BY KEVIN WARK

Avoiding Probate

Establishing joint tenancy may not have the desired effect

It is increasingly common for an elderly parent to transfer property, such as bank and investment accounts or a personal residence, into joint tenancy with an adult child. This is often done to avoid probate and probate taxes (a major concern in "high probate tax" provinces such as British Columbia, Ontario, and Nova Scotia).

Let's consider the legal implications of joint tenancy arrangements, the impact of the presumption of resulting trust, and other issues before advising a client to transfer property into joint tenancy with an adult child.

JOINT TENANCY VERSUS TENANCY IN COMMON

Joint tenancy is a form of co-ownership where each owner has an equal and undivided interest in the property. Upon the death of a joint tenant, that person's interest in the property automatically transfers to the other joint tenant outside of the deceased's estate. Consequently, there is no requirement for probating the deceased's will to give effect to the transfer to the surviving joint tenant.

Tenancy in common is another type of co-ownership arrangement, with each owner having a fixed and divided interest in the property. A deceased's interest in the property will therefore fall into his or her estate (becoming subject to probate) rather than passing automatically to the other co-owner(s).

It is possible to "sever" a joint tenancy, which converts each owner's interest to a tenancy in common, by acting in a way that demonstrates the person no longer wishes to hold the property as a joint tenant. For example, if one person sells his or her interest in the property or places a mortgage on such property, this will typically be sufficient to convert the form of ownership to a tenancy in common.

JOINT TENANCY WITH CHILDREN

A number of potential benefits are available for a parent to hold property in joint tenancy with an adult child. But some pitfalls need to be considered. First, creditors of the adult child can acquire legal rights in respect to the property. There may also be family law property right claims if the child undergoes a separation and/or divorce.

The child, now having an ownership interest, may fraudulently borrow against the property or make withdrawals from an investment account without the parent's knowledge. The child may also prevent the parent from making day-to-day ownership decisions relating to the property. But perhaps the biggest concerns can arise on the death of the parent, when other family members may challenge whether the property was intended as a gift from the parent.

When it comes to making gifts to family members, which includes the transfer of property into joint tenancy, two legal presumptions may apply. The first, which is referred to as the presumption of advancement, applies to gifts between spouses, and between parents and minor children.

In these situations, the law presumes that the spouse or parent intended to make a gift. The onus then falls on others who wish to challenge the gift to demonstrate that this was not the intention of the transferor. For example, assume Rachel transfers her condo into joint tenancy with her second husband and subsequently passes away. If the children of the first marriage want to challenge the husband's ownership of the condo, they must provide clear evidence to a court that Rachel did not intend to gift the condo to her husband, and that the condo should therefore be part of her estate.

On the other hand, a gift by a parent to an adult child is subject to the presumption of a resulting trust. That is, the child receiving the gift holds the property in trust for the beneficiaries of the estate. If other family members take issue with a gift being made, the onus is on the child to demonstrate that the parent intended such transfer to be a gift.

There have been a number of court decisions where estate beneficiaries have challenged joint tenancy between a parent and child on the basis that a deceased parent did not intend to make a gift. In some cases, the courts have held that the gift was ineffective, resulting in the property falling back into the estate and subject to probate. In other situations, the courts sided with the child, holding that the property passed to that person on death.

For example, in the recent decision in *Jansen v. Nels*, a disgruntled daughter challenged the transfer of the mother's home to her son and his wife on the basis that her mom did not intend to make a gift. This case went all the way to the Ontario Court of Appeal, where it was determined that the facts supported a gift to the son and daughter. But you can imagine the toll on the family and the legal costs involved in this type of litigation.

When dealing with a client who is considering the transfer of property into joint tenancy with an adult child (and where there are other children or interested parties such as a charity), it would be wise to discuss the reasons for wanting to do this, to review all the possible alternatives, and to clearly document the client's intentions.

For example, if the main reason is to help with banking arrangements, a power of attorney may be the most suitable solution. If the goal is to keep the property out of the estate and avoid probate, an *inter vivos* trust with all the children as beneficiaries may be the way to go. And if the intent is to make a gift through a joint tenancy arrangement, this should be clearly documented and communicated to all family stakeholders.

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