



Joint Tenancy and Real Estate Issues in Estate Planning

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Topics

- Setting the stage
- Income tax
- Probate tax
- Land transfer tax
- Mechanics of transfer
- Practical considerations
- Joint tenancies
- Life tenancies
- Estate transfers
- Trusts
- Rule against perpetuities
- Cross-border ownership
- Cottages
- Fact Patterns



Setting the stage

- Residential real property values increased 96% in the 10 year period between 1996 and 2006
- In 2005, a Canadian family's home comprised 42% of their total asset value, with the national average price for a home sold being \$303,836
- The national average price for a home sold in February, 2014 was \$406,372
 - Vancouver: \$846,978
 - Calgary: \$460,338
 - Toronto: \$553,193
 - Halifax: ~\$300,000



- Divorce rates are steady at around 70,000 per year in Canada, although the rate among seniors is increasing
- Approximately 40% of marriages will end in divorce
- More people living in “common-law” relationships, which tend to be more informal, less “documentation” but often similar property rights to married couples
- Legislation across Canada increasingly recognizing property rights of common-law, including same-sex, couples



- Cash starved provincial governments
 - Probate tax
 - Land transfer tax
- Statutory relief for dependents
 - Ensure those with means provide for dependents to relieve the “public purse”
- Family law
 - Protect and provide for spouses



Client Objectives

- Reduce taxes
 - income, probate, land transfer
- Provide for spouse
- Avoid conflict
- Fair to all children
- Protect against creditors
- Keep property in the family
- KISS
 - minimize costs and ongoing administration



Income Tax

- Land = capital property
- Inter vivos disposition = proceeds of disposition
- Capital Gain = Fair market value minus Adjusted cost base
- Taxable Capital Gain = $\frac{1}{2}$ of Capital Gain
- Availability of Exemption or Deferral



- Transfer at less than FMV consideration i.e. gift or inadequate consideration
- Transferor's TCG = $50\% \times (\text{FMV} - \text{ACB})$ unless within exception (e.g.. spouse)
- Transferee's Adjusted Cost Base
 - Gift i.e.. paid nil then $\text{ACB} = \text{FMV}$ at time of gift
 - Inadequate consideration then $\text{ACB} = \text{Consideration paid}$
 - Double Tax e.g. $\text{FMV} = 125$, $\text{ACB} = 25$, $\text{Consideration} = 50$
 - Transferor's TCG = 50 (i.e. $\frac{1}{2}(125-25)$)
 - Transferee's $\text{ACB} = 50$ later sells for 150 then TCG = 50 (i.e.. $\frac{1}{2}(150-50)$) even though increase only 25



- Testamentary Disposition
 - Deemed proceeds of disposition
- Deceased = $50\% \times (\text{FMV} - \text{ACB})$ unless within exception (e.g. spouse/principal residence)
- Estate/Beneficiary – Adjusted cost base = FMV at date of death



Principal Residence Exemption

- Principal Residence Exemption
- Property “ordinarily inhabited”
- Post 1982 – only one property per year per family unit
- Trust may designate if ordinarily inhabited by “specified beneficiary” but be careful of **NEW RULES** (more later)



Provincial Probate Tax

- Most provinces impose probate fee/tax
- Base/Exemptions generally the same with some differences
- Rates vary across the country:
 - 1.4% in British Columbia
 - Maximum fee of \$400 in Alberta
 - 0.7% in Manitoba
 - 1.5% in Ontario
- Planning strategies differ



Atlantic Provincial Probate Tax

Nova Scotia:

- Payable on FMV of deceased's assets passing through probate, less only secured debts against land
- Insurance proceeds payable to a specific beneficiary are exempt
- Top rate (after \$100,000) is 1.695% (highest in Canada)

New Brunswick:

- Similar calculation process to NS, but no specific statutory exemption for insurance proceeds
- Top rate (after \$20,000) is 0.5%



Atlantic Provincial Probate Tax

Prince Edward Island:

- Tax payable on gross value of estate assets
- Insurance passing to a beneficiary directly is exempt
- Top rate (after \$100,000) is 0.4%
- If grant is solely for vesting title to land, fee is flat \$50.00

Newfoundland and Labrador:

- Based on value of deceased's assets at time of death
- Top rate (after \$1,000) is 0.6%



