# 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. This article outlines the most common forms of joint ownership, while highlighting key advantages and disadvantages of holding property in this manner.*

The two most common forms of joint ownership are Joint Tenancy with Rights of Survivorship (JTWROS) and Tenants-in-Common (TIC).

## What is the Difference Between JTWROS and TIC?

If property is held as JTWROS, each joint tenant typically has an equal interest in the whole property. When one of the joint tenants dies, that person's interest is automatically transferred equally to the remaining joint tenant(s). Since such assets do not form part of the estate of the deceased owner, they are not included in the probate calculation.

The creation of a joint tenancy requires the existence of, at the time the property is conveyed and throughout the time of ownership, certain legal requirements, a discussion of which is beyond the scope of this article[1].

***Note:*** *Laws in Quebec are significantly different from other parts of Canada and estate planning strategies involving the concept of JTWROS are not applicable in Quebec.*

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). Where property is held as TIC, there is an outright ownership of a portion of the property and each owners interest does need not be equal. Where one of the owners of a property held as TIC dies, that person's share of the asset forms part of their estate and is transferred according to the instructions in their Will.

If an individual owns property jointly with one or more individuals, they should state clearly (in the relevant ownership documentation) whether the asset is to be held as joint tenants with right of survivorship or as tenants-in-common.

The remainder of this article focuses on considerations related to owning property as JTWROS.

[1] There are typically four unities required for a joint tenancy arrangement: unity of possession, unity of interest, unity of title and unity of time.

## "Legal" versus "Beneficial" Ownership

It is important to distinguish between “legal” and “beneficial” ownership when discussing jointly-held property. Generally, a person who owns property has both “legal” title and a “beneficial” interest in the property; however, this is not always true. In some cases, an individual may have legal ownership of a particular asset or property, but that individual is merely considered to hold such legal title on behalf of the true owner. The “beneficial” owner is considered to be the true owner of the property.

When assessing whether an individual has beneficial ownership, there are a number of items to consider, such as:

- In the case of a transfer of property, evidence of the transferor's intentions in moving property into a joint arrangement with a transferee;
- Whether income (where applicable) following the move into joint names is to be used jointly or for the sole benefit of the transferor; and
- Who is reporting income from the property for tax purposes (where applicable).

Identifying legal and beneficial owners of jointly-held property can be important when conducting tax and estate planning. Where an individual is considered both a legal and beneficial owner of property, he or she is normally responsible for any tax liability arising from the property, except where attribution rules apply. In addition, a disposition (for tax purposes) would normally occur when there is a change in beneficial ownership as opposed to simply a change in legal ownership.

## 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 question of intention often arises when property is transferred from sole to joint ownership arrangements. To help provide clarity to these scenarios, courts typically look to two different legal presumptions when determining the intention of the transferor in respect of the survivorship interest in a JTWROS arrangement on the death of the transferor. Depending on the relationship between the joint parties, one of the presumptions will typically apply.

### The presumption of advancement

- This presumes that property (or a portion of property) is transferred as an outright gift to the person that received it. This presumption typically applies when property is transferred between spouses or between parents and minor children.

### The presumption of resulting trust

- This presumes that the recipient of the property holds the property in trust for the transferor and the transferor remains the beneficial owner of the property. This presumption generally applies where there is no presumption of advancement (i.e., a transfer to someone other than a spouse or minor child).

It should be noted that an individual's intentions are typically a determining factor – presumptions are only guides. If a decedent really intended for his or her child, named as a joint owner, to receive property at death, then the courts would typically give effect to that intention. When the evidence is unclear as to a deceased’s intention, then courts would apply the presumptions as working guides to establish intent. It is also important to note that presumptions are rebuttable if evidence can demonstrate them to be wrong.

Some factors which may be relevant in determining the intention of a transferor include:

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

## Joint Ownership Scenarios

In general, three estate scenarios arise from *JTWROS* 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. Similar results would typically occur if the joint owner was a third party.

### Scenario 1 - A Genuine JTWROS Arrangement

As noted earlier, a true JTWROS arrangement is one where all of the four unities (unity of possession, unity of interest, unity of title and unity of time) exist.

Consider a parent who transfers assets (such as a stock portfolio) into a JTWROS 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[3]. 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 asset, including potential capital gains tax if the property is subsequently sold. With a genuine JTWROS arrangement, the child has identical rights, including the right to use the asset 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 asset will be exposed to their creditors, which could include an estranged spouse.

