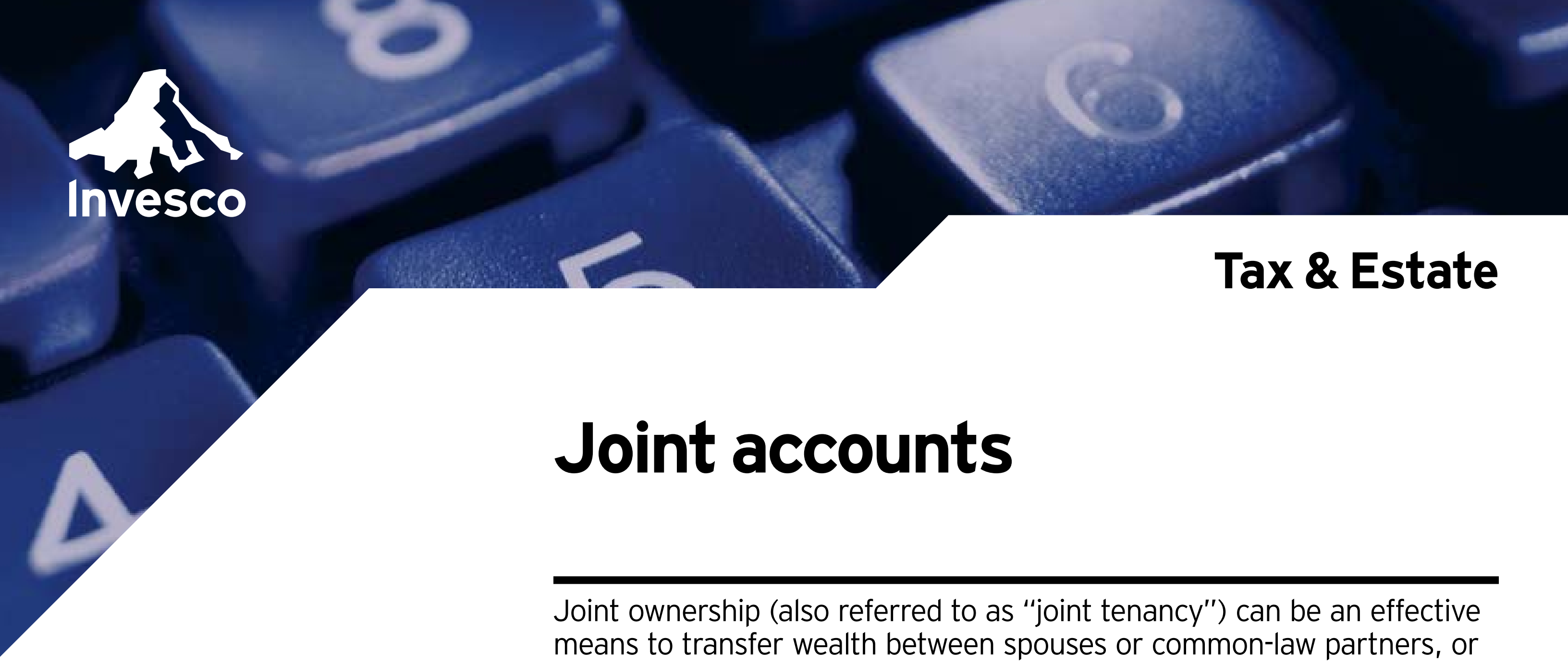

Joint accounts

Joint ownership (also referred to as "joint tenancy") can be an effective means to transfer wealth between spouses or common-law partners, or to later generations. In all provinces except Quebec,[†] accounts are often registered jointly as a way to reduce or avoid probate fees.

Joint ownership

The most common forms of community ownership are joint tenants with rights of survivorship (JTWROS) and tenants in common (TIC).

JTWROS

Joint ownership, a common-law concept, is a form of property ownership involving two or more owners that provides each owner with an undivided and identical interest in the property and, more important, the right of survivorship. Upon the death of one joint owner, the deceased's interest in the account terminates, leaving the surviving joint owner(s) with full ownership, despite any attempted disposition in the deceased's Will.