Land Transfer Tax

- Most Canadian jurisdictions impose land transfer tax on processing of land title transfers
- Payable by transferee
- Rates differ and have increased in recent years
- Exemptions and policies differ
- With increasing value of homes, the effective amount of property tax paid for a given transaction is increasing



Atlantic Canada Land Transfer Tax

Nova Scotia:

- Called “deed transfer tax” and levied by most Municipal units in NS
- Levied on transfers on the “sale price” of land and payable by transferee
- Exemptions – transfers for no consideration (i.e. gifts and transfers to trusts and from trusts and estates) and transfers between legally married spouses
- Forms a lien on the land
- Rate varies but is max 1.5%

New Brunswick:

- Payable on greater of (a) consideration for the transfer or (b) assessed value of the land
- Rate is 1% as of April 2016
- Exemptions - deeds from estates, conversion of joint tenancy to tenancy in common and vice versa, between legally married spouses and others
- Gifts are NOT exempt – must pay based on assessed value



Atlantic Canada Land Transfer Tax

Prince Edward Island:

- Similar provisions to NB but broader exemptions which encompass (a) transfers to and from trusts and (b) transfers to a family member for no consideration
- Rate is 1%

Newfoundland and Labrador:

- No land transfer tax per se, but fee to record a deed is scaled based on value of land being transferred (or of partial interest being transferred)
- Rate is 0.4% for amounts over \$500 of value
- No exemptions



Mechanics of transfer

- Deed of transfer must be in writing
- S. 6 Statute of Frauds – all contracts for the sale of land must be in writing and signed by the person it is sought to be enforced against
- Protects against perjured evidence to support a conveyance
- No particular technical form of words required, but must be clear
- S. 10 Conveyancing Act - a deed is effective if it identifies the parties and the property, specifies the property to be conveyed and is validly executed
- Deeds usually include:
 - Name of instrument and Date
 - Sometimes recitals about the transaction
 - Legal description and Interest Being Conveyed
 - Restrictions or covenants
 - Signature(s) of transferor and witness. Sometimes transferee signs too.



More Mechanics of Transfer

- TYPES OF DEED
- Warranty Deed
 - Quiet enjoyment, good title, right to convey, freedom from encumbrances and further assurances
- Quit Claim Deed/Deed Without Covenants
- Executors and Trustees Deed
 - Only covenant is that transferor has done nothing to encumber the land
- Confirmatory Deed



More Mechanics of Transfer

- **SIGNED, SEALED AND DELIVERED**
- Signature must be an original
 - Electronic Commerce Act permits many agreements, including an agreement of the sale of land, to be signed electronically, but deeds transferring interests in land are excepted (as are Wills and POAs)
- **Sealed** Historic red wax seals; in modern times we use a red wafer seal or a stamp.
- **Delivered** More than physical delivery; is a matter of intention



More Mechanics of Transfer

- Witness requirements/Affidavit of execution required for registration (Registry Act and Land Registration Act – signature of one or more parties must be proved)
- Affidavit of status – residency (Income Tax Act), spousal status (Matrimonial Property Act)
- Consideration – Actual (price paid) or implied (where a deed is under seal)
- Identify correct land!
- Deed transfer tax affidavit must be filed and taxes paid



Search/Subsearch Prior to Registration

Registry Parcel:

- Grantor search in the Grantor/Grantee index from date of abstract
- Judgment search of purchaser/transferee – 20 years
- Search Plan Index/Plans in Process
- Search by Name for Non-LR Documents in Process

Land Registration Parcel:

- Review of Parcel Register
- Judgment search of Registered Owners
- Judgment search of Purchasers - 20 years (full twenty year search)
- Search by Name for Non-LR Documents in Process for Registered Owners and Purchasers (for judgments only)
- Search for Plans in Process
- Search by PID for Documents in Process on Land Registration parcels



Registration of Deed

- NS Registry Act – no restrictions; system does not guarantee title
- NS Land Registration Act
 - Deed must be accompanied by a LR Form 24 which includes a Certificate of Legal Effect, so only an Authorized Lawyer pursuant to the Act may register a Deed
 - once registered, ownership information is updated
 - Government guarantees title of the registered owner
 - consider interest holder/type of interest



Post Registration

NS Capped Assessment Program “caps” the increase in a residential property assessment year over year for those who qualify. The cap is based on the % change in the NS CPI. If the transferor benefited from the cap and the transferee qualifies, a Notice has to be filed with PVSC to preserve the cap.

