



# Real Property Rundown

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## Overview of Presentation

- Context
  - Real Property Values
  - Marital Status
  - Client Objectives
- Options
- Competing Considerations
  - Income tax
  - Provincial Probate tax
  - Land/Property transfer tax
  - Provincial Family law
  - Provincial Statutory Claims/Dependants relief
- Case scenarios



## Context – Real Property Values

- 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



## Context – Marital Status

- 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



## Context – Other Points

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



## Context – 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



## Options

- Options – all have trade-offs – none perfect
  - Inter vivos gift
  - Testamentary gift
  - Gift of remainder interest
  - Joint tenancy
  - Transfer to a trust
  - Not-for-profit corporation
  - Sale
  - “Living together before marriage” clause in Will



## Income Tax Considerations

- 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





## Income Tax Considerations

- 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 ACB = FMV at time of gift
  - Inadequate consideration then ACB = Consideration paid
  - Double Tax e.g. FMV = 125, ACB = 25, Consideration = 50
  - Transferor's TCG = 50 (i.e.  $\frac{1}{2}(125-25)$ )
  - Transferee's ACB = 50 later sells for 150 then TCG = 50 (i.e..  $\frac{1}{2}(150-50)$ ) even though increase only 25



## Income Tax Considerations

- 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



## Income Tax Considerations

- Principal Residence Exemption
- Property Ordinarily Inhabited
- Post 1982 – only one property per year per family unit
- Trust may designate –be careful
  - Ordinarily inhabited by “specified beneficiary”
  - Designation by trust = deemed to be PR of any specified beneficiary
  - Consider s. 107(2) and s. 40(7)
  - S. 40(7) deems beneficiary to whom property was distributed to have owned the property since it was owned by the trust



## 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
  - 1.645% in Nova Scotia
  - 0.5% in New Brunswick
- Planning strategies differ



## B.C. Provincial Probate Tax

- Base
  - Applicable to real and tangible personal property solely owned by deceased and situate in BC
  - If deceased was ordinarily resident, includes intangible personal property wherever situate
- Exemptions
  - Multiple wills (probate and non-probate) in limited use but possible issue with s. 155 of the *Wills, Estates and Succession Act*



## Alberta Provincial Probate Tax

- Base
  - “Net value” of all assets that comprise the estate
  - “Net value” not defined
  - Practise to include all real and personal property that devolves upon personal representative
- Exemptions
  - Surrogate Rules do not define what needs to be included to calculate the “net value” but property that does not pass to the personal representative or is outside of Alberta should not be included



## Manitoba Provincial Probate Tax

- Base
  - Value of all assets of estate with exclusions
- Exemptions
  - gifts made by the deceased during lifetime
  - insurance, annuities and pensions not payable to estate
  - property held in joint tenancy where beneficial interest passes by right of survivorship
  - death benefit under the *Canada Pension Plan*



# Ontario Provincial Probate Tax

- **Base**
  - “value of the estate”
  - *all the property that belonged to the deceased at time of death*” less encumbrances on real property
- **Exemptions**
  - Real property only if situate in Ontario
  - Jointly held property that do not “result” back to estate
  - Assets with designated beneficiary not estate
  - *Estates Act, s 32(3)* – permits grants limited to part only of property of deceased – *Granovsky* decision
- **Land Registrar Policy**
  - Registry system – probate not needed
  - Land titles – probate needed
  - Policy - First transfer after conversion – exempt





# 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 1.645% (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 \$90,000) is 0.2%
- 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 0.5%



## Provincial 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



## British Columbia Land Transfer Tax

- *Property Transfer Tax Act, RSBC 1996, c. 378*
- Base
  - Based upon the “fair market value” of a “taxable transaction”, which includes a transfer or grant of an estate in fee simple, a life estate, a lease agreement, or a right to occupy land or require the transfer of fee simple under an agreement for sale
  - Captures transactions within 6 months of original land titles registration among related individuals
- Rate
  - 1% to 2%
- Exemptions
  - Transfers of principal residence to related persons and recreational property that has an f.m.v. of \$275,000 or less
  - See BC Ministry of Finance Tax Bulletins PTT 005 and PTT 001



## Alberta Land Transfer Tax

- *Land Titles Act, RSA 2000, c. L-4*
- APPENDIX I of Land Titles Act - Tariff of Fees Regulation
  - 3(1) A notification, transfer, vesting order or application for a leasehold certificate of title: \$50 plus \$1 for each \$5000 or portion thereof of value of the land or interest in land.



## Manitoba Land Transfer Tax

- *The Tax Administration and Miscellaneous Taxes Act, C.C.S.M. c. T2*
  - Applicable to every person who tenders for registration a transfer
- Rate
  - 0.5 to 2% of fair market value
- Exemptions
  - a transfer of non-commercial property by a person or personal representative of person's estate to the person's spouse or common-law partner or former spouse or common-law partner



# Ontario Land Transfer Tax

- *Land Transfer Tax Act*, R.S.O. 1990 c.L6
- Base
  - Whenever land or an interest in land is transferred for *valuable consideration*
  - Includes assumption of a mortgage by transferee
  - Gift during life and on death – nil consideration
- Rate
  - 0.5% (up to \$55K); 1% (\$55,001 to \$250K); 1.5% (>\$250K); 2% (>\$400K)
  - Toronto rates double
- Exemptions
  - Transfers between spouses –R.S.O. 1990, Reg 696
  - Transfers of land used to carry on an active business from an individual to family business corporation – R.S.O. 1990, Reg 697
  - Transfers of farmed land between family members
  - Certain transfers of a life lease from a NPO or a charity



