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# JOINT ASSETS AS A PLANNING DEVICE – TOOL OR TRAP?

By Arielle Lavender and RBS

Joint assets are a topic shrouded in misinformation. It has been over a decade since the law underwent a seismic shift in this area, yet joint assets continue to be used casually with little appreciation for the risks.

Holding a joint asset with another person has historically been heralded as an estate planning tool that would help avoid probate costs and was seen as easy, efficient, and uncomplicated. In recent years, however, the ease with which joint assets operate has been dramatically altered. Though their use as part of a comprehensive estate plan remains viable, it is not for those who are paperwork-averse.

**The Basics**

**What Is a Joint Asset**: A joint asset is an asset, such as a bank account, home, or investment where you own the whole asset together with another person(s). No owner is entitled to specific percentage of ownership of the asset. This is as opposed to an asset owned as "tenants in common".

**Right of Survivorship**: The biggest and most well-known benefit of a joint asset has been that if one of the joint owners dies, the other owner(s) automatically become the remaining owner(s) of the joint asset. This inheritance mechanism is called the right of survivorship – no muss, no fuss, no probate process or probate fees for that asset.

The right of survivorship is presumed to apply in respect of joint assets between spouses.

**Presumption of Resulting Trust:** The right of survivorship is **not** presumed to apply between anyone other than spouses, such as between parents and children or between siblings.

Rather, the presumption of resulting trust is the starting point. This means that the individual who was added to the assets as joint owner (most commonly a child) is presumed to hold the asset in trust for the original owner and, when that original owner passes, the estate of the original owner (typically a parent).

This occurs because the law presumes that if something is given without receiving value in exchange, the giver does not intend for the recipient to have the item for the recipient's own benefit. Rather, the law presumes that the recipient is only holding it in trust for the giver (and by extension the giver's estate when

the giver dies). This can be rebutted by evidence that the original owner intended to give it to the recipient as a gift and it is a 'true' joint asset, with the onus of proof usually lying with the person who was added to the joint asset.

**Gift of Right of Survivorship**. A decision by the Supreme Court of Canada in 2007 created the ability to gift just the right of survivorship. This type of joint asset is now commonly referred to as a "Pecore" joint asset, flowing from the name of the case.

It is, in effect, a hybrid. It avoids the probate aspect because it has the right of survivorship, but the gratuitous owner (ie the person who was added to the asset) holds it for the benefit of the original owner during his or her lifetime.

**The Trap**

**The Confusion.** Having these different types of joint assets creates chaos in the event of a falling out between the owners or the death of the original owner, and consequently much litigation. The hot topic is what type of joint asset was created.

The way to avoid these questions is to ensure that if the asset was yours and you have added a joint owner(s), that you properly document your intention as to the type of joint asset being created.

**A Gift is a Gift.** If you choose to gift the right of survivorship, keep in mind that it is like any other gift – you cannot take it back. Even though the right of survivorship is not triggered until your passing, unlike a Will, you cannot change it.

**Loss of Control and Exposure to Creditors, Taxes, and Family Law Claims.** The moment someone else's name is on the asset, regardless of the documentation created to evidence the intention as to the type of joint asset created, some control is lost and some risk is introduced.

For example:

- If my name is on your bank account as a joint owner, I could empty the account. You may be able to try and recover the money from me, but I may have already spent it and, if I am your child, the damage to family relations is likely permanent.
- If my name is on your home as a joint owner, you may have jeopardized part of your access to the capital gains exemption in respect of your home. Further, if this was the first time I had owned real estate, I have likely lost my access to the first time homebuyer's exemption for BC's property transfer tax. Worse yet, you could not sell or mortgage the property without my signature. I could

effectively hold your ability to deal with the property hostage.

- If my name is on any asset and I am sued by a creditor (my restaurant goes bankrupt, someone slips and falls on my sidewalk, I injure someone in a car accident beyond what my insurance coverage will pay…) or my spousal relationship ends, my creditors and spouse may assert a claim to all assets where I am an owner, including your assets where I am a joint owner.

**Tool, but is it the Most Appropriate Tool?**

When deciding whether to make an asset joint, ask: what am I trying to achieve?

- Assisting with the management of my assets and financial affairs if I am incapable? The better tool is an Enduring Power of Attorney.
- Estate management, such as keeping my affairs private on my death, avoiding probate fees, and minimizing the risk of my Will being contested? This may work if properly documented. So too may trust planning.

Assessing *why* a joint asset is being considered can assist in determining whether it's the best (or only) vehicle to achieve your goals. If making an asset joint is the right tool for you, then it is crucial to document your intention and your rights in relation to the asset. Undertaking the act of making an asset joint is only one step; to ensure it operates as intended and to protect the original owner, documenting the intention and inserting safeguards is the pivotal second step.

**For more information, please contact any member of our Estate & Wealth Advisory team.**

*Important Note: The information contained herein is premised on the laws of British Columbia as at August 1, 2019. It should not be treated by readers as legal advice and should not be relied on as legal advice. Detailed legal counsel should be sought prior to undertaking any legal matter.*