Eligible

- At least 50% owned by a Nova Scotia resident
- Residential property with less than four dwelling units or vacant resource
- Ownership remained within the family
- Includes owner occupied condominium, manufactured home, manufactured home park, co-operative housing, residential or resource portions of commercial farm

Not Eligible

- Majority owned by an out of province resident
- Commercial property
- New construction
- Transfer in ownership during the year unless to a close family member
- Non-owner occupied condominium



Notice Required to Preserve Cap on a Transfer

Notice is given in Form 1 Notice of Transfer or Devolution pursuant to ss 45A(5) of the Assessment Act. The form requires the person submitting the notice to confirm the transferee is a spouse, child, grandchild, great-grandchild, parent or grandparent of an owner or a member of a class of prescribed persons. Brothers and sisters of the owner are included in the class of prescribed persons. The only trusts that are referenced in the regulations dealing with prescribed persons relate to corporations that are family trusts (s. 5 of the Residential and Resource Property Taxation Assessment Regulations).



Practical considerations

- When title changes, owner(s) should consider:
 - Property insurance: update owner(s), any incidental changes in the policy coverage, exclusions or other requirements?
 - Payment of property taxes and utilities – update owner(s) on utility accounts
 - Care and maintenance responsibilities
 - Capital repair and improvements
 - Use and occupancy rights



Consider Co-Ownership Agreement

- Helpful to set rules in advance
- Decision making process: majority, or a higher threshold? Record keeping for decisions made.
- Expense sharing – initial, ongoing and extraordinary; consider a specific fund for capital repair
- Scheduling use: Exclusive or in common? Specific weeks/months, or a rotating schedule? Obligations during use – cleaning, maintenance, etc? Are long-term guests or rentals permitted?
- What happens in the event of death, marriage or divorce, unemployment
- Consequences in the event of default
- A dispute resolution process is important
- Buy-Sell considerations: first refusal, first offer, approval of a non-related purchaser, price setting mechanism



Joint tenancies

- Defined
- Four Unities
- Why?
- Pecore
- Family law
- Elder law
- Rebutting the presumption
- Severance



Defined

- *A gift of lands to two or more persons in joint tenancy is such a gift as imparts to them, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Megarry and Wade, Law of Real Property, (4th ed. 1975)*
- Distinguishing feature is the right of survivorship - when one joint tenant dies, his or her interest in the property is extinguished and passes to the surviving joint tenant(s)
- Compare with tenancy in common



Tenancy in Common

- Concurrent ownership
- Owners may have an equal or an unequal share
- No right of survivorship
- Each owner's share is individual and undivided, so can be sold, transferred, bequeathed without consent of other owner(s)
- Each owner has the right to use and occupy the entire property



Manner of Tenure with 2 or More Owners

- Common law presumption was joint tenancy
- Changed in NS – except for trustees and executors, statutory presumption is tenancy in common unless deed/instrument specifies otherwise (s.5 of NS Real Property Act)
- Same in New Brunswick (s. 20 of the Property Act (New Brunswick))
- Common law presumption of joint tenancy still applies in PEI and NFLD



Mixed Tenure

- Property can be owned by a mixture of joint tenants and tenants in common, e.g:

Spouse A and Spouse B as Joint Tenants as to a 2/3 undivided ownership interest and Spouse 1 and Spouse 2 as Joint Tenants as to a 1/3 undivided ownership interest



Four Unities for Joint Tenancy

- **1. Unity of Possession**
- Each joint tenant has undivided legal possession of the whole property
- **2. Unity of Interest**
- (i) Extent: Although in theory each joint tenant has the whole of the property, the rents and profits of the land are to be divided equally between them
- (ii) Nature: There can be no joint tenancy between those with interests of a different nature
- (iii) Duration: There can be no joint tenancy between those whose interests are similar but of different duration
- **Note** - unity of interest applies to the estate which is held jointly - it does not matter that one joint tenant has a further and separate interest in the same property



Four Unities (cont'd)

- ***3. Unity of Title***
- Each joint tenant must claim their title to the land under the same act or document
- ***4. Unity of Time***
- The interest of each tenant must vest at the same time



Why joint tenancy?

