

DEALING WITH YOUR VACATION PROPERTY

For many families, the vacation property evokes fond memories of vacations past and strong sentimental attachments. These feelings can often make it very difficult for the owners of the vacation property to decide about the future use and ownership of the property. Where there is a desire to pass on the vacation property to future generations, many questions often arise about the different transfer options that might be available and the income tax and other implications of these options.

To assist with these decisions, this Reference Guide reviews the various options available to transfer the vacation property to subsequent generations, as well as the tax and other issues that should be considered.

Note that owning a vacation property situated outside of Canada may give rise to other issues. For example, property situated in the United States may be subject to US estate tax. Professional advice should be obtained from advisors in the country where the property is located. In addition to tax issues, owners should consider having a Will and Power of Attorney prepared in accordance with the laws of the country where the property is located.

TRANSFERRING THE VACATION PROPERTY TO CHILDREN - POSSIBLE OPTIONS

One of the primary decisions that should be made is whether the transfer of the vacation property to children should take place *during lifetime* or whether it should be dealt with only *on death*.

Transfer of Vacation Property During Lifetime

Some reasons to consider a transfer of ownership *during lifetime* might include:

- ❖ To reflect the reality that one or more children may already be using the vacation property more than the parents who own it;
- ❖ A desire to have the children undertake the financial and maintenance responsibilities for the vacation property; and
- ❖ To cap the amount of capital gains with respect to the vacation property at the amount of the gain accrued as at the date of the transfer, so there would not be a large tax bill when the parents pass away. Future increases in the value of the vacation property would be passed to the next generation.

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Lifetime Transfer Options

The following options are available to transfer ownership of a vacation property to the next generation during lifetime:

- ❖ Gifting the vacation property outright to one or more children;
- ❖ Gifting a joint interest in the vacation property to one or more children;
- ❖ Selling the vacation property outright to one or more children; and
- ❖ Transferring the vacation property to a Lifetime Trust, with the children named as beneficiaries of the trust.

Each of these options is more fully discussed below.

Tax Implications

In each case, the transfer of the vacation property during lifetime would trigger a capital gain if the value of the vacation property is more than its cost. Therefore, there would be a current tax liability for the transferring parent(s) unless the principal residence exemption is claimed (if available and appropriate, as discussed below).

Transfer of Vacation Property on Death

Some of the reasons to consider a transfer of ownership *on death* might include:

- ❖ A wish to maintain control during lifetime over decisions relating to the vacation property, including use, maintenance, repairs and improvements;
- ❖ The children are not yet old enough or cannot afford to handle the financial and other responsibilities of ownership;
- ❖ To protect the vacation property from possible claims by creditors of one or more children, including the possibility of a marital or family property claim by a spouse or common-law partner of a child;
- ❖ To defer the tax on capital gains that would result if the property was transferred to others during lifetime;
- ❖ To maintain privacy regarding the vacation property succession plans; and
- ❖ To postpone the decision because the children (and/or their families) do not get along well enough to become shared owners.

Transfer Options on Death

To effect a transfer of ownership on death, the following options might be considered:

- ❖ Outright transfer of the vacation property at death to one or more children;
- ❖ Sale of the vacation property by the estate, with children given a right of first refusal to buy it; and
- ❖ Transfer of the vacation property to a testamentary trust (created by Will), with the children named as beneficiaries.

Tax Implications

Any accrued gain in the value of the vacation property is taxable on the death of the owner of the vacation property (subject to the principal residence exemption, if available and appropriate). In the case of a couple, the tax would be deferred until the death of the surviving spouse, assuming the couple owned the vacation property jointly or ownership of the vacation property was transferred to the surviving spouse when the first spouse died.

DISCUSSION OF THE TRANSFER OPTIONS

Giftting the Vacation Property Outright to One or More Children during Lifetime

A gift of the vacation property directly to a child or children may be the appropriate option.

When it might be considered:

- ❖ If the vacation property is to pass to the children eventually in any event; and
- ❖ If there is a wish to have the children more involved in the maintenance of the vacation property.

