



Wealth Management Services

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Creating Joint Tenancy with Right of Survivorship Accounts Between Parents and Adult Children

Upon the death of a parent there is no longer an automatic assumption that JTWROS accounts between parents and adult children go to the surviving adult children

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A strategy frequently used to avoid probate fees is the transfer of assets by an individual to another person, for no consideration, to be held in a Joint Tenancy with Right of Survivorship (JTWROS or joint) account. This strategy is frequently done between family members, often between parents and their adult children. The effect of this strategy is that on the death of any of the joint tenants the assets in the joint account will be transferred to the surviving tenant, through the right of survivorship. As such, the assets in the joint account would not go through the estate of the deceased tenant and there would not be any probate to pay on these assets.

A widespread belief of this strategy was that on the death of one of the joint tenants the assets would automatically pass to the surviving tenant(s) through the right of survivorship. Two decisions by the Supreme Court of Canada in May 2007 have dispelled this belief. Depending on the circumstances it would in some cases be held that the asset did not pass to the surviving joint tenant(s) through the right of survivorship, but that the surviving joint tenant(s) was holding the assets in trust for the estate of the deceased tenant as a result of the presumption of a resulting trust. Further, these Supreme Court decisions have changed the potential tax implications of transferring assets to a joint account as well as whether or not probate fees will be avoided.

Does Joint with Rights of Survivorship Lead to an Automatic Transfer or Is There a Presumption of Resulting Trust?

Assume a mother transfers assets to a joint account with right of survivorship with an adult son with the understanding that the son would assist her in the management of the account during her lifetime and that the assets would avoid probate on her death. The mother believes that on her death the funds will transfer directly to her son as the result of the right of survivorship. The court's decision made it clear that if the assets were transferred to the son in a joint account for no consideration provided by the son, and if a dispute ensues with other potential beneficiaries on the death of the mother as to the ownership of the assets in the joint account, then there could be a presumption of a resulting trust. This means that if on the death of the mother a daughter claims that the mother never intended to gift the assets to the son, and if the son fails to provide persuasive or sufficient evidence to show that the mother intended to gift the assets to him, the court will find that the son was holding the assets in trust for the estate of the mother. This will lead to the assets being distributed according to the Will, or by intestacy in the absence of a Will. This has the potential to lead to unintended consequences for the mother especially if she had an acrimonious relationship with the daughter and never intended to gift the assets in the joint account to the daughter. Further this will defeat the goal of avoiding probate fees.

This unintended consequence could have been avoided if the mother had provided sufficient evidence to show that she intended to gift the balance of the assets in the joint account on her death to her son. It is prudent for a parent who is transferring assets to a joint account with an adult

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child, to avoid unintended consequences by providing evidence of her intention at the time of the creation of the joint account. One way a client can indicate her intention is to create a memorandum on the day of the transfer, which the client could keep together with her Will, indicating her intention as to whether she wants the assets gifted on her death to the surviving joint tenant, or indicating that the surviving tenant was holding the assets in trust for the estate of the parent on her death. In the event that such a memorandum was not provided at the time the joint account was created, the transferor could still provide a memorandum indicating her intentions prior to her death. In the case of a dispute this memorandum could be entered into evidence by the surviving tenant to indicate the intention of the deceased parent.

Avoiding probate

The decisions by the Supreme Court provided a different interpretation from that previously held by CRA as to what occurs when the assets are transferred to a joint account. This provides several options when opening a joint account. This new interpretation suggests that at the time of transfer of the assets to the joint account the gift to the joint tenant is not the funds transferred to the joint account. The gift is actually the legal and beneficial title to the right of survivorship, of the balance of the assets in the joint account, at the time of death of the transferor. Since the right of survivorship is gifted immediately on the transfer of the assets to the joint account then on death the assets will not enter the estate and probate will be avoided. This could be visualized by assuming the joint account to be a basket with fruits in it. A gift of the right of survivorship will be equivalent to a gift of the basket and whatever fruit is in it in on the death of the transferor. It is not the gift of the fruits. This means on the creation of the joint account the transferor is gifting to the transferee the right to receive the balance of the funds in the joint account, through the right of survivorship, and since the gift occurs during the lifetime of the transferor it is not a testamentary disposition and does not go through the estate. So the estate of the deceased transferor avoids paying probate fees on the balance of the assets in the joint account on the death of the transferor.