- Ease of title transfer
- Low cost (compared to a formal trust, limited partnership or corporate ownership)
- Probate planning
- Note – applies equally to real and personal property (shares, accounts, chattels)



Pecore

- SCC in *Pecore* and *Madsen* cases clarified certain presumptions that apply when two persons hold property as JTWRORS
- If spouses, presumption of advancement applies – upon death of one joint owner the other obtains legal title by operation of law pursuant to the joint tenancy and is presumed to acquire the beneficial interest as well
- If parent and adult child, presumption of resulting trust applies - upon death of parent child is presumed to hold the beneficial interest in the asset on resulting trust for the parent's estate notwithstanding the child obtains sole legal title by operation of law
- Both presumptions can be rebutted



Joint tenancy – parent to child

- **Option 1:** if parent's intention on making the asset JTWROS is to immediately gift a beneficial interest to child, creates an immediate disposition for tax purposes in the hands of the parent, triggering any inherent capital gain (based on proportionate interest given away by parent) plus both parent and child must report a proportionate amount of income and gains from the asset in the future while parent is alive



Joint tenancy – parent to child, cont'd

- **Option 2:** No immediate transfer of beneficial interest to child, but intention to pass beneficial interest to child upon parent's death by survivorship
 - child gets beneficial asset on death of parent outright
- **Option 3:** No immediate transfer of beneficial interest to child and no intention to pass beneficial interest to child upon parent's death (child holds interest in trust for parent's estate)
 - asset can be dealt with by child without probate (maybe) and could fund testamentary trusts



Joint tenancy – parent to child, cont'd

- Neither Option 2 or 3 triggers a disposition of beneficial interest during the parent's lifetime and parent continues to report all income and gains during lifetime and upon death
- If Option 2, parent must document the intention to rebut the presumption of resulting trust
- Consider re option 2:
 - 1 - right of survivorship vests on death but is an inter vivos gift (hence can be done by a non-testamentary instrument)
 - 2 – deemed disposition occurs on death of parent for tax purposes



Joint tenancy – parent to child, cont'd

- If Option 3, should have child confirm that she holds her interest in the asset in bare trust for the parent during the parent's lifetime and for the estate thereafter rather than rely on the presumption of resulting trust



BUT

Consider re option 1:

1. Loss of control by original owner
2. Potential exposure to joint owner's creditors
3. Disputes among owners over intentions
4. Unexpected order of death of owners
5. Tax implications



Principal Residence Exemption

- Note – principal residence exemption is still available to transferor on death (but not usually to transferee(s) unless they too ordinarily inhabit the property, much to the surprise and chagrin of many!)
- Applies to the whole gain if option 2 or 3, and the part of the gain related to the retained portion if option 1 (but not to the child's portion if option 1!)



Family law

- Property held jointly by spouses generally divisible (subject to a marriage contract) on marriage breakdown or death
- Property held by one spouse jointly with one or more third parties MAY be divisible
- Depends on whether is legal title only OR spouse has a beneficial interest
- Then consider if is a “matrimonial asset” under s.4 of NS MPA



Family Law, cont'd

- **MPA ss. 21 (1)** The rule of law applying a presumption of advancement in questions of the ownership of property as between husband and wife is abolished and in place thereof the rule of law applying a presumption of a resulting trust shall be applied in the same manner as if they were not married, except that
- **(a) the fact that property is placed or taken in the name of spouses as joint tenants is *prima facie* proof that each spouse is intended to have on a severance of the joint tenancy a one-half beneficial interest in the property; and**
- **(b) money on deposit in a chartered bank, savings office, loan company, credit union, trust company or other similar institution in the name of both spouses shall be *prima facie* proof that the money is on deposit in the name of the spouses as joint tenants for the purposes of clause (a).**



Elder law

- What is the capacity required to transfer a title from sole to joint tenancy?
- Same as capacity to gift:
- “The question is whether the person making it was capable of understanding the effect of the deed when its general purport had been fully explained to him.”
- “That the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument and may be described as the capacity to understand the nature of that transaction when it is explained.”

Re Beaney [1978] 1 WLR 770



- Note – the more significant the gift is as a part of the deceased's estate, the more necessary it is to consider the *Banks v Goodfellow* test for testamentary capacity
- Onus on person alleging was a valid gift of beneficial interest to show maker had capacity
- Rebuttable presumption of capacity that is affected by the circumstances/evidence



Rebutting the trust presumption

- If no express documentation, need to rebut presumption of resulting trust for gratuitous transfers
- Fact specific enquiry on a case by case basis
- Consider factors noted by Rothstein, J. in *Pecore*:
 1. Evidence subsequent to the transfer – evidence related to the intention of the transferor at the time of the transfer is relevant, even if that evidence arises subsequent to the transfer, such as by a subsequent statement or declaration by the transferor
 2. Bank documents (if applicable) – statements in banking documents that suggest the transferor's intent with respect to the beneficial interest in the account (these are usually not determinative by themselves)