TIC

TIC differs from JTWROS in that there is no right of survivorship associated with it. When a co-tenant dies, his or her share passes on to his or her heirs through the Will or the rules pertaining to intestacy (where the deceased has no Will).

As compared with equal interests under JTWROS, tenancy in common need not be 50/50, but rather can be in any proportions.

Why joint ownership?

There are two common reasons given for registering an account jointly. The first is to minimize or avoid probate taxes. This is discussed in detail on the next page under the heading "Joint accounts and probate taxes."

The second is to ease the continuing administration of the account. For example, elderly parents might place their investment accounts into joint names with their adult children to facilitate dealing with the account in the future. For an alternative, please see the sidebar on page 4 titled "Powers of attorney: An alternative."

[†] Estate law differs significantly in Quebec from elsewhere in Canada. The rules described in this article do not apply in Quebec when referencing joint tenants with rights of survivorship. We present this information as a matter of general professional interest and for the benefit of advisors with clients also subject to legislation in other provinces.

Dangers of jointly held property

Before placing accounts in joint names, there are some potential risks that need to be taken into consideration. First, as discussed below, a transfer to someone other than a spouse or common-law partner may trigger immediate capital gains tax (see the heading "Deemed disposition and capital gains" on page 3). Second, a transfer of property generally means not only a loss of control over the property but also quite often the inability to make decisions relating to the property without the consent of the joint owner.

Assets held in a joint account may become exposed to creditors of the other joint accountholders, whether or not insolvency or bankruptcy comes about. Further, if most or all of an individual's assets are held under JTWROS, the deceased individual's estate may have insufficient assets to pay his or her final taxes and other liabilities.

In addition, when the parent dies, the child may become the sole legal owner of the account, which could lead to a dispute with other siblings or family members who believe that they should have a claim on the jointly held account. Finally, if the account is transferred to an adult child, it may also become open to division upon breakdown of a marriage or common-law partnership of the child and his or her spouse or common-law partner.

If a residence is involved, this could jeopardize or at least complicate all the joint owners' access to the principal residence exemption. Finally, it could also limit eligibility as a "first-time home buyer" for purposes of participation in the Home Buyers' Plan.

Joint accounts and probate taxes

The court process for confirming the validity of the Will is historically referred to as "probating" the Will. In all provinces (other than for notarial Wills in Quebec), there is a fee levied by the court for submitting such an application. The fee is calculated as a percentage of the value of the deceased's estate at the time of death, and there is usually no maximum.

With proper planning, probate taxes can be avoided or at least reduced. Under joint ownership, upon the death of one of the joint owners, the deceased's interest terminates, thereby increasing proportionately the interests of the surviving joint owner(s). The deceased's interest is sometimes said to have been transferred "outside of the estate," but strictly speaking, there is no "transfer." In bypassing the estate, the value of the deceased's jointly held account is excluded from the value of his or her assets subject to probate and, thus, probate taxes are avoided on the value of the account.

However, the transfer of a solely owned account to joint ownership can have income tax implications that should be balanced with the probate tax concerns. For more information, please consult our *Tax & Estate InfoPage* titled *Probate planning to minimize estate costs*.

Legal ownership vs. beneficial ownership

Legal ownership of an account is as simple as having one's name registered on the joint account's documents. Beneficial ownership goes beyond having legal title over the account. Where a joint accountholder has the right to the use and enjoyment of the property held in the account, he or she is generally considered a beneficial owner.

Deemed disposition and capital gains

For income tax purposes, a disposition occurs when there has been a change in "beneficial" ownership as opposed to a change in "legal" ownership. In determining whether each joint owner has beneficial ownership, a number of factors should be considered:

- Whether the account was owned by one of the joint owners prior to making it a joint account
- Evidence of the transferor's intention to gift the account to the transferee
- Whether income post-transfer was used jointly rather than for the sole benefit of the transferor
- How income was reported for tax purposes during joint ownership
- Whether the transferee actually exercised control over the account prior to death of the transferor

Where the legal owners have beneficial ownership, each joint accountholder is equally responsible for the tax liability. Each must report earnings based on his or her proportionate ownership, except where the attribution rules apply (discussed under the heading below, "Transfer to spouse or common-law partner").