Tax implications of joint tenancy with right of survivorship accounts

Prior to the Supreme Court decisions, transfers of assets to a joint account could lead to triggering of capital gains to the extent that the assets had accrued gains. This was as a result of Canada Revenue Agency's (CRA) position that that on holding an asset jointly the transfer of the legal and beneficial title in that asset led to a taxable disposition of the asset. In order to transfer an asset, to avoid the asset being included in the estate of the deceased and avoid probate fees, the transferor has to transfer both the legal and beneficial title to the asset using the joint account. This led clients to create "side agreements" which purported to having the transferor transfer the legal title of the assets to the joint tenant on the transfer of the assets to the joint account, and retain the beneficial title.

Having achieved minimization of probate fees, the transferor may want to ensure that there would be no tax consequence as a result of the disposition of securities, if applicable. In order to achieve this, the transferor should maintain beneficial ownership of the assets in the joint account by keeping exclusive control of the assets during her lifetime. This will lead to no disposition on the transfer and as such no capital gains tax liability. The transferor would have thus accomplished avoiding probate fees at death and no capital gains tax on the transfer. However if on the creation of the joint account the transferor intends to transfer full legal and beneficial title to the assets in the account immediately then capital gains may result and would have to be reported in the year the joint account was created.

Summary of the changes

The following table summarizes the legal, tax and probate issues both before and after the May 2007 Supreme Court decisions for joint accounts between parents and adult children.

Implications of Joint Tenancy with Rights of Survivorship on Accounts between Parents and Adult Children			
	LEGAL	TAX	PROBATE
OLD RULES Pre-SCC Decisions in May 2007	<p>Adding an adult child to a JTWROS account resulted in the transfer of legal and beneficial ownership of the account assets to the adult child.</p> <p>The assets automatically transfer to the surviving adult child joint tenant(s) on the death of the parent.</p>	<p>At the time of adding an adult child to a JTWROS account, the parent had to recognize for tax purposes a disposition of a proportionate amount of the account to the child. For one child this was half of the account, adding two children would result in a two thirds disposition.</p> <p>Proportionate tax reporting of all interest, dividends and capital gains going forward between all of the joint tenants.</p>	<p>Adding an adult child to a JTWROS account allowed the account to avoid the requirement for probate on the death of the parent.</p>
NEW RULES * Post SCC Decisions in May 2007	<p><i>Option 1: Immediate Transfer of Beneficial Interest in Assets in the Joint Account, with right of survivorship</i></p> <p>Adding an adult child to a JTWROS account results in the transfer of legal and beneficial ownership of the account assets to the adult child.</p> <p>The assets automatically transfer to the surviving adult child joint tenant(s) on the death of the parent.</p>	<p>At the time of adding an adult child to a JTWROS account, the parent had to recognize for tax purposes a disposition of a proportionate amount of the account to the child. For one child this was half of the account, adding two children would result in a two thirds disposition.</p> <p>Proportionate tax reporting of all interest, dividends and capital gains going forward between all of the joint tenants.</p>	<p>Adding an adult child to a JTWROS account allows the account to avoid the requirement for probate on the death of the parent.</p>
	<p><i>Option 2: Transfer Right of Survivorship (not assets) and retaining Beneficial interest in assets.</i></p> <p>Parent maintains beneficial ownership of the account during their lifetime.</p> <p>The assets automatically transfer to the surviving adult child joint tenant(s) on the death of the parent.</p>	<p>At the time of adding an adult child to a JTWROS account, there would NOT be a disposition for tax purposes.</p> <p>The parent would maintain all of the tax reporting obligations on the joint account during their lifetime.</p>	<p>Adding an adult child to a JTWROS account allows the account to avoid the requirement for probate on the death of the parent.</p>
	<p><i>Option 3 : Creating a bare trust (beneficial interest retained and no transfer of right of survivorship)</i></p> <p>Parent maintains beneficial ownership of the account during their lifetime.</p> <p>On death of the parent the assets will be distributed according to instructions contained in the parent's Will.</p> <p>The assets do not automatically transfer to the surviving adult child joint tenant(s).</p>	<p>At the time of adding an adult child to a JTWROS account, there would NOT be a disposition for tax purposes.</p> <p>The parent would maintain all of the tax reporting obligations on the joint account during their lifetime.</p>	<p>Adding an adult child to a JTWROS account while retaining the beneficial interest while alive, with no intention of gifting the assets to surviving tenant will require probate on the death of the parent.</p>

* As there are three possible options for the treatment of joint accounts between parents and adult children as a result of the May 2007 Supreme Court decision, it is very important that parents make clear, and document, their intentions for the assets in the joint account.

