

PROBATE OR NOT? A REFRESHER

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Maria Velichko

Pamela Liang

Agenda

- What is probate
- When is probate needed
- Applying for probate
- Assets that need probate
- Assets that do not need probate
- Strategies

What is Probate?

- Certificate of Appointment of Estate Trustee (“**CAET**”) – commonly referred to as “**probate**”
- Different types of applications – e.g., with a Will, without a Will, Limited to the Assets Referred to in the Will
- Over-the-counter court application

When is Probate Required?

- Not a legal requirement to probate a Will
 - Executors take authority from the terms of the Will itself
- Probate is a third party requirement – e.g., financial institutions, Land Titles Office
- Intestacy

Applying for Probate

- Information about the deceased and beneficiaries
 - Refer to court forms
- Information about the estate value
 - Date of Death values

Applying for Probate

- Estate Information Return
- Must be received by the Ministry of Finance (Ontario) within 180 calendar days after CAET is issued
- Ministry may audit – importance of keeping accurate records and books of account
- Filing amended returns (e.g., if discover another asset, or certain information is incorrect)

Estate Administration Tax

- When executors apply for a CAET, they have to pay estate administration tax (“**EAT**”)
- Rate is 1.5% of the value of assets over \$50,000 passing through the Will – so approximately \$15,000 of EAT payable on every \$1,000,000 of estate value

Estate Administration Tax cont'd

- Do not include value of real estate outside Ontario for the purpose of calculating EAT
- Otherwise, worldwide estate – unless have separate Will

Estate Administration Tax cont'd

- The only liability that can be deducted is an outstanding amount of an encumbrance such as a mortgage registered on title to real estate forming part of the estate

Does an asset need probate or not?

- Depends on the asset and the planning that has been implemented (if any)

Generally - Assets that need probate

- Bank accounts in the person's sole name
- Non-registered investments in the person's sole name
 - “Registered” accounts – such as RRSPs, TFSAs – can have a designated beneficiary – discussed further below
- Ontario real estate in the person's sole name

SEE CAVEAT ON SLIDE 15

Generally - Assets that do not need probate

- Private corporation shares
 - Mainly talking about Ontario corporations here – get advice from lawyers in other jurisdictions re probate requirement for corporations in other jurisdictions
 - Review shareholder agreement
- Personal and household articles
 - But could be subject to third party requirements

Generally - Assets that do not need probate cont'd

- Registered plans/life insurance with a designated beneficiary – discussed further below
- Assets held in a bare trust arrangement – discussed further below
- Real estate eligible for the “first dealing” exemption
 - Consult with real estate lawyer

SEE CAVEAT ON SLIDE 15

Is there only one Will or no Will?

- Whether an asset can be transferred to beneficiaries without probate is sometimes separate from whether that asset will have to be included for the purposes of calculating EAT

Is there only one Will or no Will?

- If a person had only one Will and even one asset in the estate needs probate or the person had no Will – **All* assets forming part of the estate will be subject to EAT**
- *As noted above, not real estate outside Ontario
- **IMPORTANCE OF PLANNING**

Strategies

- Multiple Wills
- Beneficiary designations
- Joint property (but pitfalls)
- Bare trusts
- Express trusts

Multiple Wills

- Commonly used strategy
 - Will 1 – deals with assets that require probate (Primary Will)
 - Will 2 – deals with assets that do not require probate (Secondary Will)

Multiple Wills

- Factors that may interfere
 - Changes to applicable laws
 - Changes to administrative practices of third parties
 - Assessment by Minister of Finance (Ontario)
 - Will challenges
 - Extenuating circumstances in the estate
 - Cost and complexity of set up may be deterrent

Beneficiary designations

- Registered accounts
 - RRSP
 - RRIF
 - TFSA
- Pensions
- Life insurance
- Designation of contingent beneficiaries

Beneficiary designations

- Can be done using financial institutions' designation forms or in the Will
- **HOWEVER:**
 - May be beneficial to have plan proceeds pass to the estate on death (i.e. to cover debts and bequests in the Will)

Jointly Held Property

- Bank accounts
- Investment accounts (non-registered)
- Real Estate
 - Joint tenancy
- Personal Property
 - Safety deposit boxes

Jointly Held Property

- Benefits
 - Convenience
 - Right of survivorship (if that is the intention)
 - Reduced exposure to estate administration tax
- Myths
 - Estate administration tax can be completely avoided
 - Beneficiaries will get along and share as intended
 - Can avoid creditors and liabilities of the estate

Jointly Held Property

- Spouses
- Adult child or children
 - Presumption of “resulting trust” on the death of the parent
 - Can be rebutted, but only with sufficient evidence
- Other individuals

Jointly Held Property

- Can lead to litigation in trying to identify the intentions of the joint owners
 - Intended beneficiaries may not receive their entitlement in the event of an “out of order” death
 - Possible mismatch between who receives the benefit of the asset and who pays capital gains taxes on it
- Property may be subject to creditors of all joint owners
- Loss of control over property

Jointly Held Property

- Applying for Probate
 - Half of the value of the asset still needs to be declared as an asset of the deceased if it was not intended to be a gift to the surviving joint owner
 - Estate Trustees swear an affidavit to provide an accurate summary of the estate assets

Jointly Held Property

- Obtain proper tax advice
 - Potential tax liability if transferred property had an accrued gain
 - Potential loss of the principal residence exemption
- Deed of Gift
- Declaration of Intention

Bare Trust

- Treated as a “look through” or agency for tax purposes
- Trustees hold property without any further duty except to convey property to beneficiaries on demand

Bare Trust

- Transfer of property to bare trustee not treated as a disposition
 - Beneficial owner remains the same
- Bare Trustee can be an individual or a corporation
 - Declaration of Trust
 - Declaration of Intention

Bare Trust

- Drawbacks
 - Complexity
 - Set up and ongoing administration costs
 - Preparation of a Secondary Will

Express Trusts

- Assets owned by Trust
 - Property transferred into new or existing trust
 - Trustees purchase the property
- Future capital gains can be deferred until beneficiaries dispose of property
 - Property “rolled out” to beneficiaries at original adjusted cost base

Express Trusts

- Drawbacks
 - Transfer of property into trust may trigger capital gains tax
 - Exceptions: alter ego trusts, joint partner trusts
 - 21-year deemed disposition rule
 - Set up and ongoing administration costs

QUESTIONS?

Wilson Vukelich LLP can help ensure that your matters are handled effectively and efficiently, and in manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

Maria Velichko mvelichko@wvllp.ca

Pamela Liang pliang@wvllp.ca

www.wvllp.ca

905.940.8700

Wilson
Vukelich LLP
Lawyers