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Perils of Joint Ownership of Property

Prepared by Anthony McGlynn, Partner and Firm Co-Chair

Two recent decisions of the Ontario Court of Appeal illustrate the dangers and unintended consequences associated with owning property jointly.

By way of introduction, both real estate and personal property can be owned jointly. For real property, the joint ownership can be joint tenancy, which passes to the survivor on the death of one of the joint owners; or it can be held jointly as tenants in common, which means that on the death of one of the joint owners his or her undivided one-half of the interest is part of the estate of the deceased co-owner. Similarly, it is possible to set up joint accounts with financial institutions, investment advisors, banks etc., with account agreements with such institutions that have the effect of placing sole ownership in one of the joint owners on the death of the other.

Joint ownership is commonly used in family situations, for example, most spouses own their principal residence in joint tenancy because it reflects the fact that they consider themselves to be a team - and also so it makes the administration of the estate of the first to die efficient and inexpensive.

However, the *Jansen v Niels Estate*¹ case and the *Holtby v Draper et al*² case, both decisions in 2017 of the Ontario Court of Appeal, illustrate the problems that can be associated with joint ownership.

In the *Niels Estate*³ case the issue was whether a joint tenancy interest in a house passed by way of survivorship to the deceased daughter-in-law pursuant to a joint tenancy as a gift, or was the deceased's joint tenancy interest properly part of her estate to be shared among her children. While repeating the complicated chain of events including multiple Wills and property acquisitions in the *Niels*⁴ case are beyond the scope of this article, the nub of the matter was that the deceased transferred her property into joint tenancy with her son and daughter in law. Subsequent to the death of the deceased, the son and daughter-in-law separated and the son transferred his interest to his separated spouse as part of the separation agreement.

The Court concluded that despite one of the deceased's daughter's claims to the contrary, the deceased was not unduly influenced or taken advantage of by her daughter-in-law, and that she fully understood and intended to gift the property to her son and daughter-in-law on her death. Further, the subsequent arrangements after the transfer into joint tenancy between her son and daughter-in-law with respect to the

¹ *Jansen v. Niels Estate*, 2017 ONCA 312

² *Holtby v. Draper*, 2017 ONCA 932

³ *Jansen*, *supra* note 1.

⁴ *Jansen*, *ibid* note 1.



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property did not have the effect of severing the joint tenancy and creating a tenancy in common.

The moral of the story is that dealing with jointly held property can be complicated and legally very technical and it is essential that appropriate legal advice be obtained and that the intentions of the parties be clearly ascertained and recorded to avoid subsequent disputes. It is always difficult to ascertain intention when the intention of the party in question is difficult to ascertain because they are dead.

In *Holtby v Draper et al*⁵, a husband transferred a farm business and real property into joint names with his second wife in a hope to avoid creditor claims by his first wife and other potential civil claims by a couple of third parties. The husband's second marriage went way of his first, and in proceedings dividing up the assets the jointly owned property was in issue.

The Court ultimately held that because the transfer of the farm business was without consideration and without the intention of making a gift the second wife was not a 50% co-owner but held her ownership interest in the shares of the farm business on a constructive trust in favour of her husband, meaning that the husband was 100% owner of the farm business. On the other hand, in respect to the real estate that was also put into joint names as joint tenancy because the husband indicated on the transfer of ownership to he and his wife that it was being done for "natural love and affection" (to avoid land transfer tax among other things) the wife retained her 50% ownership interest of the real estate.

Again, the Court was required to determine the intention of the parties by review of conflicting evidence and limited documentation. A clear delineation of the intentions of the parties at the time of the transfer into joint ownership would have resolved the matter without the resort to litigation and the use of legal presumptions applied to the limited evidence of the actual intentions.

Jointly owning property may seem to be straightforward and unambiguous; but without appropriate legal advice there are many pitfalls that could occur including costly litigation.

Anthony McGlynn is Co-Chairman & Partner, Head of Personal Legal Needs and Estate Planning & Administration Groups for Perley-Robertson, Hill & McDougall.. He can be reached at amcglynn@perlaw.ca or at 613.566.2816.

⁵ *Holtby*, *supra* note 2.