# 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 and (b) assessed value of the land
- Rate is 0.5% as of 2012
- Exemptions - deeds from estates, conversion of joint tenancy to tenancy in common and vice versa, between legally married spouses
- 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



## Family Law Legislation

- All provinces have a matrimonial property regime
  - Community property
  - Equalization of value
  - Civil regime
- Matrimonial home given special treatment



## British Columbia Family Law

- *Family Law Act*, S.B.C. 2011, c.25
  - Applicable to married persons and those living in a marriage-like relationship for at least 2 years
  - spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
  - on separation, each spouse has a right to an undivided half interest in all family property and is equally responsible for family debt
  - “family property” - on the date the spouses separate, property that is owned by at least one spouse or in which at least one spouse has a beneficial interest



## British Columbia Family Law continued

- “Excluded Property”
  - property acquired by a spouse before the relationship between the spouses began
  - gifts and inheritances to one spouse
  - spouse's beneficial interest in property held in a discretionary trust (as of May 26, 2014)
  - BUT the increase in the value of the excluded property, including discretionary trust property, is “family property” - the increase since the later of:
    - the date that the relationship between spouses began; or
    - the excluded property was acquired
- Court's will have to determine the value of a spouse's beneficial interest in a discretionary trust but improvement over previous language in which each spouse was entitled to 50% of the increase in the **value of the trust property** regardless of whether the spouse beneficiary is one of many beneficiaries.



## Alberta Family Law

- *Matrimonial Property Act*, R.S.A. 2000, c. M-8.
  - The Court may make a distribution between the spouses of all the property owned by both spouses and by each of them.
  - If the property is property acquired by a spouse by gift from a third party, by inheritance or acquired by a spouse before the marriage, the market value of that property at the later of marriage or when the property was acquired by the spouse, is exempted from a distribution under this section
  - S. 10 contains rules against dissipation



## Alberta Family Law continued

- An application by a surviving spouse for a matrimonial property order has to be commenced no more than 6 months after the date of issue of a grant of probate or administration of the estate of the deceased spouse.
- Common law partners (adult interdependent partners) are not spouses for the purposes of the Marital Property Act but may be able to claim for support under the Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5 or the Family Law Act, S.A. 2003, c. F- 4.5, s. 57 (1).
- There may also be a further claim against the estate for relief pursuant to Part 5 of the Wills and Succession Act, SA 2010 c. W - 12.2,



## Manitoba Family Law

- *The Family Property Act, C.C.S.M. c. F25*
  - Applies to “common-law partner” (either registered under *The Vital Statistics Act* or cohabited in a conjugal relationship for a period of at least three years) and married spouses
  - a surviving spouse or common-law partner may make an application for an accounting and equalization of assets, but the personal representative of a deceased spouse or common-law partner may not make such an application
  - Cannot make application after six months from the grant of letters probate of the will or of letters of administration



## Manitoba Family Law continued

- does not apply to any asset acquired by way of gift or trust benefit from a third person or by way of inheritance unless it can be shown that it was to benefit spouse/partner too
- any income from, or appreciation or depreciation in the value of, an asset acquired in the manner described is not be included in any accounting, unless it can be shown that the gift was conferred or the inheritance bequeathed, with the intention that the income or appreciation should benefit both spouses or common-law partners
- S. 6(7) to 6(9) address dissipation of assets





## Ontario Family Law

- *Family Law Act* R.S.O. 1990, c.F.3, as am.
- Equalization of “net family property” for married spouses on “valuation date”
- Common law spouses must rely on equitable claims
- Valuation dates
  - Divorce or separation with no reasonable prospect of resuming cohabitation
  - Death if surviving spouse has lower net family property
- Net family property is a formula
- Exclusions from NFP
  - Gifts or inheritances received after date of marriage
  - Interest in discretionary trust is property
  - Timing of an interest in a trust important – pre and post marriage



## Ontario Family Law continued

- “Matrimonial Home(s) has special status
  - Every property that is ordinarily occupied by a person and spouse as their family residence
  - Residence held in a discretionary trust, not a MH (*Spencer v. Riesberry*, ON CA 2012)
- Possible to have more than one
- Part II of FLA establishes rights and cannot be varied
  - Right to equal possession
  - Cannot sell, mortgage or otherwise encumber the MH without the spouse’s consent
- Can jointly file a “designation of matrimonial home”
- Limits the application of Part II rights to one residence



# Atlantic Family Law

Nova Scotia:

- *Matrimonial Property Act* divides “matrimonial assets” of legally married spouses and “registered domestic partners” under *Vital Statistics Act* – common law spouses not included in property division regime
- Includes matrimonial home(s) and all other assets acquired by the spouses before or during marriage
- Exceptions include:
  - Gifts, inheritances and interests in trusts received or held by one spouse
  - Business assets (a wide exception in NS)
  - Assets acquired after separation
  - Assets exempted under a marriage contract
- Matrimonial home treated specifically
- Spouse cannot dispose of or encumber interest in the home without consent of other spouse
- Court has various remedies available to deal with home (i.e. exclusive possession, obligation for repair and maintenance, etc.)
- Can have an unequal division of matrimonial assets or divide property that is not a matrimonial asset if equal division would be unfair or unconscionable