The Canada Revenue Agency (CRA) has consistently taken the view that the transfer of property solely owned by a taxpayer into a true joint ownership arrangement (one in which beneficial ownership has changed) would result in a disposition. However, it would not be a disposition of the "full" account but, rather, only the proportionate interest that is being transferred to the transferee(s). For example, an investor who adds one person to her account would be said to have disposed of 50% of the account. Similarly, an investor who adds two people to his account would be considered to have disposed of 66.67% of his account.

Commonly, transfers occur between spouses or common-law partners, and possibly over to an adult child or adult children. Each of these transfers can result in different tax consequences to both the transferor and transferee(s).

Transfer to spouse or common-law partner

When an investor transfers his or her account into joint ownership with his or her spouse or common-law partner, no capital gain or loss will occur. This is because capital property can generally transfer between spouses or common-law partners on a tax-deferred basis. As a result, the proceeds of disposition to the transferor spouse or common-law partner would be equal to 50% of the adjusted cost base (ACB) of the property. The transferee spouse or common-law partner will then be deemed to have acquired the property for an amount equal to 50% of the ACB.

An election is available to a transferor spouse or common-law partner to have the account transferred at fair market value (FMV). This might be elected where the transferor spouse or common-law partner has unused capital losses from the disposition of other properties (either in the current year or carried forward from prior years), which could offset the capital gain triggered on the transfer. In such a case, the transferor spouse or common-law partner will elect to have transferred 50% of the property at its FMV, and the transferee spouse or common-law partner will be deemed to have acquired the property at that same FMV.

Despite the ACB rollover of capital property, the spousal attribution rules will generally apply to future income from the property. All income and capital gains/losses generated from the transferred property will generally be attributed back to the transferor spouse or common-law partner for tax-reporting purposes. There are some exceptions to the attribution rules that are beyond the scope of this piece. For more information, please see our *Tax & Estate InfoPage* titled *Income-splitting opportunities and the income attribution rules that may prevent them*.

Example one

Marie owns a mutual fund account with an FMV of $150,000. Her ACB of the fund in the account is $100,000. She decides to add her adult daughter, Shannon, as a joint owner of the account. Upon doing so, Marie is deemed to have disposed of a 50% interest in the account. She will be deemed to have received proceeds of disposition of $75,000 for her 50% interest, with an ACB of $50,000, resulting in a capital gain of $25,000 in the year of transfer.

Powers of attorney: An alternative

Depending on personal circumstances, a power of attorney for property is an alternative to joint registration. A power of attorney grants one or more people the authority to manage a specific account (referred to as a "limited power of attorney"), or a person's entire property (called a "general power of attorney") if the grantor cannot do so because of a temporary absence from the country, an accident, disability or other infirmity. The representative (called an attorney or "mandatory" in Quebec) has the authority to make decisions but does not have ownership of the assets. This authority ends upon death or at any time the grantor decides to terminate the power, providing the grantor has the mental capacity to do so. For a more detailed discussion of powers of attorney, please refer to our *Tax & Estate InfoPage* titled *Incapacity – Planning ahead helps*.

Transfer to adult child

Where an adult child is added to an account, the transfer or gift will normally trigger a capital gain/loss through a deemed disposition of half the account. This may be problematic for the transferor in cases where the property has significant capital appreciation. Tax will be due on the deemed disposition without any cash arising to pay the tax bill.

The new joint owner – the son or daughter – acquires the account at proportional FMV. Each accountholder will be taxed on 50% of any future income and capital gains/losses generated by the account. Upon the death of either joint owner, there will be a disposition of the 50% interest owned by the deceased joint owner and a capital gain/loss may result.

The use of a "side document"

To address the potential of having capital gains triggered when an account is registered in joint names with a non-spouse, a "side document" might be used. This document is generally in the form of either a statutory declaration or declaration of trust stating that the child or children added to the account has/have legal but not beneficial interest in the account.

The standard practice of the CRA is that if beneficial ownership has not changed, no disposition for tax purposes will have occurred on the transfer of the account to joint ownership. As a result, a taxable disposition would be deferred until the parent sells the property or is deemed to have disposed of the property at death.