Tax and Probate Implications:

- ❖ The transfer to children would trigger a realization of any untaxed capital gain, which may result in an immediate tax cost to the parent(s), unless the principal residence exemption can be used;
- ❖ Future capital gains would be the responsibility of the children. For the purposes of calculating future gains, the children's *cost* would be the fair market value of the property when it was gifted to them; and

- ❖ Probate fees would be saved since the vacation property would be owned by the children and would therefore not form part of the parents' estate at death.

Issues or Concerns:

- ❖ Where the vacation property is to be transferred to more than one child, it would be important to decide whether the children should own the vacation property as joint tenants or as tenants in common. The implications of this decision are explained more fully below; and
- ❖ The transfer of the vacation property to children will result in the parents no longer having direct control over the vacation property. This may be addressed by an agreement between the parents and children outlining the use of the vacation property by the parents while alive as well as the level of involvement or control that the parents may have.

Giftting a Joint Interest in the Vacation Property to a Child or Children during Lifetime

Joint ownership of property can, in some circumstances, be a useful estate planning technique. With this option, the parents would transfer a *joint interest* in the vacation property to the children, so that the parents and children own the vacation property jointly.

When it might be considered:

- ❖ If the vacation property is to pass to the children eventually but the parents are not yet willing to part with their entire ownership interest;
- ❖ If there is a wish for the children to be more involved in the maintenance of the vacation property and/or to feel a greater sense of ownership; and
- ❖ To help ease the administration of the estate for the surviving joint owner(s) on the death of one of the joint owners, since the property would pass by right of survivorship, outside the estate, to the surviving joint owner(s).

Tax and Probate Implications:

- ❖ For tax purposes, a transfer of a joint interest in capital property is considered a *disposition* of part of the property at the *value of that part* at the time. As a result, the parent(s) would realize a capital gain in the year of the transfer relating to the part transferred to the children, unless the principal residence exemption can be used.
- ❖ Where the transfer to joint ownership is by *gift*, the *cost* to the children of their joint interest, for the purposes of calculating the children's capital gains in the

future, is also considered to be the value of the joint interest at the time of the gift.

- ❖ On the death of the surviving joint owner parent, he or she would be considered to have sold the interest in the property that had been retained by the parent(s) at the value of the interest at the time of death, which may result in a capital gain. Again, this gain may not be subject to tax if the principal residence exemption is claimed.
- ❖ When the children become the only joint owners on the death of the joint owner parent(s), they would be considered to have acquired the additional interest in the property for the same value of that interest at the time of the death. This, then, would become their *cost* for the purposes of calculating any future capital gains.
- ❖ No probate fees would be payable until the death of the last joint owner, since the vacation property would pass automatically, outside the estate, to the surviving joint owners when one of the joint owners dies.

Issues or Concerns:

Joint ownership with children means that there would be some loss of control of the property, as the children would have to agree with any decision relating to the property, such as a decision to sell it or to place a mortgage or other encumbrance against the title. Also, creditors of the children or marital or family property claims could expose the property to enforcement of debts.

Selling the Vacation Property to a Child or Children during Lifetime

Another option is to sell the vacation property to the children.

When it might be considered:

- ❖ If the vacation property is to pass to the children eventually in any event;
- ❖ If there is a wish for the children to be more involved in the maintenance of the vacation property and/or to feel a greater sense of ownership; and
- ❖ If the parents need or want the proceeds of the sale for their own living expenses or for other purposes.

Tax and Probate Implications:

- ❖ A capital gain would be realized on the sale to the children, based on the value of the vacation property at the time of the sale. This may result in an immediate tax cost to the parent(s), unless the principal residence exemption can be used.

- ❖ Future capital gains would be the responsibility of the children.
- ❖ Caution should be exercised if the vacation property is sold to the children for a price that is less than its fair market value at the time, as there is a potential for double taxation in the family. The parents would realize a capital gain on the sale based on the *fair market value* of the vacation property (and not on the reduced price), but for the children, their *cost* for the purposes of calculating future capital gains would be the *reduced price* they paid for the vacation property. The difference between the two amounts could therefore be taxed twice.
- ❖ Probate fees would be saved since the vacation property would be owned by the children and would therefore not form part of the parents' estate at death.

