

# Some Estate Planning Opportunities

## 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 save up to \$8,000.00 to \$10,000.00 a year, taking full advantage of dual graduated rates, provided there is sufficient income generated both in the hands of the spouse and in the Estate. The spouse must receive all of the income from the Trust and no one else can take from the Trust during the spouse's lifetime.

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, revoking their existing Will or making a new Will which leaves a new spouse as primary beneficiary to the exclusion of the children. You can make provision in your Will for the distribution of the monies remaining in the Trust on the death of your surviving spouse.

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 a properly worded Spousal Trust. In addition, principal residence exemption should still be available for the home.

The purpose of this document is to provide information as to recent developments in the law. The comments are of a general nature and do not contain a full analysis of the law nor does it constitute an opinion of Pallett Valo, LLP or any member of the Firm on the points of law discussed.

### The Wills/Estates/Trusts Group

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