



Probate Planning for Real Estate

The “Bare” Necessities

With Jordy Atin and Ian Hull

Agenda

1. Probate Background
2. Options for Conveyance on death
 - a. By true right of survivorship
 - b. By Will
3. By Will - Avoiding Probate
 - a. Resulting Trust
 - b. First Dealing



Probate & Real Estate - Background

Deceased died owing real estate legally registered in the Deceased's sole name.



- Who has authority to sell?
 - Executor named in the Will
- What proof is required to satisfy a Buyer of the Executor's Authority?

Probate & Real Estate - Background

The Will might not be valid:

- Not properly signed
- Later Will
- Lack of Capacity.

The Buyer wants to assurance that the person selling the property on behalf of the deceased is the person with real authority to sell.



Probate & Real Estate - Background



Certificate of Appointment (“Probate”)= proof of authority of the Executor named in the Will to convey property on behalf of the deceased.

- Buyer is entitled to this Proof where the Real estate:
 - Was legally owned by the Deceased; and
 - Was registered in the Land Titles System when the Deceased went on title.

Probate & Real Estate - Background

Buyer is not entitled to this Proof where the Real estate:

- Was legally owned by someone other than the deceased regardless of beneficial ownership.

OR

- Was registered in the Registry System when the Deceased went on title.



Giftng by Right of Survivorship



Deceased Intention on death:

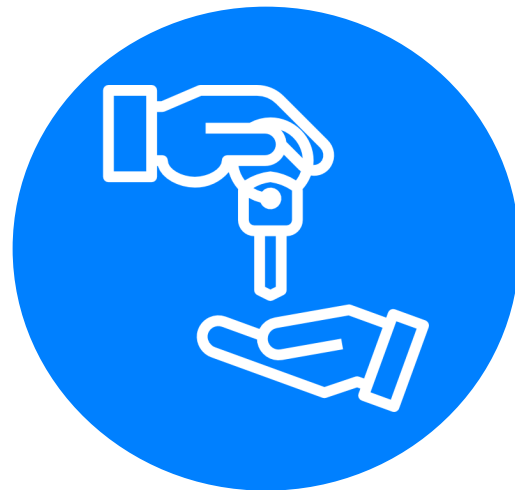
- 1.** Gift of true ownership of Real Estate directly to a specific person.
- 2.** Gift of Real Estate/Proceeds through a Will.

Gifts by Right of Survivorship

Gift of Real Estate directly to a specific person.

Can be achieved by automatic right of survivorship = joint tenancy

- Never enters the Deceased estate
- Not subject to:
 - Control of the executor;
 - Terms of will; or
 - Probate tax.



Joint Assets



Gift by Joint Ownership- Pros and Cons

Pros

- Simple
- Immediate effect on death
- Probate tax avoidance
- Creditor protection on death
 - (Power v. Grace)

Cons

- Cannot be changed without consent of other owner
- Income tax may be triggered when you transfer title
- Income tax is not avoided on death
- Income tax burden on the residue
- Loss of Principal Residence Exemption
- Lifetime control
- Creditors & family law issues
- May result in unintended benefits since it passes outside of the will

Gifts Through Will

Gift of Real Estate/Proceeds through Will.

The Real Estate passes through estate:

- Subject to:
 - Control of the executor
 - Terms of will
 - Use of Trusts
 - Conditional Gifts
 - Unequal Division
 - Probate tax (1.5%) ??????????



No Probate Necessary

Land can be conveyed without a probated Will if:

1. Was legally owned by someone other than the deceased regardless of beneficial ownership.

OR

2. Was registered in the Registry System when the Deceased went on title.



Probate Tax

When Probate is sought for a Will, tax applied as a percentage on the value of the assets governed by the Will



1. What Will is being submitted for probate?
2. What assets are governed by that Will?

Non-Probate Will

Use a separate Will that is not submitted for probate to deal with Real estate that doesn't require a probated Will:

1. Was legally owned by someone other than the deceased regardless of beneficial ownership.

Or

2. Was registered in the Registry System when the Deceased went on title.



Bare Trust



1. Was legally owned by someone other than the deceased regardless of beneficial ownership.
 - Legal owner is holding beneficial interest in trust
- Bare Trust
 - The Trustee of the Bare Trust is the legal owner
 - The original owner/owner's estate is the beneficial owner
 - The Bare Trustee must follow the instructions of the beneficial owner.
 - The distribution of the property/proceeds is governed by the owner's Will

Bare Trustee

1. The Bare Trustee is conveying title
2. The Bare Trustee is not dead.
3. No Need for proof of authority of the deceased's executor to sell.



How to Create a Bare Trust



1. Convey 100% Legal Title to Bare Trustee
 1. During life - Inter Vivos Transfer to a Bare Trustee
 2. On Death - joint tenancy = right of survivorship

How to Create a Bare Trust

2. Trust Declaration

- Bare Trustee confirms:
 - Only legal title is being held
 - No change in beneficial ownership
 - Testator still owns all beneficial interest
- No disposition for income tax purposes
- Principal Residence Exemption protected.



CRA's Position

SUBJECT Principal Residence, Capital Gain Exemption
SECTION 54, 70(5), 40(2)(b), 248(1) definition of disposition
SECTION
SECTION
SECTION
\$\$\$\$

Please note that the following document, although believed to be correct at the time of issue, may not represent the current position of the CRA.
Prenez note que ce document, bien qu'exact au moment émis, peut ne pas représenter la position actuelle de l'ARC.

PRINCIPAL ISSUES: Does the principal residence capital gains exemption apply when title on a property is not in the taxpayer's name at the time of death.