Issues or Concerns:

- ❖ The transfer of the vacation property to children will result in the parents no longer having direct control over the vacation property. This may be addressed by an agreement between the parents and children outlining the use of the vacation property by the parents while alive as well as the level of involvement or control that the parents may have.
- ❖ If the vacation property is to be sold to more than one child, it would be important to decide whether the children should own the vacation property as joint tenants or as tenants in common.
- ❖ One or more of the children may not have the cash or borrowing ability to be able to make the purchase. If the parents decide to loan the money to any of the children for the purchase, with the intent that the loan would be repaid over time, this should be clearly documented. The parents' Wills should also reflect the arrangements made, including whether the loan is to be repaid or forgiven once both parents have died and/or whether any financial adjustment is to be made for other children.

Transferring the Vacation Property to a Lifetime Trust

Transferring the vacation property to a lifetime trust, with the children named as beneficiaries, can be an effective way to deal with a vacation property.

When it might be considered:

- ❖ Where there are concerns with other lifetime transfer options;
- ❖ Where there are minor children or grandchildren, or where the children are not yet able to handle the financial and other responsibilities of vacation property ownership;

- ❖ Where the parents wish to maintain some control over the vacation property, including the ability to use the property during lifetime. The terms of the trust agreement can be drafted in order to protect the interests and concerns of the parents (or grandparents) while alive. For example, they might retain the right to the use and enjoyment of the property during lifetime (often referred to as a “life interest”); and
- ❖ Where there is a desire for a neutral party (the trustee) to be involved due to concerns about actual or potential conflict in the family.

Tax and Probate Implications:

- ❖ When a vacation property is transferred to a trust, the trust becomes the legal owner of the vacation property. As a result, it would not form part of the estate of the parent(s) on death, so there would be no *deemed disposition* of the vacation property on death.
- ❖ For tax purposes, the transfer of the vacation property to a lifetime trust is considered to take place at the value of the vacation property at the time of the transfer¹. As a result, the transfer may trigger a capital gain for the parent(s), with one-half of this gain taxable unless the principal residence exemption is used to shelter the gain. The trust’s *cost* of the vacation property would also be the fair market value of the vacation property at the time of the transfer.
- ❖ Assuming the transfer to the trust could be done without a prohibitive immediate tax cost, the use of a lifetime trust may create an opportunity to defer the realization of further capital gains in the future that would otherwise occur at death. Because the trust would own the vacation property, future increases in the value of the vacation property would accumulate within the trust. However, a trust is considered to have disposed of its property at fair market value on the 21st anniversary of the creation of the trust. As a result, there would be a deemed realization of capital gain at that time unless the trust is wound up prior to that time.

Distributions of capital from a trust generally take place on a tax deferred basis – that is, the beneficiaries would take the vacation property at the trust’s *cost* for tax purposes, so no capital gain would be realized at the time of the distribution. Eventually, this *cost* will be used by the children to calculate their capital gains on the vacation property when they actually sell their interest in the vacation property in the future, or on death. The use of a vacation property trust therefore allows capital gains on a vacation property to be deferred for a considerable time.

¹ An exception to this could be where an “alter ego” or “joint partner” trust is used. This is a particular kind of trust under the Income Tax Act. In this case, the property can be transferred on a tax deferred basis. However, this type of trust is not well-suited to a vacation property scenario.

- ❖ Probate fees would not be payable on the value of the vacation property on the death of the parents since the trust would be the owner, not the parents.

Issues or Concerns:

- ❖ The trustees for the vacation property trust should be carefully selected. If appropriate the trustees could be close relatives (other than the children) or trusted friends who are willing to accept the appointment when called upon to do so. The trust should also contain provisions for the replacement of trustees.
- ❖ The trustees of the vacation property trust could be responsible for governing the use and maintenance of the property. For example, the trustees could set a schedule for the use of the vacation property by the children, by guests, friends and third party tenants, as well as rules regarding the funding of property taxes, repairs, maintenance costs and improvements.
- ❖ Even if it is expected that the children would fund most or all future expenses relating to the vacation property, a certain amount of money should be transferred to the vacation property trust in case one or more of the children do not pay as required. Directions to the trustees should also be included in the trust document regarding the use of the funds. Depending on the amount transferred, and on the expected financial contributions from the children, the trustees may be directed to use the funds for all expenditures relating to the vacation property, or just to fund significant maintenance costs and capital improvements.
- ❖ If no funds are transferred to the vacation property trust for expenses, or if there are insufficient funds to meet expenses, the trust should include the power for the trustees to sell the vacation property.
- ❖ On the 21st anniversary of the trust, the trustees and the children may face a difficult decision: either transfer the vacation property to the beneficiaries on a tax deferred basis as discussed above, or sell the vacation property to pay the capital gains taxes. Transferring the vacation property to the children may not be realistic if they will simply argue about its use. At the same time, because of the emotional stake that some of the children may have in the vacation property, selling it may be a very unpopular decision. It may help to discuss these issues with the children.
- ❖ In the event that the beneficiaries no longer wish to share the vacation property, each child could be given the option to purchase it from the vacation property trust. If two or more children wish to purchase it, they could draw lots to determine who would get the first right to purchase, or the child offering the greatest price could be allowed to purchase it. The purchase price could be determined by one or two qualified land appraisers chosen by the vacation