## Atlantic Family Law

### New Brunswick:

- *Marital Property Act* addresses “marital property” including “family assets” and “marital home(s)”
- Similar to NS, the home has special considerations/remedies
- Common law spouses not covered
- “family assets” broadly defined (property owned by one spouse or both spouses and ordinarily used or enjoyed for shelter or transportation or for household, educational, recreational, social or aesthetic purposes by both spouses or one or more of their children while the spouses were cohabiting)
- Includes corporate assets and interests in trusts but excludes property excluded by a domestic contract, business assets, and gifts



# Atlantic Family Law

## Prince Edward Island:

- *Family Law Act* similar to Ontario and BC in treatment of “net family property” and “family home”
- Common law relationships also excluded
- Similar provisions dealing with the home appear here
- “Net family property” means the value of all the property, including the income from the property, that a spouse owns on the valuation date after deducting
  - (i) the spouse’s debts and other liabilities on the valuation date,
  - (ii) the value of property that the spouse owned on the date of the marriage, valued at the date of the marriage, less the spouse’s debts and other liabilities on the date of the marriage,
  - (iii) the value of the following kinds of property acquired by the spouse after the date of the marriage and owned by the spouse on the valuation date:
    - 1. A gift or inheritance from a third person.
    - 2. Damages or a right to damages for personal injury, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages.
    - 3. Proceeds or a right to proceeds of a contract of life, accident or sickness insurance, as defined in the Insurance Act R.S.P.E.I. 1988, Cap. I-4, if the insurance was not purchased with intent to defeat a claim under this Part.
  - (iv) the value of property owned by the spouse on the valuation date into which property of a kind described in paragraph 1, 2 or 3 of subclause (iii) acquired by the spouse after the date of the marriage can be traced, and
  - (v) the value of property owned by the spouse on the valuation date that the spouses have agreed by a domestic contract is not to be included in the spouse’s net family property;



## Atlantic Family Law

Newfoundland and Labrador:

- *Family Law Act* also similar in treatment of “matrimonial assets” and the “matrimonial home”
- Similar in nature to NS re scope of matrimonial property, but definition of “matrimonial assets” differs slightly in that it excludes “personal effects” in addition to the common exceptions of gifts, inheritances, etc.
- “Personal effects” is not defined in the Act
- Common law spouses not covered



## Statutory Claims

- Every province has regime relative to estates and the ability of spouses and other dependants to make claims against an estate
- Family law statutes (both for property and support/maintenance) and dependants relief statutes are in place in all Canadian jurisdictions
- Application of statutes varies widely



## B.C. Dependants relief legislation

- *Wills, Estates and Succession Act*, SBC 2009, c. 13, s. 60
- Must bring application within 180 days of representation grant being issued
- Planning around the wills variation issues generally accepted as a legitimate estate planning exercise in BC
- BUT can an estate planning step be considered a “fraudulent conveyance”?
- claims of spouses
  - a married spouse (happily or unhappily) does not have a present claim, so not a “creditor or other” (Easingwood)
- claims of children
  - BC Supreme Court has held that a child’s potential WVA claim does not make the child a “creditor”





## Manitoba Dependants relief

- *The Dependants Relief Act, C.C.S.M. c. D37*
- "dependant" means the spouse or common-law partner of the deceased, a child of the deceased (under the age of 18 years, or who, by reason of illness, disability or other cause was unable to withdraw from the charge of the deceased or to provide himself or herself with the necessaries of life, or who was substantially dependant on the deceased at the time of the deceased's death), a grandchild, parent, grandparent or sibling of the deceased who was substantially dependant on the deceased at the time of the deceased's death
- Court may make an order for reasonable provision out of the estate
- Application not later than 6 months from probate or administration



# Ontario Dependants relief legislation

- *Succession Law Reform Act*, R.S.O. 1990, c.S.26, Part V, s. 57 to 79
- Whose obligation? - Every deceased person who has not made “adequate provision for proper support of his dependants”
- Meaning of “dependant” – two part test
  - Relationship – spouse, parent, child, brother/sister
  - Deceased was or was under legal obligation to support
- Limitation Period - Six months after probate
- What amount?
  - In determining amount and duration court to consider list of stipulated matters - s.62(1)
  - Good faith contracts to devise property by Will may be outside an order – s.71
  - Value of certain testamentary transactions brought into estate – s.72



## Atlantic Canada Dependants relief legislation

### Nova Scotia:

- Applies to “dependents” (legally married spouse or child) where “adequate provision” for the “proper maintenance and support” not made for the dependent by **will** of testator
- Does not cover intestacy nor assets passing other than by will
- Factors are broad as are possible remedies – court may consider testator’s reasons
- 6 month limitation period, subject to extension if estate not fully distributed
- Adult, financially independent children have a claim – question of quantum of the “moral” claim if no financial need (follows BC caselaw)
- Cannot contract out of the statute

### New Brunswick:

- Very similar provisions to NS but broader definition of dependent (includes others if meet definition of dependent) and covers intestacy also
- Common law spouse (3 years cohabitation) included
- 4 month limitation period



