

Joint Tenancy Declarations



By Brian Madigan LL.B.

Now that the Supreme Court of Canada has changed the law, what are you going to do about it?

Just a quick summary about the law. There are basically two methods of holding title by co-owners of property:

- 1) tenants-in common, and
- 2) joint tenancy.

If two parties own property together, ordinarily it will be held as tenants-in-common. This is an undivided interest in the property, like partnership property. However, when it comes to joint ownership, there is a special deal between the owners. If one dies, then the surviving owner inherits the deceased's share of the property. For obvious reasons, joint tenancy is usually restricted to family situations, either married couples or parents and children.

Certainly, joint tenancy with right of survivorship had its origins in feudal England right after the Norman Invasion in 1066. In fact, some historians argue that it may even have pre-dated the common law. In any event, you get my point! Joint tenancy with right of survivorship has had a long history.

So, let's fast forward to May 2007. The Supreme Court of Canada changed over 1,000 years of established legal history with the stroke of a pen in two precedent setting cases, *Pecore v. Pecore* and *Madsen Estate v. Saylor*.

The two cases were similar in nature. An elderly father opened a joint account with his daughter. Upon his death, the daughter claimed that she inherited the proceeds of the bank account by right of survivorship. The other siblings claimed that this was not the case, and argued that just because the legal documents said "joint ownership" did not mean that the father intended to give the money to the surviving joint tenant. This was purely a procedural step to assist in the administration of the account throughout the father's lifetime and with his estate, after his death. This was an interesting and novel argument.

The Court looked at both cases, and concluded:

- 1) in *Pecore v. Pecore* the daughter should have the money, and
- 2) in *Madsen Estate v. Saylor* the daughter received it in trust for the beneficiaries of the estate.

Even though two different conclusions were drawn, each case turned on its own facts. The real issue at stake was the intention of the father. What did he intend, when he put the account in joint ownership?

The Court looked to a number of factors with respect to intention, including, the bank documents, other documents, the relationship between the parties, the existence of a power of attorney and the tax treatment of the income.

But, what's the real meaning of these cases? What's the next step? Estate practitioners should now prepare a Document entitled "Statement of Intention". Make it absolutely clear! **Is inheritance intended or not?** If so, say it. Simply, put it in writing!

Although these cases applied to bank accounts, the concept has its origins in the conveyancing of real property. So, real estate agents need to be aware of the new law. Just because the deed says it's joint tenancy, doesn't mean that the survivor will inherit.

This is precisely where a **Statement of Intention** will be helpful in real estate practice. Both cases involved parents and children and not married couples. In all likelihood, with married couples there is a "quid pro quo" and the presumption of survivorship will continue. However, I said that, not the Supreme Court of Canada, so be cautious and have a Statement of Intention signed here as well.

The two cases represent the law of the land in Canada. They are precedents that will apply to all lower Courts. In addition, you might find that Courts in other common law jurisdictions will start following these same cases. It makes sense in a modern society where legal documentation has become quite sophisticated. Over one thousand years ago, joint tenancy and the right of survivorship were quite sophisticated themselves. The concept had to be written out by long-hand, one document at a time in Deeds, Wills, and Trust Indentures. Today, just a click on a word processing program can produce the Statement of Intention.

So, if it were up to me, **I'd sign one NOW.**

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