property trustees. The net proceeds of the sale (after related costs) could be paid to the beneficiaries of the vacation property trust equally.

Outright Transfer of the Vacation Property at Death to One or More Children

Rather than transferring the vacation property during your lifetime, you may wish to make a specific gift of your vacation property to your children in your Will.

When it might be considered:

- ❖ If you wish to retain ownership until you have passed away; and
- ❖ If you are comfortable with the children having direct control over the vacation property after you have passed away.

Tax and Probate Implications:

- ❖ The vacation property would be deemed to have been disposed of at its value immediately prior to death, with any accrued gain deemed to be realized in your final year (subject to the principal residence exemption); and
- ❖ Probate fees would be payable on the value of the vacation property.

Issues or Concerns:

- ❖ You will need to plan for the tax liability if you are going to leave the vacation property to your children in your Will. Other assets of your estate will need to be used to pay the tax liability. If there are insufficient assets, the vacation property may have to be sold to pay the taxes. You may wish to consider life insurance to cover that liability, to ensure that your children can afford to keep the vacation property; and
- ❖ An outright transfer to children can be made to them as either joint tenants or as tenants in common. You will need to consider the implications of these options. Your Will should be explicit on your intentions in this regard in order to prevent disputes among your children, and to avoid the application of any legal presumptions that may otherwise arise about your intentions.

Sale of Vacation property on Death to One or More Children

Your Will could provide that the vacation property is to be offered for sale to one or more of your children.

When it might be considered:

- ❖ If you wish to retain ownership until you have passed away; and

- ❖ If you are comfortable with the children determining the ultimate ownership of the vacation property.

Tax and Probate Implications:

- ❖ The vacation property would be deemed to have been disposed of at its value immediately prior to death, with any accrued gain deemed to be realized in your final year (subject to the principal residence exemption); and
- ❖ Probate fees would be payable on the value of the vacation property.

Issues or Concerns:

- ❖ There will need to be a mechanism for determining the purchase price and payment terms which are fair to all family members, including a provision for equalization payments, if appropriate. This should include a deadline, beyond which the executors could offer the vacation property for sale to a third party;
- ❖ There may be disagreements if more than one child wishes to purchase the vacation property;
- ❖ This would favour the child or children who are more financially secure; and
- ❖ This would also result in the non-owner children losing access to the vacation property.

Testamentary Trust for Vacation Property (created by Will)

Rather than an outright transfer, another possibility is to use a trust in your Will (a testamentary trust) to hold the vacation property.

When it might be considered:

- ❖ Where you wish to have someone maintain some control over the property, such as a neutral person (the trustee), due to concerns about actual or potential conflict; and
- ❖ Where you wish to establish a trust fund to pay for the maintenance and upkeep of the vacation property.

Tax and Probate Implications:

- ❖ The vacation property would be deemed to have been disposed of at its value immediately prior to death, with any accrued gain deemed to be realized in your final year (subject to the principal residence exemption); and
- ❖ Probate fees would be payable on the value of the vacation property.

Issues or Concerns:

- ❖ Many of the issues discussed above with respect to a lifetime trust for the vacation property would be similar where a testamentary trust is concerned. For example, there would be similar concerns regarding the transfer of the property to beneficiaries or sale of the property on the 21st anniversary of the trust, trust terms dealing with the purchase of the vacation property by a beneficiary where the beneficiaries no longer wish to share it, the appointment of trustees of the trust, trust terms or trustee discretion regarding the shared use of the vacation property, and establishment of a maintenance fund.

