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DUAL WILLS

The creation of dual wills is an estate planning strategy which can result in significant savings in probate fees, without all of the costs and complexities of establishing a trust. This executive summary lays out the advantages and disadvantages of this strategy, and suggests some questions which should be considered if you are considering this as an option for your estate plan.

The Trust Alternative

Clients often ask about establishing a trust as part of their estate plan. Trust planning does have advantages, including:

- Strong defences against wills variation claims;
- Reducing or eliminating the cost of probate fees by reducing the value of the assets held by the estate; and
- Bypassing the probate process and its inherent delays
- Privacy—only the beneficiaries of a trust are entitled to know about it, whereas a probated will is public record.

However, trusts have disadvantages. The legal costs are more expensive than wills and do require annual administrative costs. In addition, income earned in the trust may be subject to the highest marginal tax bracket depending on the type of trust. Some types of trusts, such as Alter Ego and Joint Partner Trusts, are popular alternates to wills but areonly available to residents of Canada who are at least 65 years of age.

Dual Wills – Advantages

A dual wills strategy can also reduce probate fees and while more costly than a will, still less than a trust. .

The probate process requires that fees be paid to the court, which are approximately 1.4% of the value of the overall estate. However, probate is not required for every will. Only certain assets require a grant of probate before they can be transferred to the beneficiaries of the estate. For example, real estate cannot be transferred to a beneficiary without a grant of probate. The dual wills strategy involves creating one will which will be probated with the court, and a second will which will not be probated. The first includes all assets for which probate is required, and the 1.4% probate fee will be charged on those assets. The second will includes all assets which do not require probate, and no fee will be levied.

This strategy only makes sense when the estate includes significant assets which do not require

probate. Most commonly, we recommend this strategy when the estate includes shares of a privately held Canadian company. There is no general requirement under corporate law for a privately held Canadian company to require a grant of probate before transmitting the deceased's shares to their executor. As long as your company has not imposed additional restrictions in its Articles or in a shareholders' agreement, it is possible to have shares transferred in a second will, and pay no probate fees on those shares. When shares in a private company make up a large portion of the estate, this can result in very significant savings for your estate.

Other examples of assets which do not require probate, and therefore would be suitable to include in a second will, would be shareholder loans due to the will-maker unsecured loans and personal effects such as valuable artwork.

Another advantage of dual wills, compared to a trust, is that a will may be amended whenever you wish. You give up no control of the assets in that will during your lifetime, and may change your plans for those assets with relative ease. You also incur no ongoing trust administration fees, such as annual filings with the Canada Revenue Agency.

It is possible for the primary probate will to be drafted in such a way that it does not make any reference to the secondary will. If so, then the secondary will does not need to be filed with the court, and will not become public record, similar to a trust. However, it is sometimes necessary to refer to the non-probate will in the probate will, so this benefit is not always available.

Dual Wills – Disadvantages

Unlike trusts, dual wills offer no protection against wills variation claims. If a child or spouse believes your wills to be unfair, they may challenge both of them in court. In fact, even the mere potential for a wills variation claim can render the dual wills pointless.

This is because the limitation period for a wills variation claim does not begin until a grant of probate has been issued. If your executor suspects that there may be such a claim, then they may want to apply for probate solely to ensure that the limitation period has commenced. Otherwise, the threat of a potential variation claim will hang over the estate indefinitely. Some executors, especially professional trustees, may be uncomfortable with this liability and may renounce their appointments . As such, if a wills variation claim is reasonably foreseeable, then we do not recommend creating dual wills.

Dual wills also require the appointment of different executors. Under BC . law, dual wills with the same executor will merge all assets together and probate fees will become payable on assets governed by both wills. If you are hiring professional executors, this may lead to an increase in fees. If you are relying on family or friends to be your executors, then this may lead to increased personal conflict.

Questions to Consider

You will need to choose two different executors. They will need to be able to work together, as for tax purposes both wills are part of the same estate and tax returns will require them to cooperate. You need to be sure that your executors don't have competing interests, as conflict between them could result in delay and expense to your estate.

You need to decide which of your wills will provide for the payment of the debts and expenses of your estate. This can create problems if each of the beneficiaries of the dual wills are different. For instance, consider the situation if you leave your house to one child in the will to be probated, and shares of your company to a different child in the non probated will, and the where the probated will provides for the payment of all debts and expenses. If an unexpectedly large debt is uncovered, it could tilt the overall distribution of the net value of your estate in favour of the child that inherits the business. Similarly, if you are giving bequests of specific assets or amounts, you need to think about which will those bequests should appear in.

You should consider the potential for a wills variation claim. If your estate plan involves disinheriting a child and/or a spouse, or allocating an uneven distribution between your children and/or your spouse, or if there is a possibility that someone may claim to have been your spouse, then dual wills may not make sense as an option.

Multiple Jurisdictions

Another situation where we recommend creating more than one will is if you own certain assets in multiple jurisdictions. If this is the case, then creating a separate will for each jurisdiction will be advantageous for your estate.

For instance, if some of your assets are in a jurisdiction with higher estate taxes than in BC, a separate BC will which deals with all of your worldwide intangible assets can shield your estate from those estate taxes, leaving only your real property in that jurisdiction to be taxed at the higher rate. Multiple wills can also be used to avoid “forced heirship” laws found in other countries, which require you to distribute the majority of your estate in specified ways. Potential problems that arise when the provisions of a will are given different interpretations under the laws of different jurisdictions can be avoided. Finally, probate processes can be initiated simultaneously in each jurisdiction, rather than waiting for probate of a will in one jurisdiction and then re-sealing it elsewhere, resulting in a more efficient estate administration process.

However, there are unique challenges that arise in this type of estate plan. First and foremost, such planning requires the advice of legal professionals from jurisdictions outside of BC. For example, Horne Coupar LLP does not have expertise in the drafting of wills to take effect under the laws of Australia and so an Australian lawyer would need to be retained, leading to additional expenses. Specialized tax advice may also be required.

Multijurisdictional estate planning can be complex and will depend on the specific jurisdictions that are involved. Clients are well advised to seek good legal advice if considering multijurisdictional estate planning.