

Joint Accounts and Death – Who owns it?

As Canadians get older many are turning to their children to assist them with their personal finances. One solution that is sometimes utilized, is to add the child to the parents' accounts as a joint account holder. This allows the child to make withdrawals, pay bills, buy groceries, and generally make life a little easier for their parent. Often such an arrangement will be completely separate from a will and is meant to exist only during the life of the parent. In other cases, it may be the intention of the parent that the money be separate from their estate and go directly to the child when they pass on. Which intention the parent held can matter a great deal and raise serious legal considerations.

When assets are passed from one individual to another without compensation there are a number of legal consequences that arise. Historically, gratuitous transfers were used to skirt highly restrictive land laws in England. For example, under the rule of primogeniture, freehold land had to pass to the eldest son. If a parent wished to provide for a daughter they would transfer a portion of their land to a trustee who would hold it for the benefit of the daughter. The danger however, was that once title passed, the new owner could simply claim that it was a gift and the daughter had no interest. The law corrected this situation with the *resulting trust* which provides that when assets are given gratuitously they are presumed to be held by the new owner in trust unless they can prove otherwise.

One situation where the presumption of resulting trust did not apply however, was where a father gave an asset to his son. In these circumstances the courts instead decided that because it was a father's moral duty to advance his children in the world, it is more natural to presume that the transfer was in fact a gift unless evidence showed otherwise. Transfers from a husband to a wife are likewise considered to be gifts. This is called the presumption of advancement.

For many years, courts in Canada struggled with how to apply legal rules developed in Victorian England to the modern realities of Canadian families and estates. As more and more baby-boomers were made joint-account holders for the purposes of caring for their aging parents it became clear that the law needed to be clarified.

The Supreme Court of Canada would do this in 2007 with its decision in *Pecore v. Pecore*. In that case, a father transferred a large portion of his wealth into a joint account with his daughter. Doing so meant that the daughter could avoid probate fees and generally make after-death disposition of the estate less expensive. When the father died the monies in the account transferred to the sole ownership of the daughter, reducing the value of the estate. The daughter's ex-husband, who was granted a portion of the estate in the father's will commenced litigation to recover the money. The question before the court was which presumption applied. If the presumption of a resulting trust applied then the daughter held the money in trust for the estate and her ex-husband would receive part of it. However, because it was a transfer from parent to child, if the presumption of advancement applied the money was rightfully hers.

The majority of the Supreme Court decided that the presumption of advancement does not apply to adult, independent children. This is more in line with the reality of what these accounts are used for, typically the care of the adult, not the advancement of the child. As a result, assets in joint accounts of a parent and adult independent child, are presumed to be held in trust by the surviving account holder for the estate. If the parent's wish is for the joint account holder to have ownership of the assets on their death it is imperative that those intentions are made perfectly clear in order to rebut the presumption of a resulting trust. The Supreme Court

noted that evidence of this intention can be found in bank documents, tax treatment of the account, power of attorney documents and the control and use of the account. However, by far the best proof of intention is of course a clearly drafted will.

Setting up a joint account between children and elderly parents can be an important tool in elder care. Nonetheless, it is important to understand that without proper planning advice the intentions of the parent may not be respected when they pass on, leading to litigation between family members. It is very important that intentions are made clear. Taking even small legal steps can ensure the best outcome for a family.

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