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Joint Ownership as a Probate Planning Strategy – The Cautionary Tale of *Jackson v Rosenberg*

October 31, 2023

By Jennifer A.N. Corak

In Ontario, where probate fees (formally, Estate Administration Tax) are considered to be high, a number of probate fee minimization strategies have developed. These strategies carry with them benefits and risks, and must be considered on a case-by-case, asset-by-asset, basis. Arguably, the risks of some probate planning strategies may be greater than others. Recently, the case of *Jackson v Rosenberg* ("*Jackson*"),[1] a case of the Ontario Superior Court of Justice, presented us with, as Justice Charney describes it, a "cautionary tale" for those tempted to use joint tenancy as a probate fee minimization tool. This case centers around ownership of Nigel Jackson's home in Port Hope (the "Port Hope property"). It involves a review of the law relating to the presumption of resulting trust, the requirements to establish a gift, consideration of what it means to make a gift of the right of survivorship and a review of the law relating to mutual Wills.[2]

BACKGROUND

Mr. Jackson and Bernie Taube were romantic partners from approximately 1963. They also ran an antique business in which they were equal shareholders.[3] Mr. Taube, the great uncle of Lori Rosenberg, died on July 16, 2010.

On November 5, 2005, Mr. Jackson and Mr. Taube each executed a mirror Will which named the other as the sole beneficiary of their respective estates and named Ms. Rosenberg as the alternate beneficiary. Mr. Taube's Will did not need to be probated when he died since all of his assets were jointly owned with Mr. Jackson.

Mr. Jackson and Mr. Taube owned a condominium in Toronto's Yorkville neighbourhood, which they purchased in 1999 as joint tenants with the right of survivorship. Since the condominium was still owned jointly at Mr. Taube's death, Mr. Jackson, by operation of law, became the sole owner of the property (i.e., the property did not pass by virtue of Mr. Taube's Will and did not form part of Mr. Taube's estate). In May 2011, Mr. Jackson sold the condominium and subsequently purchased the Port Hope property with the proceeds of sale. Mr. Jackson was then the sole registered owner of the Port Hope property, which was his home. He paid for the Port Hope property and its upkeep with his own funds.

On February 29, 2012, Mr. Jackson transferred the Port Hope property from himself as sole owner to himself and Ms. Rosenberg as joint tenants with right of survivorship. It was held this way until September 2020, when Mr. Jackson instructed his lawyer to sever the joint tenancy and convert it into a tenancy in common. Ms. Rosenberg made no financial contribution to the Port Hope property and never lived there.

Prior to taking steps to sever the joint tenancy, a conversation between Mr. Jackson and Ms. Rosenberg's husband, Mr. Lopez, caused Mr. Jackson to fear that he would be forced out of his home. He asked a real estate lawyer to sever the ownership of the Port Hope property so that if he died before regaining ownership, Ms. Rosenberg would not get the entire home.

Mr. Jackson's affidavit stated that, in adding Ms. Rosenberg as a joint tenant, he did not intend for Ms. Rosenberg to live with him, nor did he intend for Ms. Rosenberg to have any rights to his home, at least not until he passed away. Further, in a supplementary affidavit, he explained why he added Ms. Rosenberg (Lori) as a joint tenant as follows:

It was never my intention to gift a portion of my Port Hope home to Lori. As I had no close family at that time, my intention was to have the property, with whatever equity was left in it, pass to Lori, my beloved partner's grand niece, without her having to pay the probate fees. This is why I added her on title, and for no other reason.[4]

Mr. Jackson (in his affidavit) stated that his lawyer did not discuss with him the implications of adding Ms. Rosenberg as joint tenant and that the documents he signed to effect the transfer (which included the statement that the transfer was a gift) were not explained to him.[5] Mr. Jackson's position was that the transfer was not a gift, but instead a resulting trust with the beneficial ownership being retained by Mr. Jackson.

Ms. Rosenberg took the position that any interest in the Port Hope property transferred to her by Mr. Jackson was done pursuant to an unconditional gift and that she was at no time holding the Port Hope property in trust for Mr. Jackson. She indicated that instead of dividing his estate on a 50/50 basis between Mr. Jackson and Ms. Rosenberg as Mr. Taube assured he would, Mr. Taube, Mr. Jackson and Ms. Rosenberg came to an understanding that Mr. Jackson and Mr. Taube would name each other as beneficiaries of their estates, with Ms. Rosenberg as the alternate, and that this understanding was executed by the signing of mutual Wills on November 2, 2005. Ultimately, Ms. Rosenberg argued that by severing the joint tenancy Mr. Jackson was in breach of his fiduciary duty as trustee of the property and a breach of contract as between Mr. Taube and Mr. Jackson.

