the deceased had not intended to gift an immediate beneficial interest to her daughter, so in this case the presumption was not rebutted. The result was that the house was an asset of the deceased’s estate governed by her Will. The implication (not addressed in the decision) is that the value of the house would have to be included in calculating the estate administration tax (“probate fees”) owned when the deceased’s Will was probated.

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# Agreements Required

- Co-owner or Co-Tenancy Agreement
- Trust Indenture
  - Can refer to the Will for direction regarding distribution on death
- Cohabitation Agreement
- Marriage Contract
- Separation Agreement
- Will
- Buy/Sell Agreement

# Impartiality/Conflict of Interest/ Independent Legal Advice

## Rule

- A lawyer has a duty not to
  - (a) Advise or represent both sides of a dispute; or
  - (b) Act or continue to act in a matter where there is or is likely to be a conflicting interest, unless the lawyer has the informed consent of each client or prospective client from whom the lawyer proposes to act.

## Guiding Principles

- What is a conflicting interest?
  1. A conflicting interest is one that would be likely to affect adversely the lawyer's judgement or advice on behalf of, or loyalty to a client or prospective client. Conflicting interests include, but are not limited to, the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to any other client, whether involved in the particular transaction or not, including the obligation to communicate information.



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DATE:

FROM:

This is to confirm that I/we have been advised by \_\_\_\_\_ that he/she is representing both the Vendor and Purchaser in this transaction.

This will also confirm that I/we understand that if a conflict develops between the parties, that we will be required to see a new layer and that no fees will be payable to \_\_\_\_\_ for legal work performed on the file.

\_\_\_\_\_  
\_\_\_\_\_



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# Summary of Final Considerations

- Income tax considerations
- Wills
- Powers of Attorney
- Health Care Directive