OTHER ISSUES TO CONSIDER

Avoiding Conflict

As part of planning regarding the vacation property, it will be very important to ensure that the vacation property does not become a burden or a source of conflict in the family. For example, where the children are to share the ownership and use of the vacation property, conflict can arise among them regarding matters such as the allocation of expenses, scheduling the use of the vacation property, decision-making and responsibility for maintenance and repairs.

Conflict may also arise due to the tax on capital gains that must be paid when the vacation property owner dies, particularly if the vacation property passes to only one child, since the tax cost would be shared by all the children in the absence of different instructions in the Will.

Regardless of whether the transfer of the vacation property is made during lifetime or by Will, the use of an agreement (or trust document) should be considered where there would be more than one owner of the vacation property, to set out some rules regarding the shared use and ownership. The agreement could deal with items such as:

- scheduling the use of the vacation property;
- funding of property taxes, repairs, maintenance, improvements and other expenses;
- possible rental of the vacation property to others or the use of the vacation property by guests and friends;
- allocation of responsibility for opening and closing the vacation property;
- how decisions regarding the vacation property would be made; and

- the future sale by one of the children of his or her interest in the vacation property.

In planning for the transfer of the vacation property, the Will or trust document (depending on which transfer method is chosen) should address the possibility of one of the children not wishing to receive an interest in the vacation property either now or at a later time. For example, if the vacation property is to be transferred by Will, this possibility could be addressed by providing for an alternate gift of equal value, such as cash.

Joint Ownership or Ownership as Tenants in Common

Some of the transfer options discussed above involve choosing whether the children will ultimately own the vacation property as “joint tenants” or as “tenants in common”.

Joint Tenancy

When two or more people own a vacation property jointly or as joint tenants, the right of survivorship would apply, so that when one of the joint owners dies, the surviving joint owner or owners would automatically acquire the whole interest in the vacation property that was owned by the deceased.

While this can ease the administration of the estate of the deceased joint owner, this also means that the family of the deceased owner would not have an opportunity to inherit an interest in the vacation property.

This might be seen as unfair. On the other hand, as joint tenants, all children would have to be in agreement with any proposed disposition of the property, whether to one of the children or to an outside party. Some parents choose to leave their vacation property to their children as joint tenants with the understanding that the children will have to negotiate a buy-out if one or more of them wishes to end the shared ownership arrangement.

Tenancy in Common

If two or more people own the vacation property as tenants in common, they would each own an undivided interest in the vacation property. Each person would therefore be free to give his or her interest to family members by Will (or on intestacy), or to sell the interest to anyone. This may introduce other new owners of the vacation property, which may present other concerns or difficulties.

TAX ISSUES INVOLVING THE VACATION PROPERTY

The following is a review of the income tax rules that apply to vacation properties.

Capital Gains

Because a vacation property is a capital property, the tax rules regarding capital gains and losses will apply regardless of whether the vacation property is sold or transferred during lifetime or whether it is part of an individual's estate on death.

Capital Gains on a Transfer of a Vacation Property during Lifetime

In the case of a transfer of the vacation property *during lifetime*, there will be a capital gain if the proceeds of the transfer are greater than the cost of the property. Currently, one-half of the capital gain is taxable in the year of the transfer.

For the purpose of determining the capital gain:

- ❖ *proceeds* refers to the amount actually received on the sale or transfer, or the fair market value of the property if the property is transferred as a gift; and
- ❖ *cost* of the property takes into account not only what was paid to acquire the property but also the costs of improvements made to it over the years. Special rules for determining the cost apply where the property was acquired prior to 1972 or was received as a gift or inheritance. For some vacation property owners, the cost of a vacation property for the purposes of calculating the capital gain may be higher than its original cost (plus improvements) if the owner has taken advantage of the one-time election available in 1994 to use up any unused portion of the \$100,000 capital gains exemption that was available for real estate (but eliminated in the February 1994 Federal Budget). This opportunity enabled the owners to effectively increase the cost base of the property, which in turn reduces the capital gain when the owners ultimately dispose of the property.²

Note that if the value of the vacation property has *declined* since it was acquired, this loss cannot be used to offset capital gains arising from other assets, since the property is for personal use and losses from personal use property are deemed to be nil under the Income Tax Act.

