Joint ownership

When people discuss estate planning, the topic of joint ownership of assets invariably finds its way into the conversation, mainly as a solution to potential probate fees (estate administration tax). This issue is quite complex and some actions may result in unexpected outcomes.

While the joint tenancy discussion in this article does not apply to assets located in Quebec, it may still be a matter of interest.

The thought (myth?)

In the quest to achieve a smooth and simple succession of assets at death, joint ownership is being used more frequently between parents and children or others. A joint ownership structure can create many benefits, including simplified estate administration, greater privacy, and bypass of probate fees. It follows therefore that there's no need to change title or administer the asset through the estate of the deceased joint owner.

However, this isn't always the case. If you are not careful, you may be introduced to one of the many potential pitfalls associated with joint ownership. Considering the options and potential legal and tax implications is paramount in determining if this strategy will accomplish the desires for the parties involved.

The facts

Where there is more than one owner, the ownership could take the format of either "tenants-in-common" or "joint tenants".

Tenants-in-common

As tenants-in-common, each owner has a specified share in a property and may not necessarily have equal shares. There is no rule of survivorship.

While living, the owners share the income tax liability according to their proportionate interest in the asset. If ownership is between spouses, common-law partners or minor children, attribution rules may apply.

If one owner dies – unless specifically addressed in their will – their property share will form part of their estate for distribution to the estate beneficiaries. The deceased's share is therefore subject to probate fees (estate administration tax), if any.

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A tenancy-in-common can be a very effective tool with which to pass assets along to different generations. A parent with three children may wish to use this structure to eventually pass a property to them. Upon the death of each child, their portion could be passed down to their children, thereby ensuring another generation's enjoyment of the property.

Joint tenants

As joint tenants, each owner has an identical interest and an equal entitlement to possession of the property. This right of survivorship[1] is a component of all joint tenancies.

Any tax liability arising from the property is the joint responsibility of each owner during their lifetime. (Again, if ownership is between spouses, common-law partners or minor children, attribution rules may apply.)

If any one person dies, the deceased's interest terminates and the remaining joint owner(s) automatically takes over the entire interest in the property. The property share does not flow to the heirs of the deceased owner, is not included in the estate and therefore is not subject to potential probate fees (estate administration tax).

It can be an effective way to pass property after your death to bypass probate, especially for a home or a cottage.

All joint tenancy registrations may look alike; however, depending on the facts of the situation, results may be different than expected.

When assets are held jointly in a gratuitous transfer arrangement between a parent and an adult child, the courts have held that a resulting trust[2] remains upon the death of the parent. This means, where a resulting trust is found, the asset will revert back to the estate of the parent instead of passing to the adult child. This often comes as a surprise to people who have the belief jointly-held assets pass to the surviving party by right of survivorship.

In order to have the jointly-held assets pass to the adult child by right of survivorship, sufficient evidence must be presented to support the argument that the deceased wished for the assets to pass to the other owner upon death.

Written documentation of the transferor's intention is crucial. Is their intention an outright gift or is the property planned to be held in trust?

Deeds of Gift or Declaration of Intention are formal documents that confirm a gift, or outline your wishes, and can have a profound effect on the enforceability after death.

Another concept introduced by the Pecore case is the concept of a right of survivorship as an independent property right (as opposed to an incident of joint tenancy). As with a resulting trust, the adult child is not a true joint owner. The owners may be registered on title as joint tenants, but the adult child has no right to use the asset or receive its income, until the death of the actual owner.

[1] In Quebec, the notion of tenancy, whether joint or common, together with its related terms and concepts, shall be interpreted according to the principles of undivided co-ownership under the Quebec Civil Code.

[2] Pecore *v* Pecore, [2007] 1 S.C.R. 795, 2007 SCC

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The issues

Immediate tax consequences

At the point in time when another person is included in the ownership, the beneficial ownership is changed and an immediate disposition of property for income tax purposes arises. This disposition would trigger any unrealized capital gains and result in immediate tax. This may be problematic depending on the property because there may be taxes due but no cash available with which to pay. The Income Tax Act provides for an automatic tax-deferred roll-over of capital assets to a spouse, but not to other persons.