However, this strategy may not be effective to avoid probate tax on the value of the account when the parent dies. The reason is that in such a situation, a beneficial joint tenancy does not exist. Accordingly, the executor of the deceased parent's estate may have to disclose the property in a probate application if it is to be distributed according to the terms of the deceased parent's Will. Furthermore, it may be open to interpretation whether and to what extent creditors are affected by joint ownership variations, and therefore consultation with a lawyer is advisable before taking any planning steps.

Who pays the tax?

Generally, each joint accountholder is required to include a proportion of the account's income and capital gains/losses in his or her income for tax purposes. The total income and capital gains/losses are divided among the joint account owners based on each individual's proportion of the account of which the individual beneficially owns. For example, if two individuals each beneficially own 50% of an account, then each individual would report 50% of the income for tax purposes. If the joint owners are spouses or common-law partners, the attribution rules may affect the tax treatment.

If one of the joint owners dies during the year, any income or capital gains/losses realized following the day of death will generally be reported for tax purposes in the names of the surviving joint owners.

Disappointed beneficiaries and joint accounts

The concept of resulting trust in joint accounts was addressed in two rulings from the Supreme Court of Canada (SCC) in May 2007. Both cases arose out of estate challenges where a father gratuitously added a daughter as a joint owner to an investment account. In each case, the respective daughter had the onus to rebut the presumption of resulting trust, meaning each had to show that a beneficial transfer was intended.

In *Pecore v. Pecore*, the daughter's ex-husband alleged that the joint ownership was only for convenience to avoid probate and that the account funds should be distributed in accordance with the father's Will (in which the husband was named as a beneficiary).

In *Saylor v. Madsen*, it was the daughter's two siblings who similarly claimed that the joint ownership was merely a convenience and probate-avoidance manoeuvre.

While the facts worked in opposite directions in the two cases – in favour of the daughter in *Pecore v. Pecore* and for the challengers in *Saylor v. Madsen* – perhaps the most interesting aspect of the cases was the SCC's statement that joint ownerships may be characterized as a lifetime transfer of a survivorship interest that passes at death.

In fact, the SCC suggests that such an ownership structure may avoid probate tax and still not trigger capital gains tax until death. While the strict issue before the court was the legal entitlement to the account, the further comments with respect to taxes certainly bear consideration on any addition of joint owners. It may be prudent to have a client obtain an opinion from an estate-planning lawyer before making any changes and to employ a side document to make intentions clear.

In 2014, further guidance was provided by the Ontario Court of Appeal in *Sawdon Estate v. Sawdon*. The father left approximately $1 million in a joint account with his children, but a charity (which was entitled to the residual of the father's estate) argued that the presumption of resulting trust was not rebutted and that the accounts were part of the father's estate. The trial judge concluded that these accounts were not part of the father's estate and belonged to the adult children. However, the judge concluded that the joint account was actually held in trust for all of the children and the children held the beneficial right of survivorship rather than beneficial ownership.

A further decision by the Ontario Superior Court of Justice in *Lowe Estate v. Lowe* reinforced the precedent set by *Sawdon Estate v. Sawdon*. The complexities implied by these recent decisions further emphasize the importance for consultation with a lawyer prior to taking any estate-planning steps.

Example two

Continuing from example one on page 4, Marie dies when the value of her jointly held account was $160,000. Upon her death, there would be a deemed disposition of her interest in the account for proceeds equal to her share of the FMV or $80,000. Since the ACB of her remaining 50% interest is $50,000, she will recognize a capital gain reportable on her terminal return of $30,000. In total, she will have reported a capital gain of $25,000 upon the transfer to Shannon and a capital gain of another $30,000 upon death, for a total capital gain of $55,000.

Joint accounts and death

Upon the death of one of the joint owners of an account, the deceased will be deemed to have disposed of his or her share of the account for proceeds equal to the FMV of his or her portion of the account. Any resulting capital gain/loss would be reported on the deceased's terminal tax return for the year of death. The surviving joint owner would be deemed to have acquired the deceased's portion at FMV and would adjust his or her ACB accordingly.

Note that if the joint owner is a surviving spouse or common-law partner, the proportionate share of the account would be transferred at ACB unless an election was made in the deceased's terminal return to have the asset transferred at FMV.

