LEGAL BUSINESS REPORT | ALPERT LAW FIRM
THE TAX LAW PROFESSIONALS
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JOINT TENANCY CONSIDERATIONS IN ESTATE PLANNING

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

A. ESTATE ADMINISTRATION TAX IN ONTARIO

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

B. JOINT TENANCY OWNERSHIP

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

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

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

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C. JOINT TENANCY CONSIDERATIONS

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

(i) TAX CONSIDERATIONS

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

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

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

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

transfer to a spouse or a spousal trust or alternatively through the application of the corporate roll-over rules.

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

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

(ii) NON TAX CONSIDERATIONS

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

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

3. Placing assets into joint tenancy free of consideration may create family disputes. When an individual gratuitously grants another person joint title to property and then passes away, it may be difficult to determine whether the transferor intended to make a gift to the second joint tenant or merely to place the property into the name of the

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second joint tenant for ease of administration. For example, an adult child may have been added to a joint bank account simply to help an ailing parent manage finances with no intention that remaining funds be left solely to that child. Where a transferor places assets into joint tenancy with one child or beneficiary, and where other beneficiaries would have inherited the property if it had passed by will rather than by right of survivorship, the stage for estate litigation is set.

D. PROBATE PLANNING TECHNIQUES

(i) Multiple Wills

The use of multiple wills can reduce probate fees by reducing the value of assets that pass through the estate. All assets which may be distributed only after obtaining probate are dealt with under a primary will. Other assets which may be distributed without probate are dealt with in a secondary will. If it is unclear whether or not an asset will require probate, it can be put into a will on its own so that it can be probated if necessary without affecting other assets. Upon the testator's death, only the primary will needs to be submitted to the Court, and probate fees are calculated based only upon the value of the assets passing to the Estate Trustee under the primary will.

(ii) Alter-Ego and Joint Partner Trusts

Living trusts provide another alternative method to avoid probate fees. A living trust, such as an alter-ego trust or a joint partner trust, allows a transferor to transfer assets to the trust on a tax-deferred basis. Property held by the trust need not go through probate. After the death of the transferor or the transferor's spouse (as the case may be) the beneficiaries named in the trust will be able to receive the income and capital of the trust without the necessity of obtaining probate.

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Please contact Howard Alpert directly at (416) 923-0809 if you require assistance with tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions or estate administration.