The Probater

Hull & Hull LLP

VOLUME 28, NUMBER 4, DECEMBER 2022

HULL & HULL LLP WISHES YOU HAPPY HOLIDAYS & A HEALTHY AND PROSPEROUS NEW YEAR

How Severance of a Joint Tenancy Can Give Rise to Estate Litigation[1]

By David Morgan Smith

Introduction

The holding of property in joint ownership is well established as an estate planning tool. However, as we know, it is not without its problems. As estate litigation lawyers, our firm sees many cases in which uncertainty arises from joint tenancy: is property held by the surviving joint tenant in trust for the estate of the deceased tenant, or was the joint tenancy created as a means of gifting such property to the survivor?

In short, the Supreme Court of Canada decision in *Pecore* stands for the proposition that a rebuttable presumption of resulting trust applies to transfers of property into joint ownership. All cases turn on their specific facts. Litigation over whether the joint tenancy operates as delivery of a gift or simply as an estate planning tool to avoid probate is, sadly, all too common.

Severance of a joint tenancy creates a whole different set of problems that the Court has been forced to wrestle with in certain cases and which has the potential to upend even the most carefully structured estate plan. It is this issue that we now consider.

How is a Joint Tenancy Severed?

The onus of demonstrating that a joint tenancy has been severed is always on the party asserting the severance.[2] A joint tenancy can be severed in three ways:

- a joint tenant may unilaterally sever the joint tenancy by acting on his/her own share, including by selling or encumbering it; or
- the joint tenants mutually agree to sever the joint tenancy; or
- if the joint tenants engaged in a "course of dealing" that demonstrates that they mutually treated their ownership as a tenancy-in-common.[3]

To succeed in determining if a joint tenancy has been severed in a course of dealing, the party asserting the severance must prove that the joint tenants mutually intended to hold the property as tenants-in-common and were aware of each other's position to no longer treat the property interest as joint.

For example, in *Hansen*, the joint tenancy was determined to have been severed where spouses had agreed to negotiate a separation agreement.

The spouses closed their joint bank accounts, opened separate accounts, and a new Will was drafted by one spouse leaving his estate to his children. The Court found that the intention was to "divide their interests in their property and hold their interest in common rather than jointly."[4]

When does Litigation Arise from a Severance of a Joint Tenancy?

In a typical scenario, one of the owners of a property where joint title has been severed makes an application for partition and sale. The party seeking such relief relies on the fact that title is held by two different parties, each of whom has a one-half interest in the property. The party opposing such relief will typically assert that the holder of legal title to the other half holds it in trust for another. There may also be a question as to whether the severance of a joint tenancy constituted a breach of a contract or a breach of fiduciary duty.

A common circumstance where a severed tenancy is the subject of litigation is where a family member

---

[1] Thanks to Howard Gerson and Mark Lahn for discussing the issues and providing insight into the content of this article
[2] *Re McKee and National Trust Co. Ltd. et al.,* 1975 CanLII 442 (ON CA), page 4
Su v. Lam, 2012 ONSC 2023 (CanLII), para. 17
[3] *Hansen Estate v. Hansen*, 2012 ONCA 112 (CanLII), paras. 33-39
[4] *Hansen Estate,* paras. 57-62

holds title to a residential home with another. The question becomes whether the holding of legal title accurately reflects the contributions to the purchase and maintenance of the property and whether the severing of title unfairly benefits (or unjustly enriches) the applicant with the opportunity to make an application for partition and sale. A common argument in response to such an application for partition and sale is that the property is held subject to a purchase money resulting trust for the benefit of the respondent. Evidence of a contribution to the purchase or payments against a mortgage on the property will be required to successfully assert such a claim. Another "pushback" may be evidence that the respondent funded improvements to the property, therefore gaining entitlement to assert a constructive trust. Again, obtaining the necessary evidence is crucial if such a claim is to be successful.

Another common litigation scenario is where the joint tenancy is severed, the party initiating the severance making a calculation that they will die before the other joint owner in a bid to prevent the survivor from receiving their share by right of survivorship. Of course, on occasion, there is a miscalculation and, by hedging their bets, the severing party who unexpectedly survives their co-owner loses the benefit that might otherwise have come their way by retaining title jointly. Counsel of caution is that any advice to a joint tenant to sever title must alert the client to the consequences of the order of death not being as anticipated. While the failure to sever a joint tenancy can sometimes be regretted, the reverse may also be true. The bottom line is that there are no certainties at the time of the severance.

Enforcement of a Security Interest as a Severance

Enforcement of a security interest against one joint tenant's interest may have the effect of severing a joint tenancy.[5] In *The Toronto-Dominion Bank v. Phillips et al.*[6], spouses were litigating over surplus proceeds from the power of sale of their jointly held property that the bank had moved to pay into court. The Court of Appeal found that the joint tenancy had been severed because an execution creditor of the spouses' joint debt had enforced only against the husband's interest in the surplus fund.

Severance by an Attorney under Power of Attorney for Property

A difficult question can arise when the decision about whether to sever a joint tenancy is a decision to be made by an attorney for property for an incapable donor. The question is not just whether to sever but also whether the attorney for property has the authority to sever.

In *Scalia v Scalia,*[7] the Ontario Court of Appeal reversed a decision that prevented an attorney for property from seeking partition and sale of property that his incapacitated elderly father and father's second wife held jointly. When the deceased became incapable, his attorney for property requested, among other orders, the sale of a Florida property and the division of the net proceeds to be split between the estate and the second wife.

The Court of Appeal concluded that the application judge erred by finding that the second wife purchased the home out of her own money. The Court further clarified that, despite this error of fact, the *Substitute Decisions Act* permitted the attorney for property to do "anything in respect of property the person could do if capable". Accordingly, the attorney for property was not only entitled to deal with the property as attorney but was further supported in his action to partition and sell.

One word of caution is that this case is fact specific. An attorney for property acting for an incapable donor must be alert to the terms of the Will and not take any steps to sever title to a property that is specifically documented in a Will or agreement to pass to a specific individual.

Summary

Although good estate planning avoids the prospects for litigation, the severance of a joint tenancy is a right that is (unless otherwise released) available to any joint tenant. If a joint tenant chooses to sever a joint tenancy, or if a creditor enforces against a joint tenant's interest in property, such events can have unintended consequences that may dramatically alter an estate plan and possibly give rise to litigation. Advising a client of the possibility and consequences of severing a joint tenancy is one way for the estates practitioner to control such unintended consequences.

Hull & Hull LLP

Editor: Suzana Popovic-Montag
spopovic@hullandhull.com
141 Adelaide St. W., Suite 1700
Toronto, Ontario M5H 3L5
Tel: 416.369.1140 | Fax: 416.369.1517

Please note that all back issues of The Probater are available in full text on our website hullandhull.com

[5] *Arnold Bros. Transport Ltd. v. Murphy*, 2014 MBCA 9 (CanLII)
[6] 2014 ONCA 613 (CanLII)
[7] 2015 ONCA 492