Capital Gains on Death

If the transfer of ownership of the vacation property takes place on the owner's death, the estate of the vacation property owner will have a capital gain if the value of the vacation property at the time of death is greater than its cost (as

² For property acquired prior to 1972, special rules apply so that any increase in value up to 1972 is exempt from tax, since prior to 1972, capital gains were not taxable. Accordingly, the value as of December 31, 1971 is treated as the initial cost of the property for the purposes of calculating the capital gain. If the property was inherited or received as a gift, the initial cost is the value of the property at the time of the gift or inheritance (except if it was inherited from a spouse so that a "rollover" applied, in which case the spouse's adjusted cost base is also inherited).

defined above). This is because on death, an individual is considered to have disposed of all of his or her capital assets (that is, those that could give rise to a capital gain or loss) for the market value of those assets at the time of death. This applies to any interest in real property, including a joint interest.

Exception for Transfers to Spouse or to a Qualifying Spousal Trust

For both lifetime transfers and transfers on death, if property is transferred to a spouse or to a qualifying “spousal trust” for a spouse, an exception to the usual rules applies so that the transfer can be made on a “rollover” basis. This means that the tax on the capital gain is deferred until the property is sold or is deemed to be sold on the death of the beneficiary spouse.

Record-keeping – To reduce the amount of the Capital Gain

As noted earlier, for tax purposes, expenses incurred to improve a property can be added to the cost of the property for tax purposes. This results in a reduction of the amount of the capital gain and therefore the amount of taxes payable when a property is transferred during lifetime or deemed to be sold on death.

Because of this, records should be retained of all improvements made to the vacation property, particularly those that increase the value or utility of the property and are of a lasting and permanent nature. This could include expenses such as additions to the building, major renovations, roof and building repairs, construction or replacement of decks or docks and other similar expenditures.

These records should include receipts, paid bills, cancelled cheques, and work orders, as these may be requested by the tax authorities to substantiate the cost of a property.

Principal Residence Exemption

The *principal residence exemption* is a special exemption available under federal tax laws to shelter capital gains on personal-use real property in Canada to the extent that a property has been a “principal residence”. The following highlights some of the basic rules and how they may apply to a vacation property.

“Principal Residence”

For the purposes of the principal residence exemption, a principal residence is, in general terms, a housing unit that is *ordinarily inhabited in the year* by the taxpayer or by the taxpayer’s spouse or child(ren). Since this highlighted phrase has been accepted as referring to *any period of time* during a year, the exemption can, where appropriate, generally be used even for properties such as vacation properties that are often occupied for only a small portion of the year.

After 1981, a family can only have one property qualify as a principal residence at any one time for the purposes of claiming the principal residence exemption. (Prior to that time, each individual could claim a property as a principal residence, which led to many couples arranging the ownership of their properties so that one spouse owned the family home and the other owned the vacation property.)

Making the Principal Residence Designation

The designation of principal residence is made in the income tax return for the year a property is sold or transferred or for the year of death (as the case may be).

Many individuals may have unknowingly designated a property as a principal residence and effectively used the principal residence exemption without even being aware of it. For example, if an individual sold a home for more than its cost and did not report the gain in his or her income tax return for that year, The Canada Revenue Agency (*CRA*) considers a principal residence designation to have been made for the years the home was owned.

This prevents the individual from later being able to designate any other property as a principal residence for any of the same years, which could prove to be a very costly consequence.

This highlights the importance of obtaining professional advice if a family owns two or more properties that could qualify as a principal residence and if there are plans to dispose of one of the properties. This will help to determine which property should be designated as a principal residence and for which years, so that the matter is properly addressed in the income tax returns for the year and the principal residence exemption is used in a way that would be most advantageous.

Note that the principal residence exemption is also available in the year of death, so a similar analysis should be undertaken by the executors where a deceased individual owned more than one property that would qualify as a principal residence. This will ensure that the property with the greater gain is designated as the principal residence, so that taxes on death would be reduced.

WHERE TO START?

Choosing and planning an appropriate method of transferring a vacation property to the next generation will involve the consideration of a complex combination of tax, legal, practical and emotional issues. However, the process may be made easier by consulting with professional advisors and involving the children in the discussions.