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Joint Tenancy in Estate Planning - A double edged sword!

It is a common misconception that elderly parents should own their property jointly with their children in order to avoid the associated probate fees on death. While joint ownership is a useful means of avoiding probate fees (now known as estate administration tax) there are many factors to consider before using joint tenancy as an estate planning technique.

What is Joint Tenancy?

What is unique about joint tenancy or joint ownership is the law of survivorship. On the death of a joint owner of property, the deceased person's interest in the property passes to the surviving joint owner or owners by the right of survivorship. Title or ownership is deemed to pass to the survivor(s) an instant immediately prior to death.

This deemed transfer of ownership (minutes before death) means that the property in question does not form part of the deceased person's estate because the deceased person has no legal interest in the property at the actual time of death. Therefore, no probate is required to be paid by the estate of the deceased person as the property never becomes an asset of the estate. This deemed transfer is known in legal circles as a "legal fiction".

It is important to note that the deemed transfer of ownership occurs whether or not the deceased person has a will in place.

Estate Administration Tax - "Probate Fees" vs. Income Tax

Avoiding tax is always a good thing but what if you throw out the baby with the bathwater? A person is exempt from paying income tax on the capital gains realized from the sale of their principal residence. That savings can be huge.

Transferring title to a child could result in the child (assuming the property is not the child's principal residence) having to pay income tax on the capital gains realized or deemed to be realized during the child's period of ownership of the property.

Using joint tenancy simply to avoid estate administration tax without considering the implications of the Income Tax Act is a common mistake. As well there are other factors to consider.

In Ontario, estate administration tax is payable by a deceased's estate, calculated on the value of all property belonging to the deceased at the time of death.

The formula is:

> Estate Administration Tax = $5 on each $1,000 of estate value for the first $50,000 plus $15 per $1,000 of estate value in excess of $50K

By way of an example, the estate administration tax payable on an estate having a value of $300,000 is:

On the first $50,000	$ 250
On the remaining $250,000	$3,750
Total	$4,000

Other factors to consider

1. Transaction Costs

When considering a transfer to joint ownership, one need consider that there will be the immediate legal costs of transferring the ownership of real estate –and potentially land transfer tax to pay.

2. Discounting Future Costs

Estate administration tax is only payable when the will is filed with the court in order to obtain a Certificate of Appointment. Accordingly, the tax would be incurred at some uncertain time in the future – after death. Transaction Costs on the other hand are incurred immediately.

3. Disputes

If there is a falling out between joint owners, this could lead to litigation. Who will bear the costs of maintenance and capital improvements is often a source for disagreement.

4. Control

Joint ownership might not easily lend itself to distributing your estate in accordance with your wishes. Two joint owners are deemed to have a 50/50 interest and title cannot, for example, be registered to give one person a 1% joint interest and the other a 99% interest. As well, a sale or refinancing of jointly held property cannot be accomplished without the consent of all joint owners.

Conclusion

While joint tenancy might be a means to save estate administration tax, the savings achieved only occur in the future. Those future savings need to be discounted to their present value and compared to the immediate transaction costs that will be incurred. Then, the possible net savings should be weighed against the intangible costs - that is: potential income tax liability and the risks associated with disputes and loss of control.