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Joint Accounts - Not Always What They Seem to Be

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There has been much interest recently in employing joint bank accounts, joint investment accounts and jointly held real estate to simplify the processing of the estate when one of the owners of a jointly-held asset dies and also to reduce related professional and government costs.

The most commonly stated estate planning reason for joint holdings is to avoid Estate Administration Tax, which is 1.5 per cent of the value of the estate when an application for a Certificate of Appointment of Estate Trustee is made.

Relying on family harmony, the deceased owner, usually a parent, may also assume that the surviving account holder, usually one child, will "do the right thing" and share with his or her siblings.

It does not always turn out that way, however, and bruising and costly litigation may well ensue at a cost far greater than the initial taxes that may have been saved.

Two Supreme Court of Canada decisions confirm that it is very important to exercise considerable care when these joint holdings are created to explicitly set out what is to happen to one owner's share when he or she dies.

It has long been known that jointly held assets pass to the surviving owner with nothing more than proof that the deceased owner has, in fact, died. Most married couples will arrange their affairs through joint holdings, for example, unless there are successive marriages, disabled spouses or other non-routine situations that require other planning techniques.

Beyond that, many people have established joint ownership of assets with people other than their spouses. Widowed parents holding assets jointly with adult children or grandchildren are quite common.

When the joint asset in question is a chequing account that essentially exists to make bill-paying more efficient and has only enough money in it to cover regular expenses, there is generally little problem regardless of who the surviving holder is.

Where the jointly held property is a substantial proportion of the overall net worth of an individual, however, and where leaving the jointly held property to the surviving owner results in others, who are beneficiaries under a will, getting little or nothing as a result, problems, and litigation, arise.

The decisions in May, 2007 of the Supreme Court of Canada in two cases where the real impact of jointly held assets were being appealed should cause planners to rethink the way in which they approach joint ownership.

Each case arrived at a different conclusion based on its own facts, but the overall result was a Supreme Court position that, just because an asset is held jointly, it cannot be assumed automatically that the deceased owner intended to gift the jointly held property to the surviving account holder alone.

Both cases involved fathers who put joint accounts into their own names and those of their daughters. In one case, both the daughter and her (by then) ex-husband were beneficiaries of the father's estate under his will. The ex-husband went to court to try and get a ruling that the jointly held assets were part of the estate and therefore partly his. Letters were found that were written by the father when the joint accounts were set up saying that he was doing this for estate planning purposes. This was held to be evidence that he wanted his daughter to have the funds when he died and that they were not to be handled under the terms of his will.

The second case involved one daughter who was the surviving joint account holder and her siblings who were the beneficiaries of their father's estate under his will. There was no evidence that confirmed that the father wanted only the one daughter to have the assets, and she was the executor of his estate. The daughter was ordered to include the jointly held assets as part of the estate to be divided according to the terms of the will.

In both cases, there was total rejection of the presumption of advancement (or gift) in favour of an adult, financially independent child. That means, in the absence of evidence to prove the intention to make a gift, there is a presumption that jointly held assets are held by a surviving child account holder in trust for the estate as a whole.

Recent experience indicates that banks have taken these Supreme Court decisions to heart and are becoming more cautious in transferring large joint accounts to surviving owners, particularly if there is any indication of family strife.

Anyone looking at an estate plan must examine the way that assets are owned and it is even more important now to review the transfers to joint ownership that may have occurred since the last time a will was updated. A clause in a will stating that any jointly held property is intended to go to the surviving owner, and is not intended to form part of the deceased owner's estate, should be sufficient to ensure that accounts in existence at the time a will is being prepared will be handled properly. This covers the situation where the intention is clear that the surviving holder should receive the assets outright.

However there are times when assets have been placed into joint ownership with the underlying intention that the surviving owner will, in fact, deal with them for the benefit of other beneficiaries. This intention is sometimes documented by way of a declaration of trust or a letter of direction setting out what is to be done with the assets when the original owner dies.

Extreme care must be taken in this form of approach. If the intention is that the joint owner of the property will become a form of trustee of the fund for the benefit of others, then a proper trust agreement, usually an Alter Ego or Joint Spousal Trust if the original owner is over 65, should be prepared and the assets put into accounts that reflect the trust.

The existence of only a joint account and an informal trust declaration or a letter of intention that is known to the financial advisors may prompt financial institutions to insist that the assets are still part of the estate and that a certificate of appointment is needed. There is a further possibility that the joint assets will wind up back into the calculation of the estate value and therefore be subject to Estate Administration Tax. When the surviving joint holder is also the executor named in a will and/or held a power of attorney before the original owner died, problems are even more likely.

A person trying to organize his or her estate by way of jointly held assets intended for a variety of ultimate beneficiaries may need to include all of the intended beneficiaries as joint owners, or may need to divide the joint ownership so that some assets are held jointly with each of several intended recipients.

Whatever method of estate planning is adopted, it is important that the documents be properly drafted, and that legal ownership reflects what was really intended, even if some Estate Administration Tax winds up being paid as a consequence. It is usually cheaper than the time dealing with banks and financial institutions to try and get things done after a death, or the litigation that can ensue when the surviving joint account holder isn't seen by others as "doing the right thing". ■