Probate Planning

In recent years, probate planning has become a more recognized topic in estate planning discussions. This is due to the increases in probate fees in jurisdictions such as Ontario. In many provinces however, probate fees are essentially NIL. Even when considering provinces with 'high probate fees', the costs associated with probate planning may outweigh the fees incurred.

Some common reasons why probate planning might be undertaken:

- Avoiding probate fees
- Avoid delays in the probate process
- Minimize legal and trustee fees
- Avoid dependant or creditor claims against a will
- Avoid public disclosure of estate assets

Some common reasons why probate planning should be avoided:

- Loss of control
- Expose assets to creditors and family property claims
- Can result in unintended tax consequences
- Can result in a hap-hazard transfer of assets to estate beneficiaries
- Certain beneficiaries can be disinherited
- Transfer to a child can result in the involvement of a Public Trustee
- Can result in land transfer taxes

Adding a Joint Owner

There are two types of joint ownership – 'joint tenants' and 'tenants in common'. If a property is held as tenants in common, there is no right of survivorship.

In every province and territory (aside from Quebec), you can hold assets in joint ownership with someone else with a 'right of survivorship'. When one of the owners dies, the surviving owner(s) will become the owner(s) of the applicable property, and the deceased individual's estate is not entitled to the property.

This structure allows the asset to transfer to the new owners without passing through the estate, therefore no probate fees would be applicable on jointly held assets. The Supreme Court of Canada has ruled that when an asset is held in joint ownership with an adult child, and the child did not pay for his/her interest in the property, that they are holding the property in trust and therefore, the property would still be a part of the parent's estate.

If one asset requires a probated will (real estate in the deceased's name), then all the assets in the estate (including the assets held in joint ownership with an adult child) will be included in the calculation of applicable probate fees. As such, it is unlikely that adding a child as joint owner would help avoid probate fees.

It is also possible for the adult child to rebut the presumption that the asset is being held in trust and end up retaining the asset themselves. It is important to sign a declaration stating your intentions relating to the transfer to joint ownership. A minor child should never be added as joint owner as consent from a Public Trustee would then be necessary to manage the property.

Capital Gains Tax

A capital gain will not arise when transferring an asset to joint ownership with a spouse or common-law partner, presuming that other spouse or common-law partner was the sole owner prior to the transfer.

If the property is transferred to an adult child, capital gains tax may become payable due to a deemed disposition. This situation can arise when the parent transfers the property via declaration stating that the child is a true owner of the property via gift.

Case Study

Grace owns a vacation property with a current fair market value (FMV) of $1,000,000. Grace has a full-time residence as well which she will be applying the principal residence exemption to.

Grace would like to add her son, George, as a joint owner on the vacation property. Grace's adjusted cost base (ACB) of the vacation property is $250,000, translating into an accrued gain of $750,000.

If Grace adds George as a true joint owner via a gift declaration, Grace will realize a $375,000 capital gain on the 50% interest that she is transferring to her son. This can be calculated as the FMV of $1,000,000 – ACB $250,000 = $750,000 x 50% = $375,000.

Capital gains are only 50% taxable so Grace would include $187,500 ($375,000 x 50%) in her taxable income in the year of the ownership change. Depending on which jurisdiction that Grace lives in and her other sources of income, she could be liable for as significant amount of tax.

This tax would be due despite the fact that George is did not pay anything for his interest in the property. A more prudent tax solution would have seen Grace appointing George as the beneficiary of the property within her will, allowing the value of the property to continue to accrual until her eventual passing.

If Grace would have added two children as joint owners, she would have been required to report a gain on the deemed disposition equal to two-thirds of the property instead of just one-half as the disposition is calculated on a pro-rata basis.

Conclusion

As we can see from the case study, efforts to avoid probate fees can have drastically negative tax consequences. Instead of completing probate planning in a silo, it is important to consider your entire estate when making decisions. This will allow you to plan according to protect your assets, minimize tax and preserve your legacy.

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