3. Control and use of the property/account – evidence relating to who uses and controls the asset during the transferor’s lifetime was held to be of marginal assistance to the Court
 - Rothstein held that “... the fact that a transferor controlled and used the funds during his or her life is not necessarily inconsistent with an intention at the time of the transfer that the transferee would acquire the balance of the account on the transferor’s death through the gift of the right of survivorship” (para. 66)



4. Granting power of attorney – prior to *Pecore* it was often felt that a transferor was more likely to have intended to gift the beneficial interest in an asset if the transferee also held a power of attorney which would have otherwise allowed the attorney to manage the asset for the donor's benefit

- Rothstein J. concludes that this is a factor that the trial judge can consider in determining the transferor's intention, but notes that it is "... entirely plausible that the transferor granted power of attorney and placed his or her assets in a joint account but nevertheless intended that the balance of the account be distributed according to his or her will" (para. 68)



5. Tax treatment of joint assets – whether the transferor intended to pay taxes on the income earned on the joint asset during his or her lifetime is not determinative absent other evidence, but is a factor to be considered

- The Court also held there was no inconsistency with the transferor continuing to pay tax but still intending to make a gift of the residual interest in the account given that the nature of the gift is a gift of the residual interest and not an immediate gift of the equitable interest which would trigger a disposition for tax purposes at the time the transferee is added as joint account holder



Severance of the joint tenancy

- Joint tenancies can be severed in several ways (see, for example, *Smith v Lister*, 2015 ABQB 420):
 1. Unilateral destruction by one joint tenant of one of the four essential unities (but note in NS a JT cannot sever by conveying to herself)
 2. Severance by mutual agreement
 3. By any course of dealing such that the interests of all of the parties were mutually treated as a tenancy in common
 4. Assignment in bankruptcy
 5. Mortgage of one JT interest without consent of the other JT (hard to find a willing lender!)



Other considerations

- Very powerful tool
- Simple, inexpensive and understandable
- But not the panacea many believe
- DOCUMENT INTENTIONS!
- Best practice is to clearly document transferor's intention at the time an asset is made joint (by deed of gift or declaration of bare trust) or in transferor's will
- Is it fair to all family members?
- Loss of control by parent
- Possibility of creditor exposure
- Do you need consent of existing mortgagee?
- Q - Is an inter vivos trust a better way to achieve the client's goals?



Life tenancies

- An estate in real property that ends at death, at which time ownership of the property may revert to the original owner, or it may pass to another person. The owner of a **life estate** is called a "**life tenant**". The person title reverts to on the death of a life tenant is called a "**remainderman**"
- May be created by conveying "to X for the term of his/her natural life"
- May be more restricted and terminate upon incapacity or inability to occupy
- A life tenant has a right to possession and a right to collect rents



Life tenancies (cont'd)

- A life tenant must pay property taxes (S. 45 Assessment Act provides life tenant is treated as fee simple owner, unless remaindermen ask to be assessed) and is responsible for maintenance, but there are limited consequences if maintenance is not performed (unless imposed by the document creating the life interest)
- A life tenant may alter the property, e.g. redecorating, but should not devalue the property in doing so
- A life tenant would be responsible for reckless or intentional damages
- Remainderman had no right to evict a life tenant
- May be more flexible to use a trust providing for similar occupancy rights



Estate transfers

The transfer of property upon death depends on whether the deceased:

1. Had a Will or not - Beneficiaries can be named in a Will. If a person dies without a Will they are “intestate” and his/her property devolves to his/her heirs-at-law as set out in the Intestate Succession Act
2. Date of Death - The date of death is relevant as the rules in NS changed as of October 1, 2001 with the introduction of the new Probate Act



Old Probate Act

- Applies to Wills dated before or intestacies before October 1, 2001. The timing of Probate or Administration is not relevant.
- Under a Will the real property (land) passed directly to the beneficiaries (direct devise) if not specifically left to the personal representative in trust
- On intestacy, real property devolved directly to the heirs-at-law



