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Investments

Joint tenancy

Co-ownership and the complexities of joint tenancy

Contents

Introduction

It's common for real or personal property to be held by more than one person, which is generally true for spouses and common law partners. Increasingly, however, parents have discovered the merits of co-ownership of property with their adult children. This is particularly true in estate planning, where joint tenancy generally ensures the seamless and tax-efficient transition of property from one individual to another, especially from a parent to a child or children.

This paper will provide an overview of the types of co-ownership of property as well their tax and legal implications, which can help your clients to avoid family disagreements and other potentially adverse consequences.

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Probate tax rates in Canada

Alberta	
$10,000 or less	$35
over $10,000 up to $25,000	$135
over $25,000 up to $125,000	$275
over $125,000 up to $250,000	$400
over $250,000	$525

British Columbia	
$25,000 up to $50,000	0.60%
over $50,000	1.40%

Manitoba**

New Brunswick	
$5,000 or less	$25
over $5,000 up to $10,000	$50
over $10,000 up to $15,000	$75
over $15,000 up to $20,000	$100
over $20,000	0.50%

Newfoundland and Labrador	
$10,000 or less	$60
over $1,000	0.60%

Northwest Territories	
$10,000 or less	$30
over $10,000 up to $25,000	$110
over $25,000 up to $125,000	$215
over $125,000 up to $250,000	$325
over $250,000	$435

Nova Scotia	
$10,000 or less	$85.60
over $10,000 up to $25,000	$215.20
over $25,000 up to $50,000	$358.15
over $50,000 up to $100,000	$1,002.65
over $100,000	1.70%

Nunavut	
$10,000 or less	$25
over $10,000 up to $25,000	$100
over $25,000 up to $125,000	$200
over $125,000 up to $250,000	$300
over $250,000	$400

Ontario	
$50,000 or less	$0
Over $50,000	1.50%

Prince Edward Island	
$10,000 or less	$50
over $10,000 up to $25,000	$100
over $25,000 up to $50,000	$200
over $50,000 up to $100,000	$400
over $100,000	0.40%

Saskatchewan*	
All estates	$7 on every $1,000 or 0.7%

Yukon	
$25,000 or less	$0
Over $25,000	$140

*Probate fees on real estate equity and not the fair market value

**The Budget Implementation and Tax Statutes Amendment Act, 2020 eliminated probate fees in Manitoba

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What are the types of co-ownership?

Co-ownership hinges on the fact that each individual owner has what's known as indivisible possession, which generally means that it is often not possible to physically divide the co-owned asset. However, it is legally possible to determine whether the interest each owner holds in the property is identical or unidentical.

What is tenancy in common?

This is a form of co-ownership that allows for unidentical interests in the ownership of the property. For example, if there are three owners, the first might own 50%, while the remaining two owners each own 25%. Tenancy in common does not have a right to survivorship. This means that when an owner dies, that person's last will (or the rules of intestacy) deals with their interest in the property. It may be subject to a lengthy probate process and the associated estate administration taxes. There will also be deemed disposition of the deceased owner's interest (disposal of a property without a sale), which may give rise to income taxes.

The concept of co-ownership in Quebec

Co-ownership in Quebec exists within the framework of tenancy in common, whereby each co-owner has an exclusive right to their interest in the property. Under the Civil Code, Quebec does not recognize joint tenancy with right of survivorship.

Joint tenancy defined

As mentioned earlier with respect to co-ownership, each individual owner has what's known as indivisible possession, but with joint tenancy, the interest each owner has in the property is identical, which means that each owner essentially owns 100% of the jointly held property.

On the death of a deceased joint tenant, the property passes to the surviving joint tenant(s) by rights of survivorship. In this instance, the deceased joint tenant's will does not determine how their ownership interest is dealt with.

The tax treatment on the death of a joint tenant is somewhat different from a tenancy in common as it depends on the type of joint tenancy. There will be deemed disposition, but the tax liability will depend on the type of joint tenancy.

For this type of co-ownership to be deemed joint tenancy, the four unities described below must be present.