ANALYSIS AND FINDINGS

Did Mr. Jackson make a gift? If so, a gift of what?

The Court's analysis starts by considering the law relating to the presumption of resulting trust which was set out by the Supreme Court of Canada in *Pecore v Pecore* ("*Pecore*").[6] Where a gratuitous transfer is made to an adult (other than the transferor's spouse), there is a rebuttable presumption that the transferor intended to create a trust rather than to make a gift. The onus is on the person receiving the transferred property to demonstrate a gift was intended. In *Pecore*, the Court noted that the most important evidence of intention is generally contemporaneous to the transfer, or nearly so, since once a gift is made it cannot be taken back and there is a risk the transferor could have changed his mind subsequent to the transfer. However, evidence subsequent to a transfer should not be automatically excluded. Instead, the trial judge must assess its reliability and determine what weight should be given to it. Note that the intention in question is the actual intention of the transferor.[7]

The decision goes on to set out the conditions to be satisfied in order to establish a gift as follows:

there must be (1) an intention to make a gift on the part of the donor, without consideration or expectation of remuneration; (2) an acceptance of the gift by the donee; and (3) a sufficient act of delivery or transfer of the property to complete the transaction.[8]

Since the transfer to Ms. Rosenberg as joint tenant was a gratuitous transfer, the presumption of resulting trust was found to apply and the onus was on Ms. Rosenberg to demonstrate the transfer was a gift. In considering the evidence of Mr. Jackson's intention at the time of the transfer, the Court not only considered whether a gift was intended, but also the nature of the gift.

The decision points out Mr. Jackson was clear that the purpose in transferring the property to Ms. Rosenberg was to give her whatever equity was left in the home after he died and also to avoid the payment of probate fees at his death. It considered the Acknowledgement and Direction signed by Mr. Jackson when the transfer was made (which expressly stated that his intention was to make the transfer as a gift to Ms. Rosenberg) to be important evidence of his intention (this was one of the documents Mr. Jackson

stated his lawyer did not explain to him). The Court also found it relevant that: (1) the Port Hope property was Mr. Jackson's home; (2) Ms. Rosenberg never lived in the Port Hope property; and (3) there was never any intention that Ms. Rosenberg would ever live at the Port Hope property during Mr. Jackson's lifetime.

Considering the evidence as a whole, the Court was satisfied that Mr. Jackson's intention at the time of the transfer was to gift the right of survivorship in the Port Hope property to Ms. Rosenberg, such that whatever equity remained in the property upon his death would pass to Ms. Rosenberg and not his estate. He did not intend to gift the property during his lifetime, instead he intended to retain control of the Port Hope property until his death, at which time Ms. Rosenberg's beneficial interest in whatever equity remained would arise.

The decision states that, as the *Pecore* makes clear, the fact that a person did not intend to gift property during their lifetime does not preclude the conclusion that they intended to gift the right of survivorship with respect to such property. The fact that such person may later regret their decision to make the gift of the right of survivorship does not alter their intention at the time of the transfer/gift. In this case, the fact that Mr. Jackson may not have understood that transferring the property could complicate his ability to sell or otherwise encumber the property in the future does not alter the intention he had at the time of the transfer – that is, that Ms. Rosenberg should take the benefit of the Port Hope property if she survives him, and that she would hold whatever equity remained in the property for her own benefit, and not as a trustee of Mr. Jackson's estate. Essentially, the presumption of resulting trust was partially rebutted.

Gifting the right of survivorship – what does this mean? How is it different than other types of joint tenancy?

The gift of a right of survivorship is an *inter vivos* immediate gift. However, it is a gift of whatever is left of the property at the death of the transferor/donor (as opposed to what existed at the date of the transfer).[9] This concept is more easily understood with assets like a bank account (where it is understood that the balance will fluctuate until the death of the joint owner) rather than a piece of real property, but this decision shows that it can apply to both.