If personal residences are involved, each owner of the property may jeopardize their access to the principal residence designation, as well as their eligibility as a first-time home buyer, for purposes of the Home Buyer's Plan.

Loss of control and disputes

A transfer to joint ownership could result in the loss of control of the property by the original owner, potentially leading to a number of problems.

Examples

A bank account may be subject to misuse or unknown withdrawals if the new joint owner has signing authority.

Decisions regarding real property have to be made jointly. Any disputes regarding maintenance, expenses, rental income, or the eventual sale of the property may require third party resources to solve. A joint owner could go as far as severing the joint tenancy, turning it into a tenancy-in-common, which may not be attractive to the original owner.

An important step is communicating your intention clearly and meaningfully. Letting your loved ones know what you want to happen after you die is the single most effective way to avoid estate litigation.

Probate fees (estate administration tax)

Joint ownership may appear as an obvious planning technique used to minimize potential probate fees (estate administration tax), but this strategy may only achieve the desired results if the surviving joint owner is the intended sole beneficiary of the asset.

In recent years, many family disputes – and much expensive litigation – have occurred because court decisions rely on the legal presumption that the person to whom the transfer has been made holds it in trust for the person who made the transfer. The court will assume a gift was not intended unless the recipient can prove the contrary.

A result is the estate may own the asset and potential probate fees (estate administration tax) may apply if it is necessary to probate the will.

Exposure to claims

Personal and business creditors or a spouse upon a matrimonial breakdown of either owner are able to make claims against the property. Depending on the situation, a sale of the property could be forced to pay for the claims against a joint owner.

Incapable joint owner

A joint owner of a property does not automatically have the right to make decisions regarding the property on behalf of another joint owner who becomes incapable.

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If there is no appointment of power of attorney (POA) or guardian of property in favour of the other joint owner, decisions regarding the property may have to be made in conjunction with an entirely different appointed person. This person may have legal obligations to liquidate assets such as a cottage or family home.

Complex tax and succession planning

Joint ownership may not allow for more complex tax and succession planning using a will. For example, the use of trusts will not be available to:

- Hold the property on the first spouse's death (under the terms of a will) in order to reduce taxes
- Ensure capital succession to future beneficiaries

U.S. properties?

Ownership of U.S. properties by Canadians who are not U.S. citizens can give rise to unforeseen difficulties.

U.S real property is considered U.S. status property and may subject their estate to U.S. taxes when they die. Canada includes income and any accrued gains up to the date of death when filing a final personal tax return, but the U.S. taxes individuals on the total value of their estate. There are exemptions and deductions available, so the need of a U.S. tax professional is critical.

Significant U.S. estate and gift tax issues may arise because of the interaction between the U.S. and Canadian taxation regimes.

An alternative

A POA for property is an alternative to joint registration, depending on personal circumstances. A POA gives one or more people the authority to manage specific assets (limited power of attorney), or your entire financial affairs (general power of attorney) if you are unable do so. This may cover many circumstances, such as temporary absence from the country, accident or disability. A POA provides the authority for your representative (called an *attorney* or *mandatory* in Quebec) to make decisions but they do not have any ownership of your assets. This authority ends upon your death, or at any time you decide to terminate the power (providing you are mentally capable to do so).

The final word

Joint ownership of an asset is not a simple decision about reducing probate fees. It involves a number of tax and legal issues that require professional advice to ensure each person's individual circumstances are considered. Other estate planning tools should be considered as well. Depending on the ultimate goal, other tools, such as a trust, may provide an orderly succession upon death.

John Yanchus, CPA, CA
Associate manager, Wealth Management, Sales Strategies and Support

In his current role, he is responsible for sales strategy development and supports all individual wealth strategies by creating tax and planning articles, communicating changes in tax legislation and providing expertise on product solutions.