1. **Unity of title:**
   Each owner should have an equal claim to the property under the same authorizing documents.
2. **Unity of possession:**
   Each owner should have an undivided legal possession of the property. This means that each owner has a 100% interest in the entire property and has no right to exclude the others from ownership of any part of the property.
3. **Unity of interest:**
   Each owner has an identical interest in the property by nature, extent and duration.
4. **Unity of time:**
   The ownership interest of each joint tenant must be obtained at the same time.

If any of the joint tenancy unities are severed, the joint tenancy co-ownership structure defaults into tenancy in common, causing a portion of the property to form part of a deceased owner's estate.

Three types of joint tenancy explained

Historically, joint tenancy has had an intuitive definition (joint tenancy means two or more people own property and that is pretty much it), but in recent years, the Supreme Court of Canada, in its reasons for judgment, provided further distinctions in how we define and subsequently use joint tenancy.

1. True joint tenancy

True joint tenancy occurs when both (or multiple) joint tenants have a legal and beneficial ownership in the property. Legal title generally means that you are holding the property for the benefit of another. Beneficial title generally means that you are the real owner of the property (that is, you are able to directly benefit from the use of the property). Since both owners are presumed to have equal right, access and use of the property, the CRA will treat each joint owner as owning an equal and divided interest.

Upon the death of a joint owner, the surviving joint owner will, under operation of law, assume ownership of the account. This means the property will pass outside the estate of the deceased joint owner, and any gains or losses of the deceased owner's portion will be reported in the deceased joint owner's terminal tax return (unless a spousal rollover applies). This form of joint tenancy may be best for spouse and common law partners as all true joint tenants maintain complete control of the assets.

If this type of joint tenancy involves an investment account, all subsequent investment income will be taxed in both/all joint owners' hands. Generally, the transfer (including adding a spouse as joint tenant) of capital property between spouses can be done at the adjusted cost base of the property, so no taxable capital gain/loss will result. However, if the source of the funding for the account comes from only one spouse, first generation income will be taxed to the contributing spouse. Second generation income, which is investment income generated on first generation of income, can then be split between the spouses.

Case law example: Gully v Gully, 2018 BCSC 1590

The Gully case provides a strong example as to why true joint tenancy may present problems in the future.

Ms. Gully added her son as a joint tenant to her home and other assets.

In 2017, the son consented to a judgement in the amount of **$800,000.**

The creditor then attempted to take possession of the mother's home because of the true joint tenancy that existed between the son and mother.

The creditor won in court and was given the rights to take possession of Ms. Gully's home to the extent of her son's creditor's claim.

2. Resulting trust joint tenancy

This type of joint tenancy occurs when there is a gratuitous transfer, where money or other consideration did not exchange hands (for example, when the adult child did not pay for their portion of the property). In the case of a resulting trust joint tenancy, the onus is on the adult child (transferee) to demonstrate that the gift or the transfer by the parent was intended. If the transferee is unable to prove otherwise, the asset falls back to the parent's estate and may become subject to the lengthy probate process and associated estate taxes. If the child is successful in rebutting the presumption of resulting trust, they get to keep the assets as the new owner.

Case Law Example: Pecore v Pecore, 2007 SCC 17

This case revolved around a recently deceased father who had added his daughter, Paula, as a joint tenant to his financial accounts.

In the father's will, the remainder of the estate was to be **split between Paula and her husband.**

When Paula and her husband divorced, court proceedings began to determine if there was a resulting trust which would cause the accounts to fall back into the deceased father's estate rather than go to Paula through right of survivorship.

The courts determined that the father intended to gift ownership of the account upon his passing (intent having been documented). Had the father's intent been missing, a resulting trust would have likely been presumed, requiring the accounts to fall into the father's estate, then through probate and ultimately be split with Paula's ex-husband.

3. Joint tenancy with gift of right of survivorship

This occurs when a parent adds their child as a legal owner only. Upon the death of the parent, the child assumes both legal and beneficial ownership of the property. At all times during the parent's lifetime, the parent maintains complete control of the property. The CRA treats the parent as the sole taxpayer on the asset until their death, at which point the asset is transferred to the child, and the child becomes responsible for its associated taxes going forward. Again, properly documenting this agreement is essential to prevent a presumed resulting trust or a true joint tenancy.