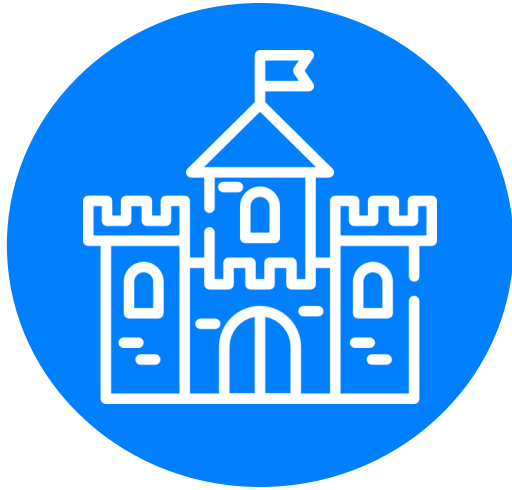
POSITION: Yes, if the taxpayer is the beneficial owner.

REASONS: Definition of "disposition" in 248(1) does not include a disposition if there is no change in beneficial ownership. Since there was no change in beneficial ownership when the title was transferred there was no disposition at the time. Taxpayer is deemed to dispose of property at time of death.

XXXXXXXXXX
038904

2010-

When to Recommend Bare Trust



- Value of the Real Estate is such that a 1.5% probate tax saving is significant
- There is a likelihood that the property will be owned by the testator at death.
- The testator understands that changing title can result in difficulties in selling the property during lifetime.
- The testator accepts the risks that CRA or Land Registrar changes their positions

Who Should be the Bare Trustee

1. A corporation as Bare Trustee

- Never dies
- Indoor Management Rule
- Surviving Directors

2. Joint owner - Person

- Can die
- Can be incapable
- Can be subject to creditors



3 Steps to Using Bare Trustee to Reduce Ontario Probate Tax

1.

Transfer

- Add other person(s) as a joint tenant

Or

- Transfer to Corporation

Plus

- Affidavit re: nominal consideration - transfer to Trustee

<https://www.fin.gov.on.ca/en/guides/ltt/0693.html>

2.

Trust Agreement

- Have Bare Trustee acknowledge true owner's 100% beneficial ownership and bare trustee relationship

3.

Secondary Will

- Use secondary will "Trust Assets" definition to deal with these assets

First Dealings Exemption

No probate is necessary to transfer land if:

1. Land acquired when the land was registered under in the Registry System.
2. Since it was acquired the land was converted from Registry System to the Land Titles System.
3. The land is identified as “Land Titles Conversion Qualified”
4. There have been no disqualifying dealings with the land between the time the owner acquired title and the death of the owner.



Non-Disqualifying Dealings

1. Discharges
2. Notices
3. Leases
4. Charges
5. Survivorship applications
6. Non-arms length transfers for no consideration.



Bulletin No. 2015-05 - Minister of Government and Consumer Services

1st Dealing



Title Search to confirm:

- 1.** LTQ Conversion
- 2.** Date of Conversion
- 3.** Testator was on title prior to the Date of Conversion

PROPERTY DESCRIPTION: [REDACTED] (MIDWAY); TORONTO, CITY OF TORONTO

PROPERTY REMARKS:

ESTATE/QUALIFIER:

FEE SIMPLE
LT CONVERSION QUALIFIED

RECENTLY:

FIRST CONVERSION FROM BOOK

PIN CREATION DATE:

2001/04/23

OWNERS' NAMES

[REDACTED], GAIL

CAPACITY SHARE

ROWN

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO
** PRINTOUT INCLUDES ALL DOCUMENT TYPES AND DELETED INSTRUMENTS SINCE 2001/04/20 **					
**SUBJECT, ON FIRST REGISTRATION UNDER THE LAND TITLES ACT, TO:					
** SUBSECTION 44(1) OF THE LAND TITLES ACT, EXCEPT PARAGRAPH 11, PARAGRAPH 14, PROVINCIAL SUCCESSION DUTIES * AND ESCHEATS OR FORFEITURE TO THE CROWN.					
** THE RIGHTS OF ANY PERSON WHO WOULD, BUT FOR THE LAND TITLES ACT, BE ENTITLED TO THE LAND OR ANY PART OF IT THROUGH LENGTH OF ADVERSE POSSESSION, PRESCRIPTION, MISDESCRIPTION OR BOUNDARIES SETTLED BY CONVENTION.					
** ANY LEASE TO WHICH THE SUBSECTION 70(2) OF THE REGISTRY ACT APPLIES.					
**DATE OF CONVERSION TO LAND TITLES: 2001/04/23 **					
CT667372	1984/06/15	TRANSFER		*** COMPLETELY DELETED ***	[REDACTED], GAIL

The First Dealings Rule

Once in Registry always
in Registry



Need a Secondary Will!

If owner only had single will and that Will had to be probated because at least one asset required probate:



- Probate tax is applicable on all assets governed by that Will.
- LTQ real estate is an asset owned by the deceased and governed by the single Will.
- Probate tax is payable on LTQ Property even though a probated Will is not necessary to convey title to the LTQ property.

Need a Secondary Will!

Use a Secondary Will that governs LTQ property.

“Registry System Real Estate” means any real estate in Ontario which is registered in the Registry System or has been converted from the Registry System to the Land Titles System after my acquisition of same and there have been no dealings with the real estate since my acquisition such that a transmission application after my death would be considered a "first dealing".



First Dealings Conveyance



1. Transmission Application
2. Covenant to Indemnify the LRO

(<https://www.ontario.ca/land-registry-on/2015-04-covenants-indemnify-land-titles-assurance-fund>)

Vesting of Property Without Probate

- S. 9 of the Estates Administration Act
 - “Automatic Vesting”
 - Only applies on an intestacy
- OR
- A Will with no power to sell (implicit or explicit)
 - *Proudfoot Estate, Re (1994)*