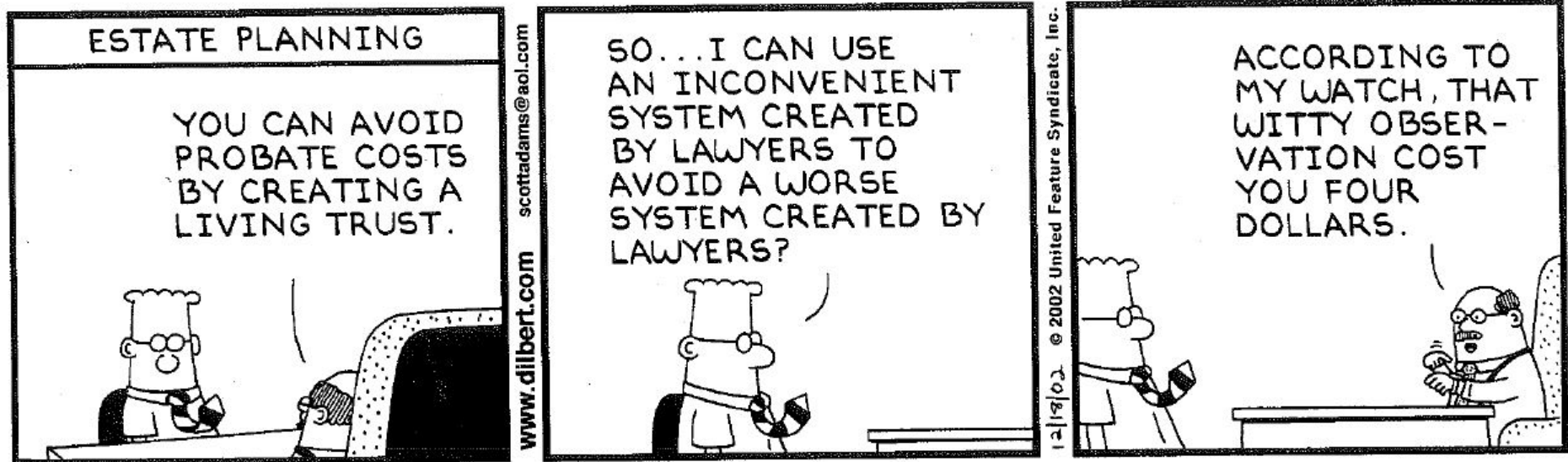
New Probate Act

- Applies to Wills dated October 1, 2001 and onward, and to a person who dies intestate on or after that date
- Real property now vests in the personal representative
- Even if a Will contains a direct devise, real property will vest in the personal representative(s)
- Heirs-at-law are vested with legal title until a grant of administration is issued, BUT only the personal representative can convey (the doctrine of “relation back” applies)
- The personal representative holds title for those entitled under the Will or upon intestacy. The personal representative conveys by a Trustees or Executors Deed



Sale By Personal Representative

- Real property may be sold by a personal representative to satisfy debts (Probate Act s. 50(1)). Also can be leased for up to a year (Probate Act 52(1)(a)).
- Consent of persons entitled to the real property is required for most other sales or leases (Probate Act s. 50(2)). The Supreme Court can authorize some sales where consent cannot be obtained (Probate Act s. 50(3)).
- Wills can provide personal representatives with a power of sale waiving any beneficiary consent requirement.
- A power of sale includes the power to mortgage or lease real property (Trustee Act s. 21(1))





Trusts

- Under the various provinces *Statute of Frauds*, a creation of trust in land and a grant or assignment of trust must be in writing:
 - NS s.5 “No declaration or creation of any trust in land shall be valid unless it is in writing, signed by the person entitled to create or declare the trust, or by his last will, but this Section shall not extend to any trust in land arising or resulting by implication or construction of law or which may be transferred or extinguished by act or operation of law.”
 - S. 6 “No grant or assignment of any trust shall be valid unless it is in writing, signed by the person granting or assigning the same, or by his last will.”



Trusts

- Testamentary trust: executors/trustees are entitled to be vested with the property at the moment of death, although actual vesting doesn't take place until the completion of administration of the estate.
- *Inter vivos* trust: Date of the creation of the trust will almost always be the date upon which the trustees are entitled to be vested with title – need a deed to complete the transfer if legal title not already held by the trustee(s).



Trusts - Survivorship

- NS Trustee Act, s. 27(1): If one of multiple joint trustees dies, the right of survivorship applies to exercising or performing the trust's powers, subject to an express contrary provision in the trust instrument.



