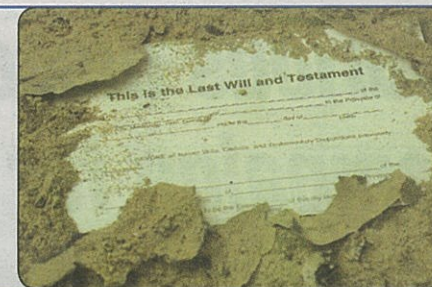


Focus On



TRUSTS & ESTATES LAW

Two decisions challenge long-standing practice

Secondary wills useful for joint accounts

BY GLENN KAUTH
Law Times

Two recent landmark court decisions highlight the usefulness of secondary wills for joint accounts, says a Toronto trusts and estates lawyer.

The comment comes after the country's highest court ruled last year in two cases, *Pecore v. Pecore* and *Madsen Estate v. Saylor*, on the issue of whether a family member named in a joint account gets to keep the asset upon a loved one's death. The decisions challenged a long-standing practice in which the asset would often go to the joint account holder. Now, that person must prove he or she was the intended beneficiary, says lawyer Jordan Atin of Hull and Hull LLP in Toronto.

"What the Supreme Court of Canada did was they reversed that. They said if you hold a joint asset with an adult child, it's presumed to fall back into your estate unless that child can prove that it was intended as a gift."

The ruling adds a new burden for people preparing their wills since they'll now have to be more clear about what they mean when creating joint ownership of an asset such as a bank account. That's because people will often put a child's name on the account for convenience purposes — such as making it easier for a child to pay the parents' bills — or in order to reduce probate fees payable on the value of the estate. Now, the court has drawn a clear distinction between the two scenarios. In cases where the joint ownership was merely a matter of convenience, the asset belonged to the estate and therefore would be divided among the beneficiaries, the judges ruled.

"So by splitting that, the court said you can actually give legal right of survivorship without requiring probate, but the estate holds onto the real value of that property, and it's part of the estate," says Atin.

As a result, Atin advises that a secondary will might be appropriate in some cases. "If you're going to use that technique on the understanding it's going to be divided in accordance with the will when (you) die, then you should be doing a separate will or include in your separate will those assets," he says.

The benefit, he notes, is that a secondary will clarifies who the intended beneficiary really is while avoiding probate fees. Without the second document, Atin believes people will lose the benefit of using joint accounts to reduce the tax. "If you just have a joint account and you don't have a secondary will, you have to pay probate fees on every asset that's owned by you at the time of death."

The issue is a growing one in Canada as rising housing prices, and hence the value of estates, lead more people to consider ways of reducing probate fees through the use of joint accounts. "One of the reasons *Pecore* went up to the Supreme Court of Canada is the number of people who were holding accounts this way because financial advisers were saying this is an easy way to avoid probate," says Atin. "So, the fact that people were advising elderly people to put their accounts joint with one of their kids for reasons not intended as gifts made it so common that the Supreme Court of Canada felt it necessary to deal with these cases."



Jordan Atin says the Supreme Court said 'if you hold a joint asset with an adult child, it's presumed to fall back into your estate unless that child can prove that it was intended as a gift.'

Confusion over the issue was leading to a flurry of litigation in the courts, Atin adds. "It was a rare case to have a will challenge that didn't also involve a joint account."

Nevertheless, while Atin recommends a secondary will as one option for joint accounts, Toronto trust and estates lawyer Barry Corbin cautions that timing still plays a role in how the courts view the document. In their ruling in *Pecore*, he notes, the Supreme Court judges took a skeptical eye to changes made after the joint account was set up. "You can see that if you made a will afterwards that says this is what I meant, what [Supreme Court Justice Marshall] Rothstein said in *Pecore* is it's not automatically inadmissible as evidence of intention, but its reliability must be assessed to guard against self-serving evidence or something that reflects a change in intention," he

says. "If you put property into a name with a kid, later have a falling out with a kid and then try to document an intention that was in fact different from what you thought at the time, you can see why a judge would be concerned about documentation that was prepared significantly later."

Like Atin, estates lawyer Pamela Cross of Borden Ladner Gervais LLP in Ottawa says a secondary will for joint accounts is one method to save probate fees but, she notes, it isn't always an ideal one. "Joint tenancies are not the best option for really wealthy people because there is lots of really interesting estate planning that can save a lot of tax," she says, noting the savings on probate fees amount to just one and a half per cent of the value of the asset. "You can set up trusts under your will that end up saving tens of thousands of dollars a year in taxes, which quickly exceeds the amount of probate saved by trying to keep it out of a will."

But, she adds, "If you don't really want to spend money on estate planning, joint tenancies are fine."

Of greater concern to Cross is what she believes is the lingering confusion caused by the *Pecore* decision, particularly since she believes the ruling essentially created a third scenario for joint accounts. While traditionally the courts considered two outcomes for a joint asset — that it would either go to the co-owner as a gift at the time it was created or that the co-owner would get legal title only — Cross argues a hybrid option now exists. In those cases, the co-owner, often a child of the original owner, holds the account in name only

while the parent is alive but still becomes the beneficiary on the parent's death. As a result, the transfer of legal title to the account to the child while the parent is still alive may not result in any immediate tax consequences, such as a capital gain. At the same time, the child has no access to the account until the parent dies, and the child's creditors may have no claim to the funds. That's exactly what happened in *Pecore*, in which the court ruled that although the father held full control over and paid all the taxes on investments he held jointly with his daughter while he was alive, there was enough evidence to show he intended her to take ownership on his death.

The ruling meant the asset wouldn't go to the estate, something Cross argues is significant. "If this form of ownership will actually defer capital gains taxes until the death of the transferor and allow the account to pass to the surviving account holder without probate fees, it could prove a valuable (and inexpensive) estate planning tool," Cross wrote in a recent paper on the *Pecore* case.

But, she points out, the ruling still leaves her and other trust and estates lawyers with many questions. "Nobody really knows how that's taxed," she says, noting that although the court suggested there would be no tax implications in cases in which the child doesn't take full ownership of the asset until the parent dies, the Canada Revenue Agency might challenge that notion.

Also unclear is what responsibilities banks and financial institutions have to help people opening joint accounts make their intentions clear. "I think it will take another couple of cases to decide how the courts interpret it," Cross says. **LI**