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JOINT TENANCY CONSIDERATIONS IN ESTATE PLANNING

This issue of the Legal Business Report provides current information to the clients of Alpert Law Firm regarding the use of joint tenancy ownership as an estate planning technique. Alpert Law Firm is experienced in providing legal services to its clients in tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions and estate administration.

A. ESTATE ADMINISTRATION TAX IN ONTARIO

When a will is probated in Ontario, pursuant to the *Estate Administration Tax Act,* a tax or "probate fee" is levied on the value of any assets that are subject to the will. These "probate fees" are imposed in addition to any income tax arising pursuant to the *Income Tax Act* (the "Act") and any other applicable taxes. Any assets that flow through a probated will are taxed at $5 per $1,000 on the first $50,000 worth of assets and $15 per $1,000 thereafter. As an example, a probated estate worth $10 million would be liable to remit approximately $150,000 of Estate Administration Tax.

B. JOINT TENANCY OWNERSHIP

In common law jurisdictions in Canada, joint tenancy is a form of co-ownership with a right of survivorship. When a joint tenant dies, the interest of the deceased passes automatically and immediately to any surviving joint tenants by operation of law, enlarging those interests. Where there are only two joint tenants, upon the death of one, complete title will vest in the lone survivor. Property held in joint tenancy need not go through probate until the death of the last remaining joint tenant.

Adding another individual (usually a family member) to title as a joint tenant is a popular strategy to minimize probate fees. The right of survivorship allows probate fees to be deferred until the death of the last joint tenant, and the process of changing title is relatively straightforward and inexpensive.

When implemented properly, holding property in joint tenancy can reduce Estate Administration Tax, particularly in the case where the joint tenants are spouses. However, there are some drawbacks associated with transferring title into joint tenancy, and in some cases the use of other estate planning techniques may be more appropriate.

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C. JOINT TENANCY CONSIDERATIONS

There are both tax and non-tax considerations when changing the ownership of a property into joint tenancy ownership.

(i) TAX CONSIDERATIONS

When adding another individual to the title of a property as a joint tenant, it is important to determine whether legal or beneficial ownership (or both) has been transferred as a result, since this affects the tax treatment of the transaction. Beneficial ownership generally exists where a person has a right to use and benefit from a property and also has some responsibility to maintain the property. Legal ownership, in contrast, exists simply when title is held in a person's name.

According to the Canada Revenue Agency (the "CRA") whether a person has beneficial ownership is a determination of fact based on certain indicia, including whether the person has (i) the right to possession, (ii) the right to collect rents, (iii) the right to call for mortgaging of the property, (iv) the right to transfer title by sale or by will, (v) the obligation to repair, (vi) the obligation to pay property taxes and (vii) other relevant rights and obligations. Not all factors need to be present to ground a finding of beneficial ownership. A written agreement specifying a type of ownership will not in and of itself be determinative, although coupled with the presence or absence of certain of the above-mentioned indicia, it may form a portion of the evidence that indicates beneficial ownership.

The CRA has indicated that a change in legal ownership without a change in beneficial ownership may not have the effect of reducing probate fees; since the beneficial interest remains with the original title-holder, the value of the beneficial interest will have to be added to the value of the estate upon probate. On the other hand, a change in beneficial ownership resulting from a transfer of property may reduce the liability for probate fees, but may also accelerate the payment of capital gains tax arising from a disposition of one-half of the property by the original title-holder.

Generally, a non-arm's length transfer of the beneficial ownership of a property will trigger immediate tax consequences since it is deemed to take place at fair market value pursuant to the provisions of section 69 of the Act. It is the CRA's position that a change in beneficial ownership will cause a disposition of one-half of the property by the original title-holder, with a resulting capital gain (or loss), unless there is a tax-free transfer to a spouse or a spousal trust or alternatively through the application of the corporate roll-over rules.

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Where an elderly parent grants a child joint ownership title of a property, this may result in a change of the beneficial ownership of one-half of the property, and any accrued capital gains, capital losses, recapture or terminal losses on one-half of the property will be crystallized at that time. As a result, the parent could become liable to pay tax on any gains or income arising in that taxation year.

In the event that a beneficial interest in a property is transferred to another person for no consideration, such a transfer is generally exempt from Ontario Land Transfer Tax; however, where the real estate property is encumbered by a mortgage then Ontario Land Transfer Tax will be eligible based on the outstanding amount of the mortgage at that time (refer to Ontario Tax Bulletin LTT10-2000).

(ii) NON TAX CONSIDERATIONS

Where a person is added to the title as a joint tenant, the first owner will lose some control over the property. The second owner will be entitled to any income and any future proceeds of disposition in proportion to his or her interest in the property. The property cannot be sold or mortgaged without the agreement of the new joint owner. The property will also become subject to any claims made by the new owner's creditors or family law claimants. In addition, if the second owner unexpectedly predeceases the first owner, the title to the property will revert back to the first owner thereby thwarting the intended purpose of having transferred the property into joint tenancy.

The following types of unilateral actions taken by either joint tenant will change the form of ownership from a joint tenancy to a tenancy in common: (i) selling or mortgaging either tenant's interest in the property; or (ii) executing a document which indicates a desire to sever the joint tenancy. Although a tenancy in common is still a form of co-ownership, it does not confer a right of survivorship so that upon the death of one tenant-in-common, that owner's interest in the property will be inherited by the heirs of the deceased's estate, rather than passing by survivorship to the other joint tenant.