Upon the death of a parent, there is a deemed disposition on the asset which is taxed on their terminal tax return. This prevents the assets from going through the lengthy probate process and avoids the associated estate taxes.

Principal residence and joint tenancy

In some instances, parents may wish to add an adult child as joint tenant on their principal residence. If this is the case, it is recommended that parents add their child using the strategy of joint tenancy with a gift of right of survivorship. This will ensure that on the parent's death or disposition of the principal residence, they or their executor can fully shelter the capital gains on the property using the principal residence exemption.

With joint tenancy with a gift of right of survivorship, there is:

- No deemed disposition when the child is added
- An ability to apply the full principal residence exemption by the parent
- No tax liability to the child when property is sold or at the parent's death
- An effective "firewall" to the potential downsides of true joint tenancy

If it were a true joint tenancy, CRA would treat the property as owned equally by each parent and child, meaning the parent may only be able to claim 50% of the principal residence exemption (assuming one joint tenant) if the child has another property they wish to utilize their exemption for.

How to dissolve a joint tenancy

Joint tenancy can be severed in three ways, known as the three rules, as described in *Hansen Estate v Hansen [2012] ONCA 112*:

1. Unilaterally acting on one's own share, such as selling or encumbering it
2. Mutual agreement
3. Any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common

The first way to sever joint tenancy is by acting unilaterally on one's own share. In essence, this means compromising one of the unities. If the unity of interest, possession or title are invalidated, the co-ownership is severed. The unity of time cannot be severed as it relates to the time of creation.

The second way to sever joint tenancy is through agreement by the parties involved, which can either be express or implied. It is recommended that the agreement is documented to prevent a future dispute.

Finally, any actions that suggest the owners are treating the property as if it were tenancy in common is sufficient to sever the co-ownership. This severance is inferred from the communication or conduct of joint tenants. Further, Hansen states: "[It] requires that the co-owners knew of the other's position and that they all treated their respective interests in the property as no longer being held jointly".

The bottom line: Documentation

Ultimately, all three forms of joint tenancy look alike, requiring clear documentation of the intention of owners. Without this, the courts will decide what they believe to be true based on facts and legal presumptions. As suggested from the decision in Weaver v Weaver Estate, 2019 BCSC 132, the recommended documentation may include the following:

1. **A deed of gift**
   This provides context to the gift of joint tenancy. This includes a description of whether both legal and beneficial ownership is gifted, or just legal ownership. In the event the joint tenancy is of real property, executing necessary land titles paperwork and other documentation should be completed.

2. **Statutory declaration**
   This expressly shows that the transferor understands the different forms of joint tenancy and the other options that may exist. Furthermore, the document should state the end interest that is gifted (for example, true joint tenancy, joint tenancy with gift of survivorship, etc.).

3. **Enduring power of attorney**
   The child should execute an enduring power of attorney in favour of the parent on the property in question. This gives the parent complete control over the assets during their joint tenancy.

4. **Bare trust agreement**
   This indicates that the interest that the child holds is held in trust for the parent's benefit during their lifetime. The trust agreement should also indicate that any principal residence benefits on real property are held in trust for the benefit of the parent. Finally, the trust deed may indicate that the trustee (child) holds the property in trust for themselves and their other siblings.

Finally, it's important that the transferor seek independent legal advice and meet one-on-one with their legal advisor to draw up the necessary document(s) describing the type of joint tenancy they wish to enter into. Since undue influence is a reality, and as explained in *Grosseth Estate v Grosseth, 2017 BCSC 2055*, the transferor needs to ensure "that gratuitous transfers are free from the taint of manipulation or coercion" by the transferee.

If an advisor inherits or purchases a book of business, it's advisable to review the client file very closely to determine the type of joint tenancy that was entered into by their clients, so they can provide them with the right advice.

General Inquiries

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