## Atlantic Dependents relief legislation continued

### Prince Edward Island:

- Also similar but different definition of dependent (also includes parent or grandparent if financially dependent, but excludes adult (over 18) children unless are mentally or physically disabled)
- Covers intestacy
- 6 month limitation period
- Contains an anti-avoidance provision (s. 19) for the capital value of assets transferred prior to death by:
  - Gifts made in contemplation of death
  - Property held in joint tenancy with the deceased
  - Property held in trust that was (a) revocable or (b) deceased was life capital beneficiary or held a power of appointment over trust capital

### Newfoundland and Labrador:

- Limited to spouse and children but covers intestacy also
- Similar factors and remedies to NS
- 6 month limitation period



## Case Scenario - Probate Avoidance

- Client is a 68 year old female and has a significant net worth.
- Capacity is not in issue (yet).
- Client has a second spouse (first spouse predeceased) and adult children from her first marriage.
- Client's assets include real property.
- Client wants to avoid probate with respect to her land.
- Questions:
  1. What strategies will work to avoid probate in each jurisdiction?
  2. What are the income tax implications of each planning method?
  3. What land transfer taxes are payable on legal or beneficial title transfers in each jurisdiction?
  4. Will the property be protected from probate fees/taxes?
  5. What are the non-tax considerations of the various planning structures, including the subsequent incapacity of the client?



## Case Scenario - Probate Avoidance Atlantic Canada

Transfer by client to true joint tenancy between spouses

- Works in all provinces to avoid probate on first death
- No income tax because of principal residence exemption and spousal rollover
- No land transfer tax (except in NFLD – no exemptions to registration fees)
- Probate tax on second death
- Interests of children not protected and no opportunity to challenge under dependents' relief (except PEI)

Transfer by client to joint tenancy with spouse as bare trustee coupled with non-probateable will to provide life interest for spouse and remainder interest for children

- No income tax now because no disposition of beneficial interest now and principal residence available on death
- May need other joint owners to ensure succession of “trustees” exists (i.e. spouse and kids)
- No land transfer tax (except NFLD, unless others are added to title also which makes it exigible in NB and PEI also)
- Non-probateable will protects the children (but multiple wills not available in NS so not outside of probate there)
- Can use a corporation as the bare trustee but watch out for land transfer tax in NB, NFLD and PEI



## Case Scenario - Probate Avoidance Atlantic Canada continued

Client transfers to inter vivos joint partner trust

- No income tax because joint partner trust
- No land transfer tax because gift (except NB and NFLD)
- No probate taxes on either death
- No 21 year rule but disposition on second death – principal residence exemption available
- Children protected because of terms of trust (if irrevocable and no encroachment power given to surviving spouse), though dependent's relief provision will not technically apply except in PEI (if trust is revocable)
- Possibly more complexity if future sale necessary during term of trust





## Case Scenario - Probate Avoidance British Columbia

- Transfer by client to true joint tenancy between spouses
  - Avoid probate on first death
  - No income tax because of principal residence exemption and spousal rollover
  - No PTT
  - Probate tax on second death
  - Interests of children not protected and no opportunity for Wills Variation challenge
- Transfer by client to joint tenancy with spouse as bare trustee coupled with non-probateable will to provide life interest for spouse and remainder interest for children
  - No income tax now because no disposition of beneficial interest now and principal residence available on death
  - May need other joint owner(s) to ensure succession of “trustees” exists (i.e. spouse and kids) but make sure related party so eligible for PTT exemption
  - No PTT
  - Does not address incapacity issues





## Probate Avoidance British Columbia continued

- Client transfers to inter vivos joint partner trust
  - Client as trustee with declaration of trust or trustee has to be related party to transfer without PTT
  - No income tax because joint partner trust
  - No probate taxes on either death
  - No 21 year rule but disposition on second death – principal residence exemption available
  - Children protected because of terms of trust (if irrevocable and no encroachment power given to surviving spouse)
  - Possibly more complexity if future sale necessary during term of trust
  - Trustee appointment(s) can address incapacity issues



## Case Scenario - Probate Avoidance Manitoba

Transfer by client to true joint tenancy between spouses

- Avoids probate on first death but no assistance if spouse predeceases
- No income tax because of principal residence exemption and spousal rollover
- No land transfer tax
- Probate tax on second death
- Interests of children not protected and no opportunity to challenge under DRA

Transfer by client to joint tenancy with spouse as bare trustee coupled with non-probateable will to provide life interest for spouse and remainder interest for children

- No income tax now because no disposition of beneficial interest now and principal residence available on death
- May need other joint owners to ensure succession of “trustees” exists (i.e.. spouse and kids)
- No land transfer tax unless others are added to title also which makes it exigible
- Non-probateable will protects the children (but question as to availability of multiple wills strategy in Manitoba so not certain that will be outside of probate)



## Probate Avoidance Manitoba continued

Client transfers to inter vivos joint partner trust

- No income tax because joint partner trust
- Have to consider land transfer tax because only exemption is for a transfer to spouse
- No probate taxes on either death
- No 21 year rule but disposition on second death – principal residence exemption available
- Children protected because of terms of trust (if irrevocable and no encroachment power given to surviving spouse)
- Possibly more complexity if future sale necessary during term of trust
- Can address incapacity issues
- Generally not in common use



