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Probate Planning Ideas

Chances are you've heard the term before. Probate fees. Or more accurately, probate taxes.

Similar to sales tax, probate fees are simple to understand. They represent a flat tax (or near flat tax) on the value of one's estate.

While the fees may be straightforward, the complexities resulting from poor planning decisions are anything but simple.

It is important to view probate fee planning as a part of the entire estate planning process. Reasons why?

- In order to avoid increased administrative costs
- Missed tax planning opportunities
- Unplanned beneficiary distributions

What is probate? An executor (administrator) obtains authority under a Will immediately after the death of an individual. In most circumstances, the executor will need to obtain Letters Probate in order to administer the estate.

As many planning strategies can be implemented without the need to consult a solicitor, individuals often fall into the "self-help" trap.

While use of do-it-yourself Will kits leads to the most estate planning mistakes, "self-help" probate fee planning would be a close second.

Post Highlights:

1. Use of multiple Wills
2. Alter Ego and Joint Partner Trusts
3. Use of life insurance
4. Joint ownership



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Use of Multiple Wills

Recommending clients to hold assets in joint tenancy and naming beneficiaries on registered accounts has been a long time probate strategy.

This strategy helps avoid probate fees and avoids assets being held should there be issues with the administration of the estate.

A strategy that has gained popularity in recent years is the use of multiple Wills. This is especially true in the case of individuals who own private corporation shares.

In order to enact this strategy, a "primary" Will is used to hold the individual's general estate. This would include assets that would require probate (investment accounts, etc.)

The "secondary" Will would include the shares of the private corporation and any debts owned by the corporation to the individual. Other assets that could be included in this Will include personal effects, jewelry and artwork.

The Wills would be executed on the same date and only the primary Will would be submitted for probate. Fees would only be payable on this Will and would likely represent a small portion of the overall estate.

The use of the multiple Will strategy has become popular in Ontario and British Columbia despite some court cases that have cast some doubt on this type of planning for advisors.

The multiple Will strategy isn't widely used as probate fees outside of a select few provinces are minimal. It can however, be helpful if an individual resides in Alberta but owns recreational property in BC as it may be necessary to obtain probate and pay probate fees on real property in another jurisdiction.



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Alter Ego and Joint Partner Trusts

An alter ego trust is created by an individual (settlor) who is age 65 or older. The trust is set up for the benefit of the settlor only during his/her lifetime.

A joint partner trust is also set up by a settlor who is age 65 or older. The difference being that this trust is for the benefit of the settlor and his/her spouse for their lifetimes. The spouse does not need to be age 65 when the trust is settled.

Both trusts are inter vivos trusts (created during the settlor's lifetime) and appoint beneficiaries to receive trust property upon the passing of the settlor, or the survivor of the settlor.

Both trusts are taxed at the top marginal tax rate on any income that is not paid out to the settlor or his/her spouse, as applicable. However, the significant tax benefit provided by these trusts is transfer of property at ACB thru the avoidance of a deemed disposition on transfer of property to the trust.

While these trusts do not provide significant tax planning options, they do offer numerous estate planning options:

- Property held within these trusts are not a part of the deceased's estate, therefore probate fees are avoided.
- A probated Will becomes public record. The same is not true for these trusts. If confidentiality is needed, these trusts are a good option.
- These trusts provide flexibility for the settlor as he/she is able to amend their estate distribution strategy if circumstances change after the trust is initially settled.
- A Will can be used for issues that shouldn't be included in a trust, such as guardianship of children.
- Litigation can impact transfers of property to beneficiaries via a Will. The same is not true of these trusts.
- The use of these trusts can provide additional protection from creditor claims.
- Alter ego and joint partner trusts can act as a power of attorney allowing the settlor to direct the trustees (per the trust terms) regarding investment and distribution plans.



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Concern should be given to the eventual tax consequences of these trusts. The deemed disposition upon passing of the settlor/spouse will be taxed at the highest marginal rate.

Additionally, certain tax planning strategies may not be available if these trusts are used. This includes the inability to offset with capital gains/losses between the trust and the individuals terminal return.

Use of Life Insurance

Life insurance has long been used to offset tax liabilities that result from the passing of a taxpayer.

For deemed dispositions that occur within a trust, it is technically the trust that is responsible for the payment of tax, not the estate.

With this in mind, it may be beneficial for the trust to be the owner and beneficiary of the life insurance policy. Given CRA's recent positions, it may be advisable for the settlor to pay the premiums from his/her own funds, as opposed to the trust paying premiums.

Insurance proceeds paid to the trust will not be subject to probate and therefore will not attract probate fees.

Joint Ownership

Joint ownership with a right of survivorship allows property to transfer from the taxpayer to the joint tenant without passing thru the estate, thus avoiding probate fees.

The most widely seen use of this planning strategy is thru the transfer of a couple's home or cottage to each other. Additionally, joint ownership of investment accounts is now being used between spouses, and between parents and children.

Caution should be used when making quick decisions about joint ownership as these can lead to unintended tax consequences and unwanted estate distribution impacts.



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Conclusion

Estate planning is complex and probate fee planning is only one small aspect to consider.

Everyone has their own unique circumstances that warrants the need for unique estate planning discussions.

Numerous unintended consequences can occur from hasty probate planning that ignores the more important overall estate planning process.

Consulting a lawyer and an accountant in advance can help you avoid making uninformed decisions and help you preserve your legacy.

By Jared Pilon CPA, CGA