Trusts - Notice

- The NS LRA limits the application of notice and constructive notice and protects purchasers with respect to unregistered interests.
- S. 4(3) stipulates that a sale will not be set aside if the purchaser has no actual knowledge of an unregistered or unrecorded interest, other than overriding interests:
 - (3) A person who engages in a transaction with the registered owner of an interest that is subject to an interest that is not registered or recorded at the time of the transaction, other than an overriding interest, in the absence of actual knowledge of the interest that is not registered or recorded
 - (a) may assume without inquiry that the transaction is authorized by the owner of any interest that is not registered or recorded;
 - (b) may assume without inquiry that the transaction will not prejudice that interest; and
 - (c) has no duty to ensure the proper application of any assets paid or delivered to the registered owner of the interest that is the subject of the transaction.



Trusts - Notice

- Under the LRA s. 28(1), property is registered in the trustee's name, with a notation that the interest is held in trust **(as long as the underlying deed connotes a trust or trustee relationship)**
- The LRA gives the purchaser certain protections:
 - Subsection 28 (3) Any conveyance or encumbrance of the interest by the trustee is, for the purpose of this Act, deemed to be in furtherance of the purposes of the trust.
 - Subsection 28 (4) No action of a beneficiary of a trust in which the trustee does not join affects the title held by the trustee.



Trusts - Notice

- Purchaser is under no obligation to inquire into the terms of the trust and is not bound by them unless they are registered : *Hoback Investment Ltd. v. Loblaws Ltd.*, 1981 CarswellOnt 505, 120 D.L.R. (3d) 682 (Ont HC).
 - Headnote: Actual notice of the particulars of a trust does not exist under the registry system unless the trust document itself is registered or unless the terms of the trust are actually communicated to the purchaser. The mere inclusion of the words “in trust” following the name of one of the parties in a deed or mortgage under the registry system does not amount to actual notice of the trust. **There is no obligation upon a purchaser to seek details of such a trust, nor is there any obligation upon a vendor to disclose details of the trust or produce evidence of the right to convey the property.**



Bare trusts

- True bare trust involves transfer of legal title of an asset by one person (the owner) to another person or persons (the trustee(s)) while retaining beneficial interest in the asset
- Can also arise in the context of making an asset JTWROS between owner and trustee(s)
- For probate purposes, legal title in that asset is transferred to the trustee(s) and it is therefore not probateable in the owner's estate upon the owner's death
- No taxable disposition on establishment as no change of beneficial ownership (Technical Interpretation 2001-0109455)



Bare trusts, cont'd

- Trustee signs a declaration of bare trust confirming intention not to obtain any beneficial interest in the asset
- Trustee is holding the asset in trust for the owner during her lifetime and then for her personal representatives (executors) after death
- Bare trusts can be used for investment accounts, bank accounts, private company shares and, of course, real estate



Bare trusts, cont'd

- **One major drawback – if any asset needs to be probated, then generally all assets beneficially owned by the deceased need to be probated notwithstanding legal title may be held in bare trust (see for example ss. 87(2) of the NS Probate Act)**
- **Extreme caution must be used to ensure all assets are outside of probate one way or another!**
- Note – this is not the same if joint tenancy option 2 intended (no probate required)
- Bare trust arrangements should always be documented clearly in writing by a declaration of bare trust signed by the trustee



Do bare trusts sever joint tenancies?

- Concerns expressed in relation to unities of interest and title
- But possible to hold legal title to property in joint tenancy even if equitable/beneficial title is held in another form of ownership (i.e. sole or tenancy in common)
- The mere fact that a bare trusts exists which separates beneficial and legal title does not, in and of itself, alter the unity of interest or title that exists among the two or more persons who hold the legal title as joint tenants



...parties may hold legal title to property in one form of co-ownership while holding equitable title in another.

For example, a mother and daughter may be joint tenants in law and tenants in common in equity with respect to jointly-held property by virtue of a trust or an act of severance. If the mother dies first, the daughter assumes full legal title by right of survivorship, but the mother's equitable interest, being held in common, passes to her estate and the daughter holds legal title as trustee for the beneficial owners, namely herself and her mother's estate.