## Case Scenario - Probate Avoidance Ontario

- Transfer by client to true joint tenancy with spouse
  - No income tax b/c principal residence and spouse
  - No land transfer tax b/c spousal exception
  - Not covered by Will submitted to Court for probate on first death
  - Probate tax on second death
  - Interests of children not protected
- Transfer by client to joint tenancy with spouse as bare trustee coupled with non-probateable will to provide for life interest for spouse and remainder interest for children
  - No income tax b/c principal residence
  - May need other joint owners to ensure succession of “trustees” exists
  - Needs to be mortgage free if other joint owners otherwise risk of land transfer tax
  - Non-Probateable Will protects the children



## Case Scenario - Probate Avoidance Ontario continued

- Inter vivos joint partner trust
  - No income tax b/c joint partner trust
  - No land transfer tax b/c gift
  - No probate taxes on either death
  - No 21 year rule but disposition on second death – principal residence
  - Children protected
  - More complexity if future sale necessary
- Rely upon first transfer after conversion policy of land registrar – create spousal trust in Will
  - No income tax b/c principal residence and spouse
  - No land transfer tax b/c gift
  - May not be available and need a valid Will



## Case Scenario Canadian Vacation Property

- Mature couple owns a vacation property in Canada; they also have other assets
- Three adult children
  - First lives near the property and loves it but does not have means to maintain it
  - Second also lives near the property, also enjoys using it but perhaps not as much as the first, and has the economic means to maintain it
  - Third lives in another province, wants to visit the property but does not want to own if it means contributing to maintaining it
- Parents believe all three children want the property; they want to treat all fairly, while also avoiding triggering income and probate taxes
- Parents may still be insurable
- Questions:
  1. What are some of the options available to the parents?
  2. What are the income tax implications of each planning method?
  3. What land transfer taxes are payable on legal or beneficial title transfers in each jurisdiction?
  4. Will the property be protected from probate fees/taxes?
  5. What are the non-tax considerations of the various planning structures, including the subsequent incapacity of the client and valuation mechanisms?
  6. Should the parents consider preparing a co-owners agreement? If so, what might it address?



## Case Scenario - Vacation Property Ontario

- Inter vivos gift to one child
  - Continued use by parents
  - FLA
  - Capital gains tax – principal residence exemption?
  - Fairness
- Testamentary gift to one child
  - Capital gains tax – principal residence exemption?
  - Beware of who bears the tax burden
  - Fairness
- Gift of remainder interest
  - Parents have use of property during life
  - Capital gains tax payable
    - Disposition of remainder interest
    - Disposition/reacquisition of life interest
    - On death, disposition of life interest
  - Fairness



## Case Scenario - Vacation Property Ontario continued

- *Pecore v. Pecore* – Joint Tenancy with One Child
- Transfer to adult financially independent child – absent proof, hold on resulting trust for parent's estate
- Document intention – gift/resulting trust
- If gift
  - What has been gifted – ROS?
  - Tax consequences?
- If resulting trust
  - Multiple wills – non-probate Will - assets held in trust
  - Administration after death
- Right to unilaterally sever
- Family Law Act risks





## Case Scenario - Vacation Property British Columbia

- Inter vivos gift to one child
  - How to address continued use by parents
  - Exposes property to child's spousal claims
  - Capital gains tax – is principal residence exemption available? If not taxable gain
  - Not fair to all kids – ability to equalize
  - PTT payable if value over \$275,000
- Testamentary gift to one child
  - Capital gains tax – is principal residence exemption available? If not taxable gain
  - Estate (not child) bears the tax burden
  - Again not fair (even with equalizing money gift in will?)
  - Is life insurance an option to address inequality (and possibly capital gains tax)
  - PTT to consider too
- Gift of remainder interest
  - Parents have use of property during life
  - Capital gains tax payable
  - Disposition of remainder interest
  - Disposition/reacquisition of life interest
  - On death, disposition of life interest
  - Fairness considerations again
  - PTT



## Case Scenario – Vacation Property British Columbia

- Joint tenancy with one child and co-ownership among all children
  - Same considerations as Ontario
- Inter vivos trust
  - Taxable disposition unless Alter Ego/Joint Partner/Spousal Trust – principal residence exemption?
  - 21 year deemed disposition rule – funding of liability
  - Funding of expenses
  - Operating agreement
  - Discretionary trust interests included in FLA
  - Avoids probate
  - PTT
- Testamentary trust
  - Deemed tax disposition on death – principal residence exemption available?
  - 21 year deemed disposition rule – funding of liability
  - Funding of expenses – set aside a separate fund in a separate testamentary trust
  - Detailed operating agreement or terms set out in trust
  - Discretionary trust interests included in FLA
  - Consider perpetuity period
  - PTT
- Not for Profit under the *Society Act*, RSBC 1996, CHAPTER 433
  - Not common but same general considerations as Ontario



## Case Scenario - Vacation Property Manitoba

- Inter vivos gift to one child or testamentary gift to one child
  - Same general considerations as other provinces
  - FPA not applicable unless can show intent to benefit spouse or convert to family asset
  - Will be land transfer tax payable upon registration of transfer of land at f.m.v.
  - Significant number of recreational properties on land leased from government (provincial and federal)
- Co-ownership among all children
  - Land transfer tax upon transfer
  - Co-ownership agreements
- While some use of inter vivos trusts, testamentary trust more commonly used
  - Terms of use specified in trust
  - Depending on who trustees will be, may be land transfer tax payable
- Rare (no?) use of not-for-profits