If the parent passes away, their interest in the asset will pass automatically to the child via the right of survivorship. Probate fees, where applicable, will be avoided on the property as it would bypass the parent's estate; however, a deemed disposition of the parent's remaining interest would result upon their death which may result in a capital gain or loss for the deceased parent[4].

Following the creation of the joint arrangement, if the child were to pass away first, his or her interest will pass automatically to the parent through right of survivorship, also avoiding probate fees (where applicable). The deemed disposition resulting from the child's death may result in a capital gain or loss for the deceased child[5].

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[3] If the transfer involved spouses, special rules contained within the *Income Tax Act* (Canada) (ITA) may permit the transfer to occur at the transferor's adjusted cost base (although attribution rules may also need to be considered).

[4] Where the transfer involves spouses, and the transferor spouse passes away, their interest in the asset will typically pass automatically to the surviving spouse via the right of survivorship. Probate fees, where applicable, will be avoided on the property as it would bypass the deceased's estate. In addition, the potential capital gain or loss resulting from the deemed disposition of the deceased spouse's interest may be deferred as a result of rules contained within the ITA.

[5] Where the transfer involves spouses, and the transferee spouse passes away first, his or her interest will pass automatically to the transferor spouse through the right of survivorship, also avoiding probate fees (where applicable). Again, the potential capital gain or loss resulting from the deemed disposition that would typically arise at death can be deferred as a result of rules contained within the ITA.

If the potential outcome of the hypothetical transaction outlined in the genuine JTWROS scenario is not preferred, then the parent could consider other options such as transferring “legal” interest only (discussed below) or the potential use of a power of attorney.

### Scenario 2 - A Resulting Trust JTWROS Arrangement

With a resulting trust JTWROS scenario, 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 but the child is more of a fiduciary with no right to use the property or receive its income. Since there is no change of beneficial ownership, the transfer would not result in a deemed disposition of half the parent's interest so any unwelcomed tax consequences would be deferred.

Upon the parent's death, their legal interest in the property would typically pass automatically to child through the right of survivorship. However, the parent's beneficial interest would normally not pass to the child, but rather will be held by the joint owner 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 generally not bypass the parent’s estate which may lead to probate fees (where 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 deceased parent.

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

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

A third possible JTWROS scenario involves the concept of a gift of the "right of survivorship". Similar to the resulting trust JTWROS scenario discussed earlier, this illustration does not provide a transferee (i.e. an adult child) with immediate beneficial interest in a property. While a parent and child are named jointly, the child would have no right to use the asset nor receive its income. However, the child’s right of survivorship (as a property right) will provide the child with full (legal and beneficial) ownership of the property if the parent passes away.

With a gift of the "right of survivorship", there would typically be no immediate deemed disposition upon re-registration of the property into joint names (where the parent gives an adult child a right of survivorship in respect of property that the parent already owns). The parent will remain solely liable for income tax in relation to the property, including capital gains or losses if the property is sold.

By giving an adult child the right of survivorship for property, a parent would generally retain full beneficial ownership while alive and subsequently pass full beneficial ownership to the adult child (if the parent predeceases the child). In some instances, a gift of right of survivorship may result in the property bypassing the parent's estate. The deemed disposition on the entire property resulting from the parent's death may result in capital gains or losses for the deceased parent.

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

## Is JTWROS an Effective Estate Planning Tool?

While joint ownership can appear to be straightforward on the surface, when it comes to estate planning, these arrangements can be quite complex.

Holding property as JTWROS can be an effective tool to help minimize probate fees and to simplify the administration of an estate. Nevertheless, there are a number of potential disadvantages associated with using a JTWROS arrangement:

- Changing ownership of a property may have tax implications;
- Property that is held in JTWROS by a bankrupt owner could be severed on bankruptcy resulting in the arrangement becoming a Tenancy-In-Common arrangement;
- Transferring property to a JTWROS arrangement may expose the property to family law or creditor claims; and
- Transferring property to a JTWROS 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 applicable parties. For example, if the transfer of property into joint tenancy was intended to include a transfer of the beneficial interest, then the parties involved should consider having a deed of gift prepared evidencing the donor's intention.

On the other hand, if the creation of the joint tenancy was for "estate planning" purposes (perhaps to avoid probate fees) or for ease of administration, then the parties involved may consider the use of a declaration of bare trust signed by the donee(s) and evidencing the intention that no transfer of beneficial interest was intended, that the donee holds legal title only and that the entire beneficial interest remains that of the owner. To this end, communication with family members is also important. Clearly communicating your estate planning objectives may help minimize potential family disputes in future.

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