Ziff, Principles of Property Law, 6th ed., p. 341-342



Practical issues with bare trusts

- Consider granting a limited power of attorney back to transferor by transferee(s) to avoid requirement for transferee(s) to sign deed if transferor wishes to sell or mortgage the property during lifetime
- Title to successor assets must be taken jointly as well (land, bank accounts and investment accounts)
- Consider contingent beneficiary designations for registered assets/insurance – can throw off the probate plan



New Principal Residence Rules for Trusts

- Previously covered all “personal” trusts in the ITA
- Trust designates on Form T1079 with the T3 return
- Trust notes the specified beneficiaries
- Effective after 2016, trust must be an “eligible trust” to qualify AND must have a “specified beneficiary” AND for property acquired after October 2, 2016 trust terms must provide the specified beneficiary with a right to use and enjoyment of the property as a residence throughout the period trust owns the property



New PR rules for trusts, cont'd

- Do you need a specific clause or is a right to use and enjoyment of the trust property generally by a specified beneficiary enough?
- Eligible trusts:
 - alter ego, joint partner, spousal and self-benefit trusts (specified beneficiary is settlor or spouse/common-law partner of settlor)
 - qualified disability trusts (specified beneficiary is the “electing beneficiary”)
 - trust for minors where parents not alive and one or both parents settled the trust



New PR rules for trusts, cont'd

Principal Residence. For any real property used or enjoyed by the Settlers as a principal residence where such real property is intended to be designated as a principal residence by the Trustees of the Trust, the Settlers shall have the right to use and enjoy such real property throughout the period in the year that the Trust owns such property. The Settlers shall each be considered a “specified beneficiary” for purposes of the *Income Tax Act* (Canada) and the Trust shall be considered an “eligible trust” for purposes of the principal residence exemption pursuant to that Act. The Trustees may make such elections and designations required hereby.

[Sample clause for joint partner trust – modify for other trusts]



New PR rules for trusts, cont'd

- Non-eligible trust (i.e. a classic residence/house trust) still qualifies to shelter gains up to December 31, 2016
- Consider:
 - rolling out property to beneficiaries (now or later – beneficiary can still use the PR exemption for years up to the end of 2016 when owned by the trust) (See s.107(2) and s. 40(7) of the ITA)
 - sale by trust to trigger gain now and shelter with exemption



Rule against perpetuities

- Cannot defer vesting of interests in land beyond relevant perpetuity period (life in being plus 21 years)
- Rule abolished in NS in 2013, but Variation of Trusts Act enhanced
- Could have a dynastic trust in NS now
- But, 21 year rule in s. 104(4) of the ITA limits the efficacy in many cases
- PEI – statutory life in being plus 60 years
- NB and NFLD – original common law rule applies for trusts of land



Cross-border issues

- Non-resident land ownership in Atlantic Canada – several considerations:
 - s.116 clearance on sales
 - Withholding on rents (consider relevant treaty provisions)
 - No NS property tax CAP
 - Title transfers on death
 - Limited/ancillary wills and limited EPOAs
 - US revocable living trusts
 - Bare trusts vs. joint tenancy



Cottages

- Often wanted by more than 1 family member
- Emotional attachment often turns minor disagreement into a larger conflict
- Often have different maintenance and upkeep obligations than a residence in an urban area. Water quality (is it potable?) and quantity; Septic system requirements.
- Often have access issues – may not be on a public road; easements and rights-of-ways may not be in place for private roads; contributions for road maintenance fees are not always evenly applied and often not documented at all; when road maintenance is provided it may only be seasonal; a railway is not a right-of-way, even if tracks are removed



Cottages (cont'd)

- Acreage estimates in historic descriptions are often overstated
- Caution re claims to adverse possession on large parcels of land
- Angling Act provides rights to travel over uncultivated lands to reach a fishing hole
- Beaches Preservation and Navigable Waterways legislation may restrict rights to build wharves or other structures on or near the beach
- Change of use tax



Fact Pattern 1

- Mom executed deed 10 years ago to Daughter 1
- Mom now incompetent
- Daughter 2 holds her EPOA
- Daughter 2 consults you
- What is your advice?



Fact Pattern 2

- Regular inter vivos trust settled in year 1 with 3 trustees and land transferred to it
- 1 dies year 2
- 1 becomes incompetent year 3
- 3rd trustee consults you in year 4 about sale of land
- What is your advice?



Fact Pattern 3

- Client inherited cottage from her parents 20 years ago
- She has no children or spouse
- Continued to be used regularly by other family members (her two other siblings and their children) with her permission
- She is now 75 and wondering what to do about this asset in her estate planning
- What is your advice?



Conclusion

- Many property law, tax, estate, trust issues at play
- Various solutions/options
- Each client situation will be unique!



Questions ???



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