

ADVANCED PROBATE AVOIDANCE

A. Introduction

An Executor acquires the authority to administer the estate of a deceased person by virtue of being appointed as executor under a will. That authority is confirmed by a court by virtue of the process of probating the will. The court order confirming authority, known as a Grant of Probate, allows for the protection of third parties called upon to liquidate and transfer estate assets into the name of the executor. Many such third parties will not transfer property of the deceased without a probated will.

In Manitoba an application for probate (and administration with or without will annexed) attracts a charge payable to the government determined as a percentage of the value of the estate. Currently that fee is \$50.00, plus \$6.00 for every \$1,000.00, or fraction thereof, of the value of the estate in excess of \$10,000.00. There is no ceiling to the fee. The percentage used to calculate probate fees may increase in the future. In Ontario the rate is \$15.00 per thousand dollars of estate value.

Whether or not probate of a will is necessary, and the cost of same, will depend on the nature of the assets owned by the deceased.

Subsection 24(1) of the Manitoba Court of Queen's Bench Surrogate Practice Act requires a complete inventory to be filed with an application for probate or administration which details "all the property which belonged to the deceased at the time of his death".

The Law Fees and Probate Charge Act of Manitoba provides that a charge is to be paid for an application for probate or administration based on the "value of the property devolving" from the deceased.

It follows that any asset which does not belong to the deceased at the time of his or her death does not need to be included in the inventory, and any asset that does not "devolve" does not attract a charge for application purposes.

Therefore, probate charges can be minimised by reducing the number of assets that belonged to the deceased at the time of death or that devolve upon death.

In addition to a reduction in probate charges, the removal of assets from the pool of those that are included in the inventory of the estate can result in other estate cost savings, including:

- a reduction of legal fees payable to the lawyer acting for the personal representative of the estate; and
- a reduction of fees payable to the personal representative,

which other fees are, generally, determined as a percentage of the aggregate value of the estate.

Taking all those fees together, a probate avoidance strategy can, in practice save more than 6/10's of a percent of the estate value and may save as much as 5 or 6 percent of the estate value.

This paper is intended to briefly outline some advanced strategies available to reduce the cost of probate charges.

B. Beneficiary Designations

Proceeds payable to designated beneficiaries from insurance, annuities and pensions are not part of the deceased's estate.

Insurance Trusts

Proceeds payable under an insurance policy can be the subject of an insurance trust created by will or a separate document outside of a will.

Such a trust will require trustees to hold, invest and distribute the proceeds from the insurance policy in accordance with specific terms of trust.

The proceeds are payable to the individual trustee(s), not the estate, and are therefore outside of the estate, and not subject to probate charges.

In order to qualify as an insurance trust:

- the settlor must be the owner of the insurance policy
- the payment of the proceeds of insurance has to be a result of the settlor's death, i.e. it must be the settlor's life that is insured
- the settlor must designate by proper designation the trustee(s) of the trust as the beneficiary(ies)
- no property, even nominal in value, can be transferred into the trust prior to the settlor's death
- the insurance designation must qualify as a testamentary instrument, meaning it needs to be revocable.

C. Inter Vivos Trusts

Inter vivos trusts, once created and effective during the life of the settlor (the maker of the trust), are an effective means of avoiding probate charges.

Property transferred to a trust during the life of the settlor is not property that belongs to the deceased at the time of death, and therefore does not attract probate charges. There are a number of different types of inter vivos trusts.

Alter Ego and Joint Partner Trusts

An Alter Ego Trust can be created if:

- the settlor is 65 years of age or older
- the trust is created after 1999, under which the settlor declares a trust over trust property to be held by trustee(s) under certain trusts
- the settlor is entitled to be the sole recipient of all of the income from the trust during his/her life
- no other person is entitled to receive any income from the trust or make use of any of the capital of the trust during the settlor's life
- the trust does not elect out of the rule that deems the trust to dispose of all of its property on the death of the settlor

The property transferred from the settlor to the trust is transferred on a tax-deferred basis.

The trust will be deemed to have disposed of all of the trust property upon the death of the settlor and the capital from the trust can be distributed to or be held for the benefit of persons specified in the trust document.

A joint partner trust is similar to an alter ego trust except that the income earned by a joint partner trust is shared or used by the settlor and his or her spouse until the death of the survivor, and the trust is not deemed to have

disposed of its property until the death of the survivor of the settlor and his or her spouse.

In both an alter ego and joint partner trust the property can be transferred to beneficiaries without the necessity of probating a will. The transfer will occur after the death of the settlor with an alter ego trust, and after the death of the survivor of the settlor and his or her spouse, in the case of a joint partner trust.

Trusts Generally

Some ancillary considerations related to trusts which affect the decision to use a trust include: the possible loss of control of the trust assets; immediate legal costs of creating the trusts; ongoing accounting costs related to maintaining the trust; cost of trustee fees; and tax considerations.

D. Supplementary Wills

Another strategy available to reduce probate fees is the use of multiple wills. Extreme care need be taken in drafting of multiple wills to ensure that the terms of each will do not conflict and that neither has the effect of revoking the other.

Use of multiple wills is not a tried and true strategy in Manitoba. Its success would be reliant on the case of *Granovsky Estate v. Ontario*, a 1998 decision from the General Division of the Supreme Court of Ontario.

In *Granovsky*, a testator had a Primary Will and a Secondary Will, drafted with the intention that only the Primary Will would be probated. The Secondary Will concerned the distribution of specific property that was expected to be capable of being transferred to designated individuals without the necessity of a probated will.

The value of the property detailed under the Secondary Will was significant, and its exclusion from the application for probate meant a saving of \$375,000.00 in probate charges.

The court in *Granovsky* considered a provision of Ontario's applicable legislation that allows for an application for a limited grant of probate supported by a statement of value only of the property that is the subject of such a limited application. Subsection 24(3) of the Manitoba Court of Queen's Bench Surrogate Practice Act is similarly worded.

The provision was found to support the use of multiple wills, confirming the ability to apply for limited probate and payment of probate charges that only relate to the assets which are the subject of that application for probate.

The same strategy should work in Manitoba. Thus, a testator should be able to use a supplementary will that details a testator's intentions to distribute specific assets to specific beneficiaries without the need to include those assets in an application for probate. Two types of assets that this strategy may apply to are shares in a privately held corporation and cottage property and associated personal property owned and located on Crown leased vacation land.

E. Information in this Paper not Substitute for Legal Advice

This paper is intended as an introduction to this topic. It is not a substitute for specific legal advice tailored to a client's particular needs. Any person wishing advice on how to order their affairs, or those of a client, should contact a member of our Wealth and Succession Practice Group. This paper is also based on the laws of Manitoba, and while laws are similar from Province to Province, the content of this paper may not be accurate in other provinces.

F. Conclusion

Strategies for the avoidance of probate fees range from the simple to the complex. Insurance trusts, RRSP trusts, alter-ego trusts and multiple wills all provide advanced options for aggressive clients. Available strategies for probate fee avoidance may or may not dovetail with other estate planning objectives, and

therefore care must be taken in implementing a strategy that may save probate charges but may inadvertently trigger income taxes or cause some other unexpected effect.

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Wealth and Succession Practice Group

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We regularly assist our clients in minimizing income taxes paid and structure special arrangements to improve the lives of the families, friends and community left behind. This involves estate freezes, corporate restructures, living trusts, tax planned wills, special trusts for disabled beneficiaries, estate administration, trust administration and pension fund administration.

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