

Joint Accounts and Estate Planning

Joint ownership is a common method of holding property that is often used by family members, such as spouses or aging parents and their children for estate planning purposes. There are several items to consider prior to transferring property into joint ownership. Please note this article does not apply to U.S. citizens, residents or green card holders.

The two most common forms of joint ownership are Joint Tenancy with Rights of Survivorship (JTWROS) and Tenants-in-Common (TIC). If individuals own property jointly, they should clearly state in the ownership documentation (if applicable) whether the property is held as Joint Tenants with Rights of Survivorship or as Tenants-in-Common.

What is the difference between JTWROS and TIC?

If property is held as JTWROS, each joint tenant typically has an undivided interest in the whole property. When a joint tenant dies, that person's interest automatically transfers to the remaining joint tenant(s). The property does not form part of the deceased tenant-owner's estate and therefore it is not included in the value of the estate for probate purposes.

Please Note: *Laws in Quebec are significantly different from the rest of Canada where Common Law estate planning strategies involving JTWROS are not applicable under Quebec Civil Law.*

If property is held as TIC, each joint owner has an independent right to possess and dispose of their ownership interest without the consent of the other owner(s). There is outright ownership of a portion of the property. Each owner's interest does not need to be equal. Where a joint owner dies, that owner's share of the property forms part of their estate and may be dealt with in accordance to the terms of their Will.

What impact do presumptions have on Joint Accounts?

When assessing legal and beneficial ownership of jointly held property, consideration is typically given to common law principles. The main issue is the intentions of the transferor when the property is transferred into JTWROS. To help provide clarity, courts typically look to two different legal presumptions when determining the transferor's intentions. When the transferor's intentions are unclear or unknown, the presumptions provide a guide to determine intent.

Depending on the relationship between the joint parties, one of the presumptions will typically apply. However, in certain cases, legislation may specify that a different presumption applies.



The general presumption of resulting trust

- The recipient of the property holds the property in trust for the transferor and the transferor remains the beneficial owner of the property, is the presumption that generally applies.

The presumption of advancement

- Property (or a portion of property) transferred is an outright gift to the person that received it. This applies depending on the relationship between the parties. For example, it typically applies when property is transferred between spouses or between parents and minor children.

It should be noted that the transferor's intentions are the determining factor. If, for example, the deceased intended for his or her child, to be named as a joint owner to receive property at death, then the courts would typically give effect to that intention.

Some factors which may be relevant in determining a transferor's intentions include:

- Evidence of the relationship between the parties;
- Wording in documents that suggests the transferor's intention as to the beneficial interest in the property;
- Control and use of the property;
- Granting of a power of attorney appointing the transferee; and
- Transferor's tax treatment of joint property.

Joint Ownership Scenarios

In general, three estate scenarios arise from ownership structures. Each scenario can produce different inferences and reinforces the importance of seeking professional guidance when estate planning. For illustrative purposes, each of the scenarios below involves property held jointly between a parent and an adult child.

Scenario 1 - A Genuine JTWRROS Arrangement

Consider a parent who transfers property (such as a stock portfolio or bank account) into a JTWRROS arrangement with an adult child. If the parent intended to transfer both the "legal" and the "beneficial" ownership, then the transfer would trigger a deemed disposition for income tax purposes, which could result in capital gain or loss at the time of the transfer. This may or may not be desirable. However, from the time of the transfer onwards, both parent and child will each be liable for income tax on one-half of any future income produced by the property, including any tax on capital gains if the property is sold.

With a genuine JTWRROS arrangement, the child has identical rights, including the right to use the property, including withdrawing funds from accounts, and receive its income. The parent will no longer have full control over decisions related to the property, and the child's interest in the property will be exposed to their creditors, which could include an estranged spouse.

If the parent passes away, their interest in the property will pass automatically to the child via the right of survivorship. Probate taxes, where applicable, on the property will be avoided as it would bypass the parent's estate. However, a deemed disposition of the parent's remaining interest in the property would result upon their death, which may result in a capital gain or loss for the parent.

Following the creation of a genuine JTWROS arrangement, if the child were to pass away first, their interest will automatically pass to the parent via the right of survivorship, also avoiding probate taxes (where applicable) but probate taxes would eventually be payable on the death of the parent. The deemed disposition resulting from the child's death would result in a capital gain or loss for the deceased child.

If the potential outcome of the hypothetical transaction outlined in the genuine JTWROS arrangement scenario is not preferred, then the parent could consider other options such as the below scenarios (depending on the parent's intentions) or the potential use of a power of attorney for property.

Scenario 2 - A Resulting Trust JTWROS Arrangement

With a resulting trust JTWROS arrangement, a child's joint interest in property does not give them a beneficial interest. Both parent and child are registered on legal title as joint tenants (when possible) but the child is more of a fiduciary with no right to use the property or receive its income for their own benefit. Since there is no change of beneficial ownership, the transfer would not result in a deemed disposition of one-half of the parent's interest. Therefore, no unwelcome tax consequences would result.

Upon the parent's death, his or her beneficial interest would normally not pass to the child, but rather be held by the child on behalf of the parent's estate to be distributed according to the parent's Will (or the rules of intestacy where there is no Will). The property would not bypass the parent's estate and may lead to probate taxes (when applicable). In addition, the deemed disposition on the entire property resulting from the parent's death may result in a capital gain or loss for the parent.

If the child dies first, their legal interest in the property would automatically revert to the parent with the parent regaining full legal and beneficial interest in the property.

Scenario 3 - A Gift of "Right of Survivorship" Arrangement

A third possible JTWROS arrangement involves the concept of a gift of the "right of survivorship". Similar to the resulting trust JTWROS arrangement discussed above, this arrangement does not provide the child with an immediate beneficial interest in a property. While a parent and child are named jointly, the child would have no right to use the property or receive its income for their benefit. However, the child's right of survivorship (a property right) will provide the child with full legal and beneficial ownership of the property upon the parent's death.

With a gift of the "right of survivorship", there would typically be no immediate deemed disposition upon the transfer. The parent will remain solely liable for income tax in relation to the property, including capital gains or losses if the property is sold.

A gift of right of survivorship will result in the property bypassing the parent's estate, thereby potentially reducing probate taxes. The deemed disposition on the entire property resulting from the parent's death may result in capital gains or losses for the parent.

If the child predeceases the parent, their right of survivorship ceases. Since the child has no beneficial interest in the property, probate taxes and income taxes would not be applicable.

Is JTWRROS an Effective Estate Planning Tool?

Joint ownership can be quite complex since it may result in more than one outcome.

Holding property as JTWRROS can be an effective tool to help minimize or avoid probate taxes and to simplify the administration of an estate. However, there are a number of potential disadvantages associated with using a JTWRROS arrangement:

- Changing ownership of a property may have tax implications
- Transferring property to a JTWRROS arrangement may expose the property to family law or creditor claims; and
- Transferring property to a JTWRROS arrangement may cause the property to end up in unintended hands.

Final Thoughts

Part of a professionally prepared estate plan should include documentation setting out the intentions of the transferor. To this end, communication with family members is also important. Clearly communicating your estate planning objectives may help minimize potential family disputes in future. Finally, consider speaking to your TD advisor and your legal counsel.



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