## Case Scenario - Vacation Property Ontario

- Co-ownership among all children
- Family meeting
  - Who wants cottage, who can afford it
- Chance of conflict escalates with multiple owners
- Presumed to be tenants in common
- If joint tenancy – “last man” standing wins
- Consider a co-owner’s agreement
  - Restrict rights of disposition – spouse/3<sup>rd</sup> party/family
  - Specify process for one tenant to dispose of interest –ROFR
  - Specify process for usage – “friends” usage/3<sup>rd</sup> party rental
  - Specify process of sharing of expenses
  - Dispute resolution process



## Case Scenario - Vacation Property Ontario

- Inter vivos Trust
  - Tax disposition unless Alter Ego/Joint Partner/Spousal Trust – principal residence exemption? – 21 year rule? – funding of liability
  - 21 year deemed disposition rule – funding of liability
  - Funding of expenses
  - Operating agreement
  - FLA – *Spencer v. Riesberry*
  - *Rose v. Rose*
  - Avoids probate
- Testamentary Trust
  - Deemed tax disposition on death – principal residence exemption?
  - 21 year deemed disposition rule – funding of liability
  - Funding of expenses – set aside a fund
  - Operating agreement
  - FLA – *Spencer v. Riesberry*
- Perpetuity period



## Case Scenario - Vacation Property Ontario

- *Spencer v. Riesberry* – Ontario Court of Appeal
- Mother set up IV Trust – before Sandra’s marriage
- Acquired four homes and transferred to IV trust
- Mother and four adult children beneficiaries
- On mother’s death property of trust divided equally among four children
- Each child occupied one home as her family residence
- Issue – Was the family residence that Sandra occupied with her family a “matrimonial home”?
- S. 18 – Must have an interest in the property that is occupied
- Issue - Did Sandra have an interest in the property she occupied with her family?
- Decision – No
  - Beneficiary does not have an interest in the underlying assets of the trust
  - Upshot - properly structured trust avoids “matrimonial home” status
  - Not mean nothing included in NFP – interest in a trust is property



## Case Scenario - Vacation Property Ontario

- Not for Profit Corporation
- Member corporation under ONCA/CNCA – organized for recreation and pleasure
- Useful where long term solution needed
- Avoids perpetuity issue, avoids 21 year deemed disposition
- Expense involved
- Transferor – tax disposition on transfer of property – principal residence exemption
- Corporate governance provisions to safeguard v. winding-up BUT not possible to completely protect against
  - Fundamental changes – super majority vote
  - Different classes of membership – voting/participatory – ceases on death – no tax consequences
  - Winding up - assets to charity, other non-profit, members
  - Unanimous members agreement now permitted



## Case Scenario - Vacation Property Ontario

- Not for Profit
  - Funding of expenses
    - Annual dues – different membership categories pay differing level of dues – address differing economic circumstances and usage
    - Levy special dues to address unexpected expenses
  - Tax Considerations
    - S. 149(l) – organized and operated exclusively for...pleasure, recreation...except profit – cannot distribute or otherwise make available any of its income for the personal benefit of members
    - If anticipate earning taxable income e.g. rent, then may be important BUT earning of rental income may put it offside of “non-profit” purpose test
    - Accumulation of income may put a NFP offside of s. 149(l) status unless can show are reasonable reserves for anticipated expenses e.g. anticipated capital expense
    - Shareholder benefit rules apply to members
    - May be tax consequences to members on a winding-up





## Case Scenario - Vacation Property Ontario

- *Live Together Before Marriage*
  - Will provision – useful where decisions cannot be made prior to death - shifts decision-making burden from parents to children
  - Allows cottage to be held for period of time e.g. 3 years
  - Expenses covered during holding period
  - Children determine among themselves who wants to (co)own and who has means to (co)own – provides a means for those children who do not want an interest to be bought out by those that do
  - Valuation mechanism ought to be included
  - If estate sufficient in size – allow purchasing children to use interest in other estate assets to fund purchase
  - If children cannot agree by end of period – cottage sold
  - Independent third party – administer and resolve disputes



## Case Scenario - Vacation Property Atlantic Canada

### Inter vivos gift to one child

- How to address continued use by parents
- Exposes property to child's matrimonial claims
- Capital gains tax – is principal residence exemption available? If not taxable gain
- Not fair to all kids
- Land transfer tax payable in NB and NFLD

### Testamentary gift to one child

- Capital gains tax – is principal residence exemption available? If not taxable gain
- Estate (not child) bears the tax burden
- Again not fair (even with equalizing money gift in will?)

