



Tips for Gifting a Right of Survivorship

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Inter vivos gifts consisting of a survivorship interest in real property may be an appealing alternative to gifting land through a will – such gifts typically pass outside of an estate and the value of the gift can even be reduced or eliminated by converting a joint tenancy to a tenancy in common.¹ This month’s Solicitor’s Tip focuses on how to gift a right of survivorship, and both how and why the intent to make such a gift should be documented.

Gifting a right of survivorship vs a full beneficial interest in land

The right of survivorship is inherent in the creation of a joint tenancy – when a joint tenant dies, their legal interest in the property will be extinguished and pass to the surviving joint tenant(s).² If a person receives a right of survivorship as a gift, this means that they cannot enjoy it until after the donor passes away. Technically, however, the gift is not testamentary in nature and will take effect immediately as an *inter vivos* gift.³

The difference between owning only a right of survivorship without further beneficial ownership versus a full beneficial interest in property is aptly demonstrated by the consequences of severing a joint tenancy. In this situation, if one of the tenants only holds a right of survivorship, they will simply hold their interest in the land in trust for the donor as a tenant in common. In comparison, if they were gifted a full beneficial interest in the property and the joint tenancy is then severed, they will continue to have an interest in the portion of the property that was gifted to them, although they will no longer have a right of survivorship over the property as a whole.

Why the intent to give a right of survivorship should be documented

Technically, it may not be necessary to document a gift consisting of a right of survivorship in real property – such a gift may be recognized, even if the donor’s intent is not recorded.⁴ Nevertheless, documenting the intent to give this right is advisable for several reasons. First, such a document may be used to rebut the presumption of resulting trust. Unless there is evidence that establishes on a balance of probabilities that a gratuitous property transfer was intended to be a gift, the law presumes that the donee holds their interest in

¹ See *Jackson v. Rosenberg*, 2024 ONCA 875 [*Jackson 2024*]. Supplementary reasons are reported at 2025 ONCA 48.

² *Fuller v. Fuller Estate*, 2010 BCCA 421 at para 51; *Weaver v. Weaver Estate*, 2019 BCSC 132 [*Weaver*] at para 65.

³ See *Jackson 2024*, *supra* note 1 at paras 29, 31, 48.

⁴ A gift is not a “disposition” that must be evidenced in writing: see *McKendry v. McKendry*, 2017 BCCA 48 [*McKendry*] at para 48.

the property in trust for the donor, including an interest received by right of survivorship.⁵ Second, a document that records the donor's intent to gift a right of survivorship may be useful if the donor later chooses to sever the joint tenancy. Should a dispute arise as to whether the donee has an interest in the property as a tenant in common or holds their interest in the property in trust for the donor, the document can be used to establish the nature of the gift.

How to document an intention to gift a right of survivorship

A variety of instruments may be used to document a donor's intention to gift a right of survivorship, including a trust declaration,⁶ a deed of gift,⁷ or a statutory declaration.⁸ It also appears to be possible to record the donor's intent using a hybrid document that combines multiple instruments.⁹ Regardless of what instrument is used to record the donor's intent, the instrument ought to expressly set out the donor's intent to gift a survivorship interest in property by transferring it into joint tenancy.¹⁰ A well drafted instrument will also make it clear that the donor is gifting the right of survivorship immediately and that it is an *inter vivos* gift.¹¹

Additional information regarding the donor's intent may also be recorded in the instrument. For example, the donor may specifically intend to:

- retain control over the property during the donor's lifetime,
- restrict the donee from severing the joint tenancy; or
- retain the right to remove the donee's name from title.

The last point is not to be confused with reserving a right of revocation, however. According to the British Columbia Court of Appeal, a document which states that a survivorship interest may be revoked cannot be characterized as an *inter vivos* gift. That said, documentation of an *inter vivos* gift may "acknowledge that certain *inter vivos* dealings with the property [will] result in the right of survivorship disappearing."¹²

Closing

When assisting a client with gifting a survivorship interest in real property through an *inter vivos* gift, it is advisable to create an instrument to document the client's intentions. The object of such documentation is to minimize the risk of future litigation over the gift, both if the gift takes effect upon the donor's death, or if the donor chooses to eliminate the donee's interest in the property by severing the joint tenancy. Ultimately, the instrument

⁵ See *Pecore v. Pecore*, 2007 SCC 17 at para 24; *Bergen v Bergen*, 2013 BCCA 492 at para 42. In *Jackson* 2024, *supra* note 1 at para 44, the court notes that a gift consisting of a right of survivorship will only require the presumption of resulting trust to be partially rebutted.

⁶ See *McKendry*, *supra* note 4.

⁷ See *Weaver*, *supra* note 2.

⁸ See *Weaver*, *ibid*.

⁹ For example, the deceased in *Herbach v. Herbach Estate*, 2019 BCCA 370 [*Herbach*] executed a "Deed of Gift and Trust" to gift a right of survivorship to two of her children.

¹⁰ For example, in *Herbach*, *ibid*, the impugned clause stated that the donor's children held their interest in specific assets as trustees, for the donor's benefit, during the donor's lifetime.

¹¹ *Ibid* at para 24.

¹² *Ibid* at paras 35-36.

ought to document the client's intent clearly, and include specific information, as reviewed above, in order to be effective.