Property that is owned as a true joint tenancy passes automatically (outside of the deceased's Will) to the surviving owner(s) on the death of one of the owners, and the last surviving joint tenant takes full ownership of the property. Where the joint tenancy is as a result of a gratuitous transfer of the real property, one must ask whether it is a true joint tenancy, or whether it instead falls under one of the following two categories:

1. a resulting trust, in which case one joint tenant (the "beneficial owner") has a beneficial interest in the property and the other has no beneficial interest in the property and holds title in trust for the beneficial owner (this is commonly seen when a parent transfers a property to an adult child to enable the adult child to assist with the management of the parent's financial affairs); or
2. a gift of the right of survivorship, where a joint tenant (the "donee") is gratuitously placed on title by the original owner (the "donor"), the donee has no beneficial entitlement to the property during the lifetime of the donor, and the donor retains control of the property during their lifetime, but if the donee survives the donor then the donee will receive the entire property by the right of survivorship.

If it is determined that a gift of the right of survivorship has been made, the donee is only entitled to what is left of the donor's interest on the donor's death, meaning that they will receive nothing if the property is sold prior to the donor's death;[10] however, as is discussed above, the gift cannot be revoked. Therefore, if at the donor's death there is value in the property, it passes to the donee. The donor can encumber or sell the property as the donor chooses, but cannot take back the gift all together.

Can a joint tenancy be severed if a gift of the right of survivorship has been made? If so, what if the joint tenancy is severed?

Another way real property can be owned by multiple owners is as tenants in common. Where property is owned as tenants in common and one of the owners dies, the deceased owner's interest is dealt with in accordance with the terms of their Will (or, if they have no Will, in accordance with the laws of intestacy). At times, joint tenants will take steps to sever their joint tenancy to get rid of the right of survivorship (this must be done while the joint tenant is alive).[11]

A joint tenancy can be severed by transferring an interest jointly held with another from oneself to oneself (as was done by Mr. Jackson). The question is whether a joint tenancy can be severed in the situation where there has been a gift of the right of survivorship. Pointing out that the Ontario Court of Appeal does not appear to have weighed in on this question post-*Pecore,* that the Manitoba Court of Appeal and British Columbia Court of Appeal have concluded such a joint tenancy can be severed, and that the Saskatchewan Court of Appeal and Alberta Court of Appeal came to the opposite conclusion (i.e., that a transferor/donor cannot sever the joint tenancy after having gifted the right of survivorship), the Court in *Jackson* preferred the approach taken in Manitoba and British Columbia, stating that "the law relating [to] the severance of joint tenancies continues to apply after *Pecore*. The right of survivorship is the same whether the joint tenancy was the result of a bargain or a gift, and there is no reason why the former can be severed but not the latter".[12]

What did severing the joint tenancy mean for Mr. Jackson (the donor) and Ms. Rosenberg (the donee of the right of survivorship)? They became tenants in common, each with a 50% interest in the Port Hope property, and the right of survivorship was eliminated with respect to Mr. Jackson's 50% interest but not Ms. Rosenberg's 50% interest. If Mr. Jackson owns his 50% share at his death, it will form part of his estate to be dealt with in accordance with the terms of his Will.[13] The presumption of resulting trust applies to Ms. Rosenberg's 50% interest and her 50% share of whatever equity remains in the Port Hope property at Mr. Jackson's death will pass to her.

If Mr. Jackson does not update his Will dated November 5, 2005, his 50% interest will pass to Ms. Rosenberg pursuant to the terms of such Will. Ms. Rosenberg argued that Mr. Jackson cannot change this Will because he and Mr. Taube signed mutual Wills (that is, Wills that the makers have agreed cannot be changed, at least to their effect, without the consent of the other). While a discussion of the law of mutual Wills goes beyond the scope of this article (for this, please see paragraphs 99 to 119 of the *Jackson* decision), it is worth noting that mutual Wills are different than mirror Wills, and that mutual Wills involve an agreement between the will-makers that the Wills cannot be changed or revoked (evidence of which must be clear and cogent). The Court found that there was no mutual will agreement between Mr. Taube and Mr. Jackson.

CONCLUSION

In Ontario, probate planning is a common topic of discussion between estate planning lawyers and their clients. There are several often-used strategies that can reduce exposure to probate fees on an individual's death. That said, a case like *Jackson* is a reminder of the importance of taking the time to consider the pros and cons of the decisions being made during the estate planning process.

