

# Joint tenancy does not always mean joint ownership



Floyd Gradley  
Estate and trust lawyer  
Tax and Estate Planning Team

## » QUICK SUMMARY

Joint tenancy provides many estate planning benefits, and has some potential pitfalls if you don't create a legal document indicating your intentions. The three joint tenancy options include "true" joint tenancy, creation of a "resulting trust," and gift of a "right of survivorship."

Joint tenancy has always been a complex estate planning tool in Canada, particularly when only one person contributes financially to a jointly held asset. However, the complexity has increased since 2007, the result of two landmark Supreme Court of Canada judgments. And while joint tenancy rules discussed in this article do not apply to assets located in Quebec, they will still be a matter of interest to advisors there whose clients have assets located in other provinces.

### Three ways to create a joint tenancy

There are three joint tenancy options for someone (let's call her "Mom") who wants to transfer an existing asset into joint tenancy with someone else (let's call him "Son") or buy an asset and register it in joint tenancy with Son. Each option has a different effect.

#### 1. 'True' joint tenancy

One of Mom's options is to create a "true" joint tenancy, giving Son a joint legal interest and a joint beneficial interest in the asset. With this option, Son's joint tenancy gives him joint ownership with Mom. He and Mom are registered on title as joint tenants and have identical rights, including the right to use the asset and receive its income. Mom will no longer have full control of decisions respecting the asset, and Son's interest in the asset will be exposed to his creditors, which could include an estranged spouse.

If Mom transfers an asset she owns into true joint tenancy, she must report the disposition of one-half of that asset in her income tax return for the year in which the transfer occurs. Unless the asset is her principal residence, the disposition will likely create a capital gains tax liability for her if the asset value is greater than its adjusted cost base. Mom and Son will each be liable for income tax on one-half of any future income produced by the asset, including capital gains tax if it is sold (unless the asset is a principal residence and either of them can use the capital gains tax exemption for their one-half interest).

If Mom dies, her interest in the asset will pass automatically to Son because of the right of survivorship which is an incident of all joint tenancies (outside of Quebec, where this is not available). Probate fees will be avoided because Mom's estate is bypassed, but the deemed disposition resulting from Mom's death will likely create a capital gains tax liability for her estate if the value of her interest in the asset is greater than its adjusted cost base. (If the joint tenants were spouses, however, capital gains tax could be deferred until death of the second spouse.)

If Son dies first, his interest will pass automatically to Mom through right of survivorship, avoiding probate fees. However, the deemed disposition resulting from Son's death will likely create a capital gains tax liability for his estate if the value of his interest in the asset is greater than its adjusted cost base, which is the value of his interest on the date when Mom created the joint tenancy.



## 2. Creation of a ‘resulting trust’

Mom’s second option is to create what’s known as a “resulting trust” joint tenancy, giving Son a joint legal interest in the asset but retaining the full beneficial interest for herself. With this option, Son’s joint tenancy does not give him joint ownership. He and Mom are registered on title as joint tenants but Son is essentially a trustee with no right to use the asset or receive its income. Mom will not suffer any undesirable consequences associated with a change of beneficial ownership, such as an immediate capital gains tax liability, loss of full control, or exposure to Son’s creditors.

If Mom transfers an asset that she already owns into a resulting trust joint tenancy with Son, there is no taxable disposition. Mom remains solely liable for income tax, including capital gains tax if the asset is sold (unless the asset is her principal residence).

If Mom dies, her legal interest in the asset will pass automatically to Son through right of survivorship (outside of Quebec, where this is not available). However, her beneficial interest will not pass to Son but will instead be held by him for her estate, to be distributed according to her will (or the rules of intestate distribution if she has no will). Since the asset will not bypass Mom’s estate, it is unlikely that probate fees will be avoided. In addition, the deemed disposition resulting from Mom’s death will likely create a capital gains tax liability for her estate if the value of the asset has increased since she acquired it.

If Son dies first, his legal interest in the asset will pass automatically to Mom through right of survivorship and she will regain a full legal interest in the asset, and retain full beneficial interest. Since Son had no beneficial interest in the asset, there will be no probate fee or capital gains tax liability.

## 3. Gift of a ‘right of survivorship’

Mom’s third option is to give Son a “right of survivorship.” The concept of a right of survivorship as an independent property right was introduced in 2007 by the Supreme Court of Canada in *Pecore v. Pecore*, a decision respecting a daughter’s rights as joint tenant of her deceased father’s investment account. Confusion now abounds because the term right of survivorship can be used to indicate either an incident of joint tenancy or an independent property right, depending on the context.

As with a resulting trust joint tenancy, this option does not give Son joint ownership with Mom. Although Mom and Son are registered on title as joint tenants, Son has no right to use the asset or receive its income. Mom will not suffer any undesirable consequences associated with a change of beneficial ownership, such as an immediate capital gains tax liability, loss of full control, or exposure to Son’s creditors. However, Son’s right of survivorship (as a property right) will give him full ownership of the asset if Mom predeceases him.

There is apparently no taxable disposition if Mom gives Son a right of survivorship respecting an asset she already owns. Mom will remain solely liable for income tax, including capital gains tax if the asset is sold (unless the asset is her principal residence).

By giving Son a right of survivorship respecting the asset, Mom can retain full beneficial ownership while alive and yet pass full beneficial ownership to Son if she predeceases him. Probate fees will be avoided because Mom’s estate is bypassed, but the deemed disposition resulting from Mom’s death will likely create a capital gains tax liability for her estate if the value of the asset has increased since she acquired it.

If Son predeceases Mom, his right of survivorship (as a property right) ceases. Since he has no beneficial interest in Mom’s asset, there will be no probate fee or capital gains tax liability.

## Intent must be made clear

Because all joint tenancy registrations look alike, disagreements may arise after Mom’s death about what type of joint tenancy she intended to create. She may have intended to give Son a right of survivorship (as a property right), but his siblings may argue that Mom intended to create a resulting trust so that, as beneficiaries in her will, they will receive a share of the asset.

To ensure that her intention is honoured, Mom should use a written legal document to evidence the creation of the joint tenancy. Without satisfactory evidence of her intention, legal presumptions will be used to determine her intention, and the presumed intention may not be Mom’s actual intention.

Use of joint tenancy can create many benefits, including simplifying estate administration, providing privacy and avoiding probate fees. However, care must be taken to create the most advantageous option and to document it properly, so as to ensure that the potential problems associated with joint tenancy do not outweigh its advantages. ■