Operational Issues

From an operational perspective the firm's current procedures, in dealing with joint accounts on the death of the transferor, have the ability to deal with both the current gift of legal and beneficial interest or the gift of right of survivorship. In both cases the client's intention is to gift the balance of the funds in the account on the death of the transferor to the surviving tenant.

It is the firm's policy, on the death of a transferor, to require probate or a court order when we have been provided with notice of arrangements (or a third party claim) stating or implying that the surviving joint tenant was not the ultimate or intended recipient of the assets in the joint account through the right of survivorship. This firm's position remains unchanged, even in light of the Supreme Court's decisions. An example where probate would be required would be a situation in which the transferor creates a separate document intending that under certain circumstances the assets in the joint account will be distributed according to her Will, and that document is presented or an estate representative makes a claim, on the death of the transferor, that the assets belong in the estate. Those situations would likely result in a frozen account and a case-by-case handling.

Alternate strategies to avoid probate

For certainty in planning, the transferor should refrain from effecting arrangements where the surviving joint tenant is not the ultimate or intended recipient of the assets in the joint account, on the death of the transferor, through the right of survivorship. Clients should consider alternate strategies that create certainty in planning with regards to avoiding probate. Such strategies include, but are not limited to, creating an alter ego trust, making an outright gift to adult children, and being a donor of a power of attorney.

ALTER EGO TRUST

An Alter Ego trust allows an individual who has attained age 65 and over to transfer property to a trust on a tax free rollover basis. This is an inter vivos trust and under the terms of the trust, until the death of the individual, the individual will be entitled to receive all of the income of the trust and no person, except the individual, will be entitled to receive any income or capital from the trust. This strategy will avoid probate on death and cause no immediate tax consequence on the transfer.

OUTRIGHT GIFT

An outright gift of the transferor's assets, during her lifetime, to an adult child is a relatively simple way of avoiding probate on the death of the transferor. This strategy minimizes potential litigation particularly if the transferor is willing to give up control of the assets. However this strategy could lead to tax consequences for the transferor on the transfer of the gift.

POWER OF ATTORNEY

If the transferor's intention in creating a joint account is not to avoid probate but to make it convenient for an adult child to manage her property, then it would be advisable for the transferor to give the adult child a power of attorney. This will provide some level of certainty on the death of the transferor as the relevant assets would be gifted according to the transferor's Will.

Joint accounts issues going forward

MAKE INTENTIONS CLEAR WITH REGARDS TO JOINT ACCOUNTS

As a result of the Supreme Court decisions, when a parent transfers assets to an adult to be held in a joint account with an adult child it is prudent for the parent to indicate her intention especially if the parent is holding the assets joint with one adult child to the exclusion of other heirs. Another strategy to avoid potential disputes on the death of the parent in this circumstance is to have the parent leave the residue of her estate in her Will only to the surviving tenant on the account.

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The question of whether the transferor retained exclusive control of the assets during her lifetime could be a question of fact. However the fact that the transferee withdrew funds from the joint account during the lifetime of the transferor is not conclusive evidence that the transferor transferred beneficial title to the transferee of the assets in the joint account.

“SIDE AGREEMENTS” NO LONGER REQUIRED

It appears that there is no further requirements for “side agreements” the goal of which was to separate the legal and beneficial title to the assets in the account in order to avoid probate as well as disposition on the transfer of the assets to the joint account.

EXTENSION TO OTHER RELATIONSHIPS

Finally even though the example used in this article refers to joint accounts between parents and adult children, similar principle applies to joint accounts between other individuals (excluding husbands and wives, and parents and minor children which are discussed in another article) particularly when only one person transferred all the assets to the joint account for no consideration.

Note: The above information is based on the current and proposed tax law in effect as of the date of this article. The article is for information purposes only and should not be construed as offering tax advice. Individuals should consult with their personal tax advisors before taking any action based upon the information contained in this article.

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