Placing assets into joint tenancy free of consideration may create family disputes. When an individual gratuitously grants another person joint title to property and then passes away, it may be difficult to determine whether the transferor intended to make a gift to the second joint tenant or merely to place the property into the name of the second joint tenant for ease of administration. For example, an adult child may have been added to a joint bank account simply to help an ailing parent manage finances with no intention that remaining funds be left solely to that child. Where a transferor

places assets into joint tenancy with one child or beneficiary, and where other beneficiaries would have inherited the property if it had passed by will rather than by right of survivorship, the stage for estate litigation is set.

D. PRESUMPTIONS OF (I) RESULTING TRUST AND (II) ADVANCEMENT

In the two leading Supreme Court of Canada cases, *Pecore* and *Madsen,* the Court clarified the analysis required to determine whether an individual named as a joint tenant has beneficial ownership or merely legal ownership. Case law regarding this issue relies on two legal presumptions: (i) the presumption of resulting trust and (ii) the presumption of advancement.

A resulting trust arises when a party holds title to property but has received it without giving consideration for it or has received the title to the property as a fiduciary. The presumption of resulting trust operates so that where a gratuitous transfer occurs, the property is presumed to belong to the transferor, and the person who has received the property is under an obligation to return that property to the original title-holder. This presumption operates so that where a testator transfers property during his lifetime to a beneficiary, upon the testator's death, the property is presumed to belong to the testator and thus falls into the testator's estate. This presumption can be rebutted by sufficient evidence to the contrary.

The presumption of advancement is an exception to the presumption of a resulting trust. It stipulates that where a gratuitous transfer is made by a parent to a minor child, it should be presumed that a gift to the minor child was intended.

The Court emphasized that cases involving these presumptions must be decided primarily according to the specific facts of each case.

1. *Pecore v Pecore*, 2007 SCC 17

In this Supreme Court of Canada case, the testator had placed the majority of his assets into joint accounts with his adult daughter prior to his death. The accounts, which the testator retained control over, had a right of survivorship. The testator's will did not mention the accounts, but left specific bequests for his daughter, her husband and their children. The residue of the estate was directed to be divided between the testator's daughter and her husband.

After the testator's death, the daughter and her husband divorced. The husband claimed that the amounts in the joint accounts should form part of the residue of the

estate, which he was entitled to share in, rather than passing to the daughter alone through the right of survivorship.

The Supreme Court determined that both the presumption of resulting trust and the presumption of advancement remain applicable in certain situations, since they provide guidance to the courts when trying to determine a deceased testator's intentions and predictability to testators attempting to plan their affairs. Both presumptions must be rebutted on a balance of probabilities. The Court stated that the onus to rebut the presumption of resulting trust is on the potential recipient of the property. The Court further decided that the presumption of advancement, which can be used to rebut the presumption of resulting trust, is only applicable to minor children. However, the Court remarked that although dependency of an adult child on a testator parent is not a sufficient basis to result in a presumption of advancement, such dependency may be used as evidence to rebut the presumption of resulting trust.

The Supreme Court overturned the traditional rule of evidence that barred evidence subsequent to the time of the transfer from being adduced to show the intention of the testator. The Court held that evidence of a testator's intention that arises subsequent to a transfer should not be automatically excluded if it is relevant to the intention of the testator at the time of the transfer. However, the trier of fact will assess the reliability of any subsequent evidence and determine the appropriate weight it should be given.

In this case, the daughter, as the potential recipient of the property, had the onus to rebut the presumption of resulting trust. Because she was not a minor she could not rely on the presumption of advancement to do this. However, the trial judge had determined that there was enough evidence to show that the testator had intended to make a gift of these accounts to his daughter alone. Therefore the Supreme Court relied on the trial judge's findings of fact, coupled with the correct application of the presumptions, to determine that the assets in the joint accounts had passed to the daughter through a right of survivorship and did not form part of the residue of the testator's estate.

2. ***Madsen Estate v Saylor*, 2007 SCC 18**

The facts of this Supreme Court of Canada case were very similar to the *Pecore* case, above. The testator made one daughter a joint signatory on several bank and investment accounts which had a right of survivorship. At all times he maintained control of the accounts and paid taxes on income earned from the assets in the accounts. After the testator's death, the daughter administered the estate, but did not

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include the amounts in the joint accounts in the estate. Her two siblings commenced litigation against her to have the amounts included in the estate.

The Supreme Court determined that the presumption of resulting trust was relevant to these facts. The Court would therefore presume that the accounts remained the property of the testator and passed to the testator's estate unless evidence to the contrary was proved on a balance of probabilities. The presumption of advancement was not applicable because the daughter was not a minor child, and so the court would not presume that the accounts were intended as a gift from parent to child.

The Supreme Court found that, unlike in the *Pecore* case, there was not enough evidence that the testator intended the joint accounts to pass by right of survivorship rather than through his estate. Although the banking documents mentioned a right of survivorship, they did not indicate a clear intention on the part of the testator to make a gift of the funds in the accounts to the testator's daughter. None of the evidence on record indicated that the testator favoured the daughter who held joint title to the accounts over his other children. The Court held that this daughter merely had legal ownership, but not beneficial ownership of these accounts. The Court ordered the daughter to repay the money from these accounts into the estate to be distributed accordingly.