

DEATH IS NOT THE END, PART 2



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"Death is not the end. There remains the litigation over the estate."— Ambrose Bierce

In the previous edition of the *Bailiwick*, I identified four main areas where litigation over an estate can arise. In this Article, I will discuss the second main area where litigation over an estate arises, namely a joint tenancy dispute.

A parent will often transfer his or her house or bank account into joint tenancy with one of his or her adult children. This may be done for convenience, or to avoid potential probate fees. No matter the reason, transferring your house or bank account into joint tenancy with an adult child can lead to unintended estate planning and to disputes among family members, both before and after your death.

In general, when a parent transfers a house or bank account into joint tenancy with one of his or her adult children, upon the death of the parent, those assets are automatically transferred into the name of the joint tenant adult child, and those assets would not form part of the estate. As a result, those assets would not be distributed pursuant to the terms of the parent's will or, if there is no will, pursuant to the *Estate Administration Act*.

For example, if a parent transfers an interest in joint tenancy in his or her house to one of his or her adult children, and the parent dies, the joint tenant child becomes the sole owner of the house, and the house does not form part of the estate. This is where the dispute often arises. It is not uncommon for a house to be the only significant asset owned by a parent, and as a result, if the house is not part of the estate, nothing would be left in the estate to distribute to the other beneficiaries, who are typically the other children. Not surprisingly, the other children of the deceased parent may contend that it was not the intention of their parent to give the house to the one child to the exclusion of the other children. They will likely contend that it was the intention of their parent that the house would form part of the estate.

Disputes can also arise before the death of the parent. If a parent transfers a house or bank account into joint tenancy with his or her child, and afterwards wishes to have the house or bank account transferred back into his or her own name, a dispute can arise if the child does not cooperate. It is easy to imagine this scenario if there is a falling out between the parent and the child.

Recently, the Supreme Court of Canada ruled on two cases involving elderly parents who had transferred their bank accounts into joint tenancy with an adult child. The Court held that where assets are held in joint tenancy between a parent and an adult child, the child will be presumed to hold those assets in trust for the estate of the deceased parent. This is called a resulting trust. Although the Court will presume that the assets are held in trust for the estate, that presumption can be rebutted if there is evidence that the parent intended to give those assets to that child alone.

On the other hand, if these assets are transferred to a child who is a minor at the time of the transfer, there is a presumption of advancement, which essentially means that the Court will presume that the parent intended the transfer as a gift to the minor child, to the exclusion of others. This presumption can also be rebutted if there is evidence of the parent's intention to the contrary.

The intention of the parent is central in these disputes. Unfortunately evidence showing the true intention of the parent is often difficult to find. Accordingly, it is very important that those intentions are documented clearly when assets are transferred into joint tenancy.

In the next addition of the *Bailiwick*, I will discuss the third main area where litigation over an estate can arise, namely when a person dies intestate (without a will).

Until then, I leave you to consider the following words of Niccolo Machiavelli:

"A son can bear with equanimity the loss of his father, but the loss of his inheritance may drive him to despair."

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