A similar tax result would occur if the account was held as TIC except that the estate, as opposed to the surviving tenant in common, would be deemed to have acquired the deceased's portion of the account at FMV.

CRA and joint accounts

A 2003 tax case, *Oolup v. the Queen*, further highlights the risk that continues to exist with the joint registration of assets.

The facts

After Ms. Oolup's mother died, she became very close to her grandparents, she visited them regularly and helped manage their affairs. The grandparents' savings were held jointly in a GIC account to which Ms. Oolup's name was also added.

After the death of her grandparents, Ms. Oolup became the executrix of her grandmother's (the last to die) estate. For "reasons of family harmony," Ms. Oolup chose to keep only $10,000 from the $200,000 GIC account and to divide the rest equally among her grandmother's children (and their heirs) in accordance with the terms of her grandmother's Will.

CRA's position

The CRA, relying on the principle of resulting trust, argued that the $200,000 GIC account was not a true joint ownership and instead formed part of Ms. Oolup's grandmother's estate. Therefore, the $10,000 that was paid to Ms. Oolup for services rendered as executrix should be taxable.

Ms. Oolup's defence

Ms. Oolup testified that although she knew her grandmother wanted her to have the GICs "because of all the time they had spent together," she "didn't feel comfortable" with the idea of keeping all the money for herself. She was also concerned with the prospect that her relatives might think that the money had been her motivation behind her devotion to her grandparents. To avoid this, she chose to share all but $10,000 of "her" GIC money with the family.

The ruling

Based on the evidence, the judge found that there was no resulting trust and that the GIC funds became Ms. Oolup's property following her grandmother's death. As a result, the $10,000 retained by her as the surviving joint accountholder was not received as executor's fees and was, therefore, tax-free to her.

Conclusion

While Ms. Oolup was successful in keeping her inheritance tax-free, this case should serve as a significant estate-planning lesson. It is evident that the CRA can take the position that a joint account is not truly a joint account. But what if the facts in the case were different? One can clearly envisage the CRA taking the opposite position where a parent adds an adult child's name to his or her joint account "for estate-planning purposes only." Here, the parent's intention is for it to become a resulting trust with no transfer of beneficial ownership. The CRA could argue that there is indeed a disposition of half the account and demand any capital gains tax be paid at that time. It behooves all investors to take joint accounts seriously; if parents are simply trying to give the adult child control over the account, the best route may be a power of attorney (see page 4).

Ease of administration

In order to effect the re-registration of an account not held jointly into the name of a surviving beneficiary under the Will (or under the laws of intestacy), it is usual practice for financial institutions to request probate before the assets are transferred (some *de minimis* rules may apply). However, in the case of JTWROS accounts, generally only a notarial copy of a death certificate may be all that is required to effect the transfer.

In-trust accounts

In-trust accounts or "informal trusts" as they are sometimes called, are used by parents to invest funds on behalf of minors who do not have the legal capacity to enter into a binding contract. Because of the nature of in-trust accounts, they cannot be held as JTWROS or TIC. However, it is possible to register the account in the names of two adults who would each act as "co-trustees" on the account, for example, "Jack and Jill Smith in trust for Johnny Smith." The advantage of doing this would be in case one trustee dies, the other trustee may be able to take over control of the account immediately with little administrative hassle. The financial institution should be consulted before registering the account in order to be certain how it deals with such matters. For more information, please consult our *Tax & Estate InfoPage* titled *In-trust accounts*.

Registered education savings plans

Registered education savings plans (RESPs) are tax-deferral tools whereby a subscriber can save for a beneficiary's post-secondary education. An RESP can have joint subscribers, but the subscribers must be spouses or common-law partners.

The advantage to doing so is that either spouse or common-law partner (or both) may be able to receive an Accumulated Income Payment if the conditions for such payments are met. In addition, the surviving spouse or common-law partner could take control of the account automatically upon the death of his or her joint subscriber spouse or common-law partner. For more information, please consult our *Tax & Estate InfoPage* titled *Registered education savings plans (RESPs)*.

For more information about this topic, contact your advisor, call us at 1.800.874.6275 or visit our website at invesco.ca.

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