Where the estate plan in question involves adding another individual as a joint tenant on real property, the risks of doing so must be canvassed and carefully considered. Discussions should be had regarding the intention of the current owner. Some questions that should be asked include: Is the owner's primary concern reducing exposure to probate fees on their death? Does the owner want the person they are adding as joint tenant to receive the property on the owner's death, or do they want the property to still be dealt with in accordance with the terms of their Will? Are they looking to make a gift of the property at this time, recognizing this means they will no longer have complete control over the property? If so, do they understand the possible tax consequences and other exposure (such as to the creditors of the newly added joint owner)? Do they understand a gift cannot be revoked? Once the owner's intentions are understood and instructions have been received, the work is not done. Proper documentation is key.

Overall, while joint ownership may seem like an "easy" way to achieve probate fee savings, there are steps that need to be taken for this strategy to be effective. Failure to take the time to properly engage in this special planning can lead to cases such as this and legal

fees that far exceed any probate fee exposure associated with the property flowing through the deceased's Will.

The information and comments herein are for the general information of the reader and are not intended as legal advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

This article was originally published by the Ontario Bar Association's Trusts and Estates Law Section on Friday, October 13th, 2023.

[1] 2023 ONSC 4403 [*Jackson*].

[2] A review of the law of mutual Wills goes beyond the scope of this article.

[3] Mr. Jackson claimed that the business was never profitable and that he often financially assisted Mr. Taube. Mr. Jackson worked full-time outside of the store until 2001. The business was operated in leased premises. Mr. Jackson alleged Mr. Taube had $60,000 in credit card debt when he died, and that the assets they owned jointly were sold to pay off such debt. Ms. Rosenberg claimed that it was Mr. Taube who financially supported Mr. Jackson. Justice Charney notes that the question of who supported whom was not relevant to the legal issues to be determined in the application, but that if factual disputes were relevant, he would prefer the evidence of Mr. Jackson over the allegations of Ms. Rosenberg (calling them speculative and incorrect, and providing examples of their inaccuracy).

[4] *Jackson*, *supra* note 1 at paras 20 and 21. The decision points out that Mr. Jackson knew that property that is jointly owned passes automatically to the surviving member if the other owner dies, avoiding the inclusion of the property value in the calculation of probate fees when probating the estate, since this is how he became the owner of the Yorkville condominium after Mr. Taube's death.

[5] As part of the transfer adding Ms. Rosenberg as joint tenant, Mr. Jackson signed an Acknowledgment and Direction to allow his lawyer to transfer the property which included a Land Transfer Tax Statement indicating the transfer was made for nominal consideration ($2.00), and which included the "explanation for nominal consideration" as "gift", and a direction signed by both Mr. Jackson and Ms. Rosenberg instructed the lawyer to effect the transfer as a gift on the basis that no consideration was passing between the parties.

[6] 2007 SCC 17 [Pecore]. Recently, in *Bradshaw v Hougassian*, 2023 ONSC 3266, the Ontario Superior Court of Justice provided a summary of the law of resulting trust which is adopted in this case (see *Jackson* at para 39).

[7] Jackson *supra* note 1 at paras 37 to 44.

[8] Jackson *ibid* at para 41, citing *McNamee v. McNamee*, 2011 ONCA 533, 106 O.R. (3d) 401, at para. 24; *MacIntyre v. Winter*, 2021 ONCA 516 at para. 40; and *Falsetto v. Falsetto*, 2023 ONCA 469, at para. 27.

[9] For a discussion relating to this principle, including of case law from Manitoba and British Columbia, please see the *Jackson* decision at paragraphs 58 to 76.

[10] Compare this to the draining of a bank account. If Person A has a bank account and gifts the right of survivorship in the bank account to Person B, then Person A proceeds to drain the account of funds during Person A's lifetime, there will be nothing left for Person B to receive on Person A's death.

[11] There are three ways for an owner to sever a joint tenancy during their lifetime: (1) by an act of any one of the persons interested operating on his or her own share; (2) by mutual agreement; and (3) any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.

[12] *Jackson* *supra* note 1 at para 86. The discussion regarding the severance of joint tenancy can be found at paragraphs 77 to 98 of the decision.

[13] Or, if he does not have a valid Will at his death, in accordance with the laws of intestacy.

For more information or inquiries:

Jennifer A.N. Corak

Toronto
416.947.5088

Email:
jcorak@weirfoulds.com

Jennifer Corak is a Partner in the Wills, Trusts & Estates Practice Group at WeirFoulds LLP.