### Gift of remainder interest

- Parents have use of property during life
- Capital gains tax payable
- Disposition of remainder interest
- Disposition/reacquisition of life interest
- On death, disposition of life interest
- Fairness considerations again



## Case Scenario - Vacation Property Atlantic Canada

Joint tenancy with one child

- Transfer to adult financially independent child – absent proof, hold on resulting trust for parent’s estate (Pecore presumption)
- Document intention – gift/resulting trust
- If gift
  - What has been gifted – Right of Survivorship?
  - Tax consequences?
- If resulting trust
  - Multiple wills – non-probated will - assets held in trust (does not work in NS)
  - Administration after death
- Right to unilaterally sever
- Matrimonial risks re child’s spouse



## Case Scenario - Vacation Property Atlantic Canada

### Co-ownership among all children

- Same considerations as Ontario



## Case Scenario - Vacation Property Atlantic Canada

### Inter vivos trust

- Tax disposition unless Alter Ego/Joint Partner/Spousal Trust – principal residence exemption? – 21 year rule? – funding of liability
- 21 year deemed disposition rule – funding of liability
- Funding of expenses
- Operating agreement
- Is Spencer v. Riesberry applicable in PEI? Trust interests specifically excluded in NS and NLFD, but included in NB
- Avoids probate

### Testamentary trust

- Deemed tax disposition on death – principal residence exemption available?
- 21 year deemed disposition rule – funding of liability
- Funding of expenses – set aside a separate fund in a separate testamentary trust
- Operating agreement
- Is Spencer v. Riesberry applicable in PEI? Trust interests excluded in NS and NLFD, but included in NB
- Consider perpetuity period (abolished in NS, LIB + 60 in PEI, regular in NB and NLFD)



## Case Scenario - Vacation Property Atlantic Canada

Not for Profit corporation

- Similar considerations to Ontario
- Not common in Atlantic Canada
- NS company limited by guarantee may be appropriate vehicle



## Case Scenario – Statutory Claims

- Husband (age 73) and Wife (66) in long-term second marriage for both
- Husband has two adult children from previous marriage:
  - Daughter (36) who is responsible, employed and visits Husband and Wife frequently
  - Son (38) who spends his limited funds on gambling and various substances and has little contact with Husband
- Wife has one adult child from previous marriage:
  - Son (39) who is employed but who is always pressuring Wife for money and Wife is prone to giving in to requests
- Husband owns the home that Husband and Wife live in, which he came into the relationship with. The house has increased significantly in value during the marriage.
- Husband and wife have accumulated reasonable wealth during marriage but the house would be the largest single asset
- Husband would like to preserve the house for Wife's use but retain control and ultimately have it gifted to his daughter, who grew up in house
  - Concern relative to claim by Husband's son
  - Concern re Wife's son influencing disposition of house if Wife had outright ownership
- Questions:
  1. What are some of the options available to Husband?
  2. What are the income tax implications of each planning method?
  3. What land transfer taxes are payable on legal or beneficial title transfers in each jurisdiction?
  4. Will the property be protected from probate fees/taxes?
  5. What are the non-tax considerations of the various planning structures, including the subsequent incapacity of the client?
  6. Is a marriage/post-nuptial agreement/waiver recommended or necessary?



## Case Scenario – Statutory Claims B.C.

- Joint tenancy with daughter (coupled with declaration of trust signed by daughter)
  - Does not protect wife after H dies
  - Does avoid probate on H's death (although not if daughter predeceases)
  - Transfer of principal residence to related person so no PTT
- Inter vivos spousal trust for wife
  - Could work but if falls into husband's estate – risk of claim by Husband's son
- Testamentary spousal trust with gift over to H's daughter
  - Does not avoid wills variation claim by H's son (and W)
  - Probate tax payable





## Case Scenario – Statutory Claims B.C.

- Joint partner trust
  - Provide for ongoing use of home during joint lives
  - Ability to sell and purchase replacement properties
  - Statement of intention re home to be available for daughter power to rent out and provide rental income to surviving spouse
  - Wife and daughter as trustees so PTT exemption
  - Not part of Husband's estate - protects from wills variation claims
  - If H as trustee with declaration of trust, still need to probate his Will to transfer after his death – possibly caught up in wills variation claim
  - Daughter as remainder beneficiary
  - No income tax consequence on transfer
  - No 21 year rule
  - Principal residence on second death if no other home owned by couple
  - Avoids probate taxes



## Case Scenario – Statutory Claims Manitoba

- If dependants relief claim a concern (financial dependence of adult child or spouse), consider joint spousal trust as dependent cannot contract out of or waive DRA rights
  - Would need consent from spouse under *The Homestead Act* and spousal agreement to avoid FPA dissipation type claim
  - Cannot show trust relationship on title – transfer by H to daughter with declaration of trust by daughter but LTT at time of transfer
  - Other considerations as shown in Ontario slides
- If no DRA claim likely, testamentary spousal trust for W with gift over to H's daughter
  - Would need spousal agreement re FPA rights
  - Probate payable on H's death and LTT when transfer to daughter



## Case Scenario – Statutory Claims Ontario

- Joint partner trust
  - Provide for ongoing use of home during joint lives
  - Ability to sell and purchase replacement properties
  - Statement of intention re home to be available for daughter power to rent out and provide rental income to surviving spouse
  - Wife plus independent as trustees – protects daughter from Wife's son
  - Daughter as remainder beneficiary
  - No income tax consequence on transfer
  - No 21 year rule
  - Principal residence on second death if no other home owned by couple
  - No land transfer tax as no consideration and no change in beneficial interest
  - Avoids probate taxes
  - Not part of Husband's estate - protects daughter from brother
- IV Spousal trust for wife could work but then falls into husband's estate – risk of claim by Husband's son
- Testamentary Spousal trust – risk of claim by Husband's son



## Case Scenario – Statutory Claims – Atlantic Canada

### Joint tenancy with wife

- Does not protect wife after H dies, nor provide for gift to H's kids after W dies unless W leaves it to them in her will (a “hope and a prayer” strategy)
- Is a mutual will contract between H and W appropriate?
- Does avoid probate on H's death (though not if W predeceases!)

