

## Some Estate Planning Opportunities

Opportunities in estate planning: Depending on the wishes, family dynamics, and assets in question, one might be in a position to take advantage of estate planning tools such as multiple Wills and Spousal Trusts to achieve a well-rounded estate plan which saves probate fees and income taxes while protecting one's estate and the interests of his or her beneficiaries after death.

### Multiple Wills May Reduce Probate Fees

If you have shares or loans receivable in private corporations or other assets that can be transferred without "probate", Multiple Wills could reduce the Estate Administration Tax ("probate fees") payable in your estate.

"Probating" a Will is the process of having the Court confirm the validity of the Will and the appointment of the person(s) entitled to administer the estate. "Probate" (now called Certificate of Appointment of Estate Trustee with a Will) is not required in every estate. Whether or not probate is required depends on the nature of assets held, how the assets are held (i.e. joint tenants or otherwise), and the requirements of the body having control over the transfer of those assets. Historically, the value of all assets was required to be included in the probate application except for those assets passing outside the Will, i.e. to a joint owner on survivorship or to a named beneficiary on an insurance policy. Real estate located outside Ontario was also not required to be shown in the probate application.

Some assets disposed of under a Will do not require probate to transfer them to the beneficiaries. Examples of this are shares and loans receivable in private corporations and personal effects. The assets that do require probate can be dealt with in one Will and probate fees paid only on the value of those assets. The assets not requiring probate can be dealt with in a separate Will. As no probate of this separate Will is required, no probate fees are payable on the assets dealt with under that Will.

This planning opportunity is relatively recent and dealt with by the Court in 1998 in *Granovsky v. R.* In that case, the Court granted probate for the assets dealt with under one Will, without requiring that the separate Will that dealt with private corporation shares be submitted for probate or that probate fees be paid on the value of the assets dealt with under that separate Will. The loss of revenue to the Province in that case was significant (about \$375,000). Not surprisingly, the Ontario government appealed this decision, but later abandoned its appeal. Since then, the Courts have dealt with issues involving separate Wills on several occasions and have indicated that it is not necessary to probate a Will to have recourse to the Courts for matters related to that Will, i.e. passing accounts, removing a Trustee, etc. Further, the Court forms have since been amended to contemplate an application to probate a "limited" estate. Although it is always open to

the legislature to limit or eliminate the use of Multiple Wills, no steps have been taken in this regard in the several years since the *Granovsky* decision.

Whether or not Multiple Wills should be used will depend on the nature of assets held, the value of assets not requiring probate and corresponding anticipated savings in probate fees. In the right circumstances, Multiple Wills could significantly reduce probate fees otherwise payable by your estate.

### Spousal Trusts

Spousal Trusts are used for a variety of reasons. One is to avoid duplicate probate fees. This happens when an asset is held in sole ownership and is left to a surviving spouse and probate fees are paid on the first death. Then when the surviving spouse dies, probate fees are paid again on the same asset when it is left to the children. Use of joint ownership or designation of the surviving spouse's beneficiary does defer probate fees until the second death. Spousal Trusts have other uses, however, such as creating a second taxable entity, the Estate, that has an income flow that is taxed at the graduated tax rates. The spouse then has their own income which is taxed at graduated rates together with the benefit of the income from the Spousal Trust which is also taxed at graduated rates. The taxes paid on the two income streams must be compared to the tax which would have been paid by the surviving spouse had all the assets been left outright and tax been paid on the combined income in that spouse's hands. We are advised that this technique can provide for substantial annual tax savings, taking full advantage of dual graduated rates, provided there is sufficient income generated both in the hands of the spouse and in the Spousal Trust.

In addition to this tax savings, Spousal Trusts are often used to give the deceased spouse some additional control over the assets they have left in their Estate. Many people like the idea that the property is somewhat protected from the remarriage of the surviving spouse. If assets are left outright to the surviving spouse, they can remarry thereby revoking their existing Will, or make a new Will which leaves a new spouse as primary beneficiary to the exclusion of the children.

Drawbacks to Spousal Trusts include the more complicated wording of the Will, the fact that the spouse does not have complete freedom and control of the assets of the deceased spouse,

the filing of annual tax returns, and the imposition of fiduciary duties on the spouse as an Estate Trustee in managing the assets even with a broad power of encroachment inserted in the Will.

A Spousal Trust can be used to hold non-registered investments or real estate such as the family home. In either case, there is no triggering of income taxes on the death of the first spouse when the property passes into the Trust and it provides that the spouse is entitled to receive all of the income from the Trust and no person other than the spouse can receive capital during the spouse's lifetime. In addition, the principal residence exemption should still be available for the home.

## Testamentary Trusts for Other Beneficiaries

Testamentary Trusts for non-spouses are useful in a variety of circumstances. Without a Testamentary Trust, when an individual attains the age of 18, that person will receive his or her bequest from a Will. This may not be desirable when significant assets are involved. Testamentary Trusts can be used to control when assets are distributed to beneficiaries. A "special" Testamentary Trust may also be useful in certain circumstances when a beneficiary receives government assistance. A Testamentary Trust in this

instance can be used to ensure that income earned on assets do not reduce the government assistance received.

Testamentary Trusts also provide opportunities to save tax. Beneficiaries with Testamentary Trusts can save significant taxes on the income earned on the assets intended for them. Since Testamentary Trusts are taxable entities that are taxed at graduated rates, significant tax savings are possible if income is taxed in the Trusts rather than in the hands of beneficiaries. Testamentary Trusts can also be used to income split with a beneficiary's family to significantly reduce the family's tax burden. If your beneficiaries are U.S. citizens or live permanently in the U.S., planning that utilizes Testamentary Trusts can be used to save U.S. Estate tax when they die.

The main drawbacks of Testamentary Trusts include that the beneficiary may not have complete freedom or control of the assets inherited, the filing of annual tax returns, and the imposition of fiduciary duties on the beneficiary as a trustee if the beneficiary is named as a trustee. In addition, 21 years after their creation, Testamentary Trusts are deemed to dispose of their assets at fair market value triggering tax on any accrued capital gains on assets owned at that time.

## Pallett Valo LLP Wills, Estates & Trusts Group

Our goal is to help our clients arrange their personal and business affairs in the most efficient and advantageous manner possible. We work closely with our clients and their other professional advisors to develop a customized estate plan. We use vehicles like tax-planned trusts and wills to accomplish our clients' personal objectives while minimizing adverse tax consequences, including the reduction of probate taxes. We are experienced in the complex issues relating to business succession planning and ongoing wealth transfer. In this way, our clients are better prepared to deal with aging, illness, incapacity and death.

Upon incapacity or death, we represent and advise Estate Trustees, beneficiaries, heirs, surviving spouses and other family members. We have unique expertise advising families with disabled beneficiaries. When disputes arise in the administration of an estate, we provide experienced counsel to assist in their resolution, whether by litigation or other dispute resolution mechanisms.

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