

## Joint Tenancy: Some problems

### Joint tenancy

By Brian Madigan LL.B.

While there are some advantages to joint tenancy, there are also some problems. The primary advantage is the ease of administration of a deceased's estate. It is simple and uncomplicated, nothing more than the registration of a death certificate is required to effect the transfer.

However, with joint tenancy there are two presumptions that need to be considered:

- 1) the presumption of a resulting trust, and
- 2) the presumption of advancement.

### Resulting Trust

If one party transfers property to another gratuitously, then the law will assume that the transfer was intended as a trust and not as a gift. The person holding title would now do so, for the benefit of the transferor as Trustee and not for themselves on their own account. So, the transfer was for "legal title" only and not "beneficial title". This is only a presumption. It can be satisfied if the contrary intention can be proved. The obligation would be upon the recipient to satisfy a Court that there was truly a "gift".

### Advancement

There is another common law doctrine that needs to be considered. In fact, it conflicts with the resulting trust doctrine, or perhaps it could be considered as an amendment or qualification. It is the doctrine of the "presumption of advancement". It was developed several hundred years ago to support gifts made by fathers to their children. It was presumed that the father would have a legal obligation to support the child and would therefore have intended the transfer as an outright gift. So, the principle of advancement could be used to defeat the principle of the resulting trust in such circumstances.

As time went by this doctrine was extended to include wives and others who were dependent upon the grantor.

Modern legal jurisdictions all recognize that this doctrine is antiquated. In some cases, it has been abolished, reduced or modified by the Courts or by legislators.

The problem is that in Ontario, it's still here.

So, let's look at a rather common situation. An elderly parent holds title to the family house. The children have all grown up and moved out. Eventually, it seems

reasonable to undertake some sort of estate planning. This usually involves a Will, Powers of Attorney, beneficiary nominations, and possibly the transfer of the family home. So, someone comes up with the bright idea that the title should be conveyed to the parent and one of the children in “joint tenancy”. This will eliminate probate fees on the value of the house and might eliminate the need for probate altogether.

Let’s assume that Joe (the father) conveys the title to Maureen, his daughter in joint tenancy. But, Joe has two other children, Robert who is a workaholic and Jennifer who lives in the United States. There is no question that Maureen is the one who is called upon to look after dad’s daily needs, groceries, housekeeping, trips to the doctors etc.

This can’t go on forever, and it doesn’t. Joe dies. So, who gets the property?

Maureen claims it’s hers. It was in joint tenancy. Robert and Jennifer say it should be split three ways. They claim the doctrine of resulting trust should apply. Maureen is presumed to be a Trustee and dad the beneficiary. Maureen counters with the doctrine of the presumption of advancement. She is a child of Joe, and he must have intended to provide her with an additional benefit. After all, she was ‘the one’ caring for him. And, so it goes. In fact, basically all the way to the Supreme Court of Canada.

All these issues are presently before the highest Court in Canada for consideration and resolution. The Court has reserved judgment in *Pecore vs. Pecore*, and *Brooks, Estate Trustee vs. Saylor*.

In the meantime, while we are awaiting a decision, there is some guidance from the Ontario Court of Appeal. That Court said that you have to look at the whole of the evidence. Look at the bank accounts, look at other relevant factors and make a determination about Joe’s true intention as demonstrated by his behaviour. Only, if you can’t figure it out, apply the two legal doctrines. That seems to make sense. But, let’s wait to see what the Supreme Court of Canada says before we draw any unnecessary conclusions.

One word of advice while we’re waiting: document dad’s intentions!

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