### Joint partner trust best option

- Same general considerations as Ontario slide
- Land transfer tax payable on transfer to trust in NFLD and NB
- If irrevocable, not caught by PEI anti-avoidance provision for dependent relief

### Inter vivos spousal trust for wife

- Could work but same considerations as Ontario slide

### Testamentary spousal trust with gift over to H's kids

- Does not avoid dependent relief claim by H's son
- Probateable unless use multiple will/bare trust



## Conclusion

- Planning for each scenario is customized
- What works to address probate planning may not be advisable to avoid matrimonial claims, and what works in one province may not work in another
- Focus should be on a solution that is tailored to specific client goals
- No “one size fits all” answer



# Questions?



# Thank You!



## APPENDIX - British Columbia Legislation

- **Probate**

- *Probate Fees Act*, R.S.B.C. 1999, c. 4, (s. 2)

- **Family Law**

- *Family Law Act*, S.B.C. 2011, c.25, (s. 3, 81 to 85)

- **Dependant's Relief**

- *Wills, Estates and Succession Act*, SBC 2009, c. 13, (s. 60 to 63)

- **Property Transfer Tax**

- *Property Transfer Tax Act*, RSBC 1996, c. 378





# APPENDIX - Alberta Legislation

- **Probate**

- *Surrogate Rules*, A.R. 130/95, Schedule 2

- **Family Law**

- *Matrimonial Property Act*, R.S.A. 2000, c. M-8

- **Dependant's Relief**

- *Wills and Succession Act*, SA 2010 c. W - 12.2, Part 5

- **Property Transfer Tax**

- *Land Titles Act*, RSA 2000, c. L-4
- APPENDIX I of *Land Titles Act* - Tariff Of Fees Regulation



# APPENDIX - Manitoba Legislation

- **Probate**

- Schedule to *The Law Fees and Probate Charge Act*, C.C.S.M. c. L80
- *Queen's Bench Rules* 74.07(1) and 74.14(5)

- **Family Law**

- *The Family Property Act*, C.C.S.M. c. F25, (s. 1, 7, 28 and 29)

- **Dependant's Relief**

- *The Dependants Relief Act*, C.C.S.M. c. D37

- **Property Transfer Tax**

- *The Tax Administration and Miscellaneous Taxes Act*, C.C.S.M. c. T2, (s. 112 and 114)



## APPENDIX - Ontario Legislation

- **Probate**

- *Estates Act*, R.S.O. 1990, c. E.21
- *Estates Administration Tax Act*, 1998, S.O. 1998, c. 34
- *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (Rule 74)

- **Family Law**

- *Family Law Act*, R.S.O. 1990, c. F.3

- **Dependant's Relief**

- *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (Part V)

- **Land Transfer Tax**

- *Land Transfer Tax Act*, R.S.O. 1990, c. L.6



## APPENDIX - Atlantic Canada Legislation

- Probate Tax
  - *Probate Act*, SNS 2000, c 31 (see s. 84A-88, 86, and 59-50)
  - *Probate Courts Act*, SNB 1982, c P-17.1 (see s. 56-75)
  - *Probate Act*, RSPEI 1988, c P-21 (see s. 119)
  - Probate, Administration and Guardianship Rules under the *Rules of the Supreme Court*, SNL 1986, c 42, Sch D
    - *Service Charges Act*, SNL 1998 c S-13.2 (see s.4(3))



## APPENDIX - Atlantic Canada Legislation

- Family Law

- *Matrimonial Property Act*, RSNS 1989, c 275 (see s. 3-4, 8, 10-11, and 13)
- *Marital Property Act*, SNB 2012, c 107 (see s. 16-20, 22-24)
- *Family Law Act*, RSPEI 1988, c F-2.1 (see s. 19-20, 22, and 24)
- *Family Law Act*, RSNL 1990, c F-2 (see s. 6-8, 10, and 18)



## APPENDIX - Atlantic Canada Legislation

- Dependants Relief
  - *Testators' Family Maintenance Act*, RSNS 1989, c 465 (see s. 2, 3, and 5-6)
  - *Provision for Dependants Act*, SNB 2012, c 111 (see s. 1-2, 4, 7, 9 and 13)
  - *Dependants of a Deceased Person Relief Act*, RSPEI 1988, c D-7 (see s. 1, 2, 5-6, 14, 16, and 19)
  - *Family Relief Act*, RSNL 1990, c F-3 (see s. 2, 3, and 5-6)



## APPENDIX - Atlantic Canada Legislation

- Land Transfer Tax
  - *Municipal Government Act*, SNS 1998, c 18 (see s. 102-104 and 109)
  - *Real Property Transfer Tax Act*, SNB 1983, c R-2.1 (see s. 2 and 6)
    - *Regulation 83-106 under the Act* (see s. 3)
  - *Real Property Transfer Tax Act*, RSPEI 1988, c R-5.1 (see s. 3-4)
  - *Registration of Deeds Act*, SNL2000, c R-10.01 (see s. 34(2) and 39)
    - Schedule of Fees