

Banks more aware of undue influence

Estates in joint names opens up problems

BY DALE SMITH

For Law Times

An increasing number of estates are being put into joint names, in many cases as a means of avoiding probate taxes. Unfortunately, this can also mean that those estates become vulnerable, and the assets can be taken advantage of by the joint holder. Lawyers say there needs to be a greater sense of transparency around joint estates so that the outcomes don't turn out to be messy or complicated.

One common situation where joint estates can become an issue is when parents might register their house in the name of one or two children, and when they pass and the house transfers into their names, other beneficiaries may take exception if they don't feel that it's what their parents intended.

"Realistically, if a couple comes in, and they want to change the ownership structure of a house from tenant in common to joint tenancy, I think the lawyer should be asking some very specific questions to both clients about what is the intention of this transfer and obviously explaining what the consequences are of the trans-



Corina Weigl says there may be unforeseen income tax consequences as a result of having an estate put into joint names.

fer," says Miriam Vale Peters, partner with Kelly Manthorp Heaphy in Ottawa.

Vale Peters cites a case she argued, *Steen v. Gibsons LLP*, 2015 ONSC 4933, as a perfect example of an estate being put into joint names as a means of avoiding estate taxes and probate fees.

The woman had three sons and three large investments that she put her name joint with each of the sons on each of the investments. When she passed, the estate trustee — who was Vale Peters' client — wound up hav-

ing to pay all of the tax on all of the investments, and litigation ensued because he argued that it was his mother's intention that they split all of the investments equally.

"This woman, in an attempt to save [about] \$8,000 in estate fees, cost the estate in legal fees probably 10 to 20 times that," says Vale Peters.

"There's nothing wrong with putting your assets in joint tenancy, but understand that to save a couple of thousand bucks, you'd better make sure that your beneficiaries know what's going on ahead of time and there isn't going to be major litigation over who gets what."

Vale Peters says lawyers should ensure that their clients' beneficiaries know about the structures that they are putting into and that the lawyer should at least have detailed notes in their files to provide evidence in the event that it gets litigated.

Rachel Blumenfeld, partner with Aird & Berlis LLP in Toronto, says she has seen an increase in the number of these joint names cases over the past 10 years and increasing amounts of litigation over cases that tend to involve one child who had accounts put into joint names insisting that it was supposed to

pass to them alone because they had been helping the parent out, which sometimes happens with second marriages and children from the first marriage.

Blumenfeld says that, in many cases, the courts have decided that it wasn't the case and the accounts revert to the estate, where the work to prevent having to pay probate fees has been for naught.

Blumenfeld says she advises clients that if all they want is to ensure that a child can access an account to help the parent, they would be better off going the route of a proper power of attorney.

"Yes, you likely will have probate fees at the end of the day, but you won't have a fight between your kids," says Blumenfeld.

"If they are very insistent upon it, I will set up a declaration of trust that stands behind that account that indicates that the [child] is holding it in trust for [the parent], so that upon the parent's death, it doesn't fall to her but to the estate."

If the intention remains to avoid probate fees, Blumenfeld notes that a secondary will could be used that won't necessarily be probated. In Ontario, secondary wills tend to be used

more often when a person has a private corporation, but they can be used when there are joint accounts.

"You may want to put something in the will that says I have this account with my daughter but the intention when I set it up was that it's for both of my children and we only did it like this for convenience," says Blumenfeld.

Blumenfeld gives credit to the banks for becoming more aware of issues of undue influence with accounts being put into joint names and are flagging the cases more often.

"When you think about this from elderly adults who are becoming vulnerable, they may be subject to the influence of their children who are trying to convince them that owning property as joint tenants with right of survivorship isn't going to change anything but it's going to help them avoid probate taxes at the end of the day," says Corina Weigl, partner with Fasken Martineau DuMoulin LLP in Toronto.

Weigl says there may be unforeseen income tax consequences, as well as consequences for goals about the disposi-

Understand risks

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tion of assets after death.

For example, she says what may happen is that, despite a will saying that a house was to be sold and the proceeds divided, the child who has the house in joint tenancy may insist that it was to be given to them as a gift.

Weigl points to the Supreme Court of Canada's decision in *Pecore v. Pecore*, 2007 SCC 17, where this was the case.

Weigl also notes a case she dealt with where a man put his financial assets into a joint name with his only son, who then began changing the investment philosophy to one of greater risk at a time when his father was incapacitated by a stroke.

Upon recovery, the man tried to reassert control over his assets, which resulted in litigation and a settlement, with the added hurt of the breakdown of the re-

lationship with his son.

Another issue, says Weigl, is when an account is put into joint names with a child, and when that child has matrimonial issues, it exposes the account to the matrimonial claims of the spouse or other creditors of the child.

"You need to really understand what the potential risks are with the joint tenancy and make sure that your clients understand," says Weigl.

"There are alternative ways to reduce the payment of probate taxes and, in some cases, it's simply not warranted to take all steps to reduce probate taxes."

Weigl adds that if there is still an insistence on going the joint tenancy route to avoid probate taxes, it should be done transparently, involving all of the children and beneficiaries in the discussion in order to avoid surprises when the parent dies. **LT**

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