

LITIGATION SERVICES

Joint Ownership ~ to be or not to be

Many people open or transfer existing bank accounts into joint names with one or more of their children as an estate planning tool. The idea is that the surviving joint owner of the account, which is more likely than not to be the child, will assume full ownership of the account upon the death of the other joint owner by the right of survivorship. In this way, the plan is for the funds in the account at death to be directly "transferred" to the survivor outside of the deceased's estate, thereby avoiding probate fees on those funds and protecting them from challenge under the Wills Variation Act.

Two recent decisions by the Supreme Court of Canada, however, have clarified that putting bank accounts into joint names may not achieve the desired estate planning goals. In particular, the Court confirmed that where one joint account holder contributes all of the funds to a bank account, but opens the account as, or transfers ownership of the account into, a joint account with his or her adult child, there is a legal presumption that the adult child holds the beneficial interest in the balance of the funds in the account as of the date of the death of the parent, in trust for the estate of the deceased parent. This is called, in legal jargon, a "presumption of resulting trust." In this way, the balance of the funds in the account would be payable to the beneficiaries under the deceased's will, or where there is no will, pursuant to the intestacy provisions under the Estate Administration Act. The funds, as part of the deceased's estate, would also be available for redistribution under the Wills Variation Act against the express wishes of the deceased parent as expressed in his or her will.

This situation is in contrast to the situation where a parent opens a bank account as, or transfers an existing bank account into, a joint account with his or her minor child. In that situation, there is a legal presumption that the parent intended to gift the account balance as at the parent's date of death to the child.

It is important to remember that the legal presumptions above noted are just that presumptions. They can be rebutted by evidence relating to the parent's intention in placing the account into joint names. It is also important

to note that, while the Supreme Court of Canada was dealing with joint bank accounts, the same presumptions would likely apply to all jointly owned assets purchased and maintained solely by the parent, including such things as real property and automobiles.

Evidence that may be considered in determining the parent's intention, and whether the presumption of resulting trust is rebutted includes:

1. whether the intention of the parent is expressed in writing or otherwise. It would be a good idea for the parent to write down his or her intention in creating the joint ownership and leave that note in a safe place, perhaps along with a copy of his or her will.
2. anything in the bank documents used in setting up the joint account that specifically suggests the parent's intent regarding the beneficial interest in the account;
3. who controls and uses the funds in the account after the set up or transfer of the account into joint names;
4. whether the parent grants a power of attorney to the child who is or becomes the joint account holder; and
5. how the parent treats the income earned on the funds in the account for tax purposes after the transfer into joint tenancy.

The Supreme Court of Canada has, however, made it clear that a number of these factors may only be of marginal assistance and will not be determinative of the parent's intention. Rather, it is the totality of the evidence that will determine his or her intention.

If you are an executor under a will dealing with assets jointly owned by the Testator and another person, a person who jointly owned assets with a deceased person, a disinherited child aware that your deceased parent held some of his or her property jointly with another or a beneficiary under a will aware that the deceased held some of his or her property jointly with others, you may well have some complex legal issues to consider and rights to enforce. If you are a person contemplating using the joint ownership of assets as an estate planning tool or for some other reason, you may wish to consult a lawyer before creating the joint ownership.

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