

The perils of using joint tenancy for estate planning (Jackson v. Rosenberg)

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In Ontario, properties may be registered in joint tenancy as an estate planning mechanism. Property that is jointly owned passes automatically to the surviving member if the other owner dies. This generally avoids probate fees associated with the property. Property owners should be aware, however, that adding a non-owner to title by way of joint tenancy may provide them with an irrevocable interest in the property even if they have not made any financial contributions.

This consequence was illustrated by the decision in *Jackson v. Rosenberg*, 2023 ONSC 4403 (CanLII), which the application judge called “a cautionary tale” for persons who might be tempted to use joint tenancy to avoid the payment of probate fees.

The dispute involved claims between a property owner (Jackson) and the great-niece (Rosenberg) of his long-time romantic partner (Taube). In addition to being romantic partners, Jackson and Taube ran an antique business in which they were equal shareholders. Over the years, Jackson and Taube frequently attended family dinners at the home of Rosenberg’s mother.

In November 2005, Jackson and Taube each executed a mirror will which named the other as the sole beneficiary of their respective estates. Rosenberg was named as the alternate beneficiary.

Taube passed away in July 2010. His will was not probated because all of his assets were jointly owned by Jackson.

Jackson and Taube owned a condominium in the Yorkville neighbourhood in Toronto, which they purchased in 1999 as joint tenants. Upon Taube’s death, title to the condominium went to Jackson as the sole owner through the right of survivorship of a joint tenancy. The condominium was never part of Taube’s estate.

In May 2011, Jackson sold the condominium and purchased a property in Port Hope with the proceeds. He was the sole registered owner. The Port Hope property was Jackson’s home. Rosenberg made no financial contribution toward its purchase or upkeep.

In February 2012, Jackson transferred the property from himself as sole owner to himself and Rosenberg as joint tenants with right of survivorship. Title was held this way until September 2020, when Jackson instructed his lawyer to sever the joint tenancy.

Jackson’s request to sever the joint tenancy occurred after Rosenberg’s husband advised Jackson that they planned to upgrade the Port Hope property so that they could sell it. Once sold, they would use the proceeds to purchase a two-storey property on a golf course, and Jackson could live with them. Jackson was understandably shocked and frightened by this conversation.

Litigation ensued. Rosenberg claimed that before her great uncle’s passing, Taube had assured her that he would divide his estate on a 50/50 basis between her and Jackson. She claimed that the transfer of the Port Hope property to her as a joint tenant was an unconditional gift by Jackson.

Jackson, conversely, took the position that the 2012 transfer was not a gift. His evidence was that it was never his intention to gift a portion of his Port Hope home to Rosenberg. While he intended to have the property, with whatever equity was left in it, pass to Rosenberg without her having to pay the probate fees, he claimed that his lawyer did not discuss any other implications of adding Rosenberg on title to the property as a joint tenant. As a matter of law, Jackson claimed that Rosenberg held title under a resulting trust, with the beneficial ownership being retained by him.

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A resulting trust arises where a property is in the transferee's name but is impressed with an obligation to return the property to the transferor either because the transferee is a fiduciary or because they gave no value for the property: *Pecore v. Pecore*, 2007 SCC 17. One common situation where the issue of resulting trust arises is where a parent transfers property to an adult child to enable the adult child to assist with the management of their parent's financial affairs.

In the case of a gratuitous transfer, there is a rebuttable presumption of resulting trust, as explained by the court in *Bradshaw v. Hougassian*, 2023 ONSC 3266, at paras. 38 - 39:

Where a gratuitous transfer is made, there is a rebuttable presumption that the transferor intended to create a trust rather than to make a gift, on the principle that "equity presumes bargains and not gifts". The onus is on the person receiving the transfer to demonstrate that a gift was intended, failing which the transferee holds the property in trust for the transferor.

Since Rosenberg had made no contribution towards the purchase or upkeep of the Port Hope property, she had the onus of proving that she had received her interest in the property as a gift in order to rebut the presumption that she was holding it in trust for Jackson.

As a matter of law, a gift requires three conditions: (1) an intention to make a gift on the part of the donor, without consideration or expectation of remuneration; (2) an acceptance of the gift by the donee; and (3) a sufficient act of delivery or transfer of the property to complete the transaction: *McNamee v. McNamee*, 2011 ONCA 533, at paragraph 24; *Falsetto v. Falsetto*, 2023 ONCA 469, at paragraph 27.

Based on the evidence, the court concluded that Jackson's intention at the time of the transfer was to gift the right of survivorship in the Port Hope property to Rosenberg. He understood that he was putting the property into joint tenancy for the purposes of estate planning and his intent was that whatever equity remained in the property upon his death should pass to Rosenberg, and not to his estate.

Further, Jackson did not intend to "gift" the property to Rosenberg during his lifetime as he wanted and intended to retain control of the Port Hope property throughout his life. Jackson's intention was that Rosenberg's beneficial interest in the property would arise only after his death.

However, this meant that it was also Jackson's intention that, should he predecease Rosenberg, she would take the benefit of the property.

The presumption of resulting trust was therefore partially rebutted. In the court's view, because Jackson gifted the right of survivorship to Rosenberg he could not subsequently revoke that gift.

While Jackson had the right to sever the joint tenancy, that severance made each a tenant in common with a 50% interest in the property. Rosenberg therefore held a 50% interest in the property, but on the basis that the 50% interest was held by way of a resulting trust for Jackson during his life. Until he dies, Jackson retained all remaining rights and interests in the Port Hope property and was free to encumber or sell it.

The decision shows that joint tenancy is a risky way to minimize probate fees. As noted by the application judge, the legal fees that both parties will have to pay to resolve this dispute will far exceed any probate fees that Rosenberg would have had to pay. A PDF version is available to download [here](#).

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