

BASIC PROBATE AVOIDANCE

A. Introduction

Generally, probate charges are payable to the Provincial Government to probate or approve a will on the death of the testator. There are a variety of ways to avoid or reduce these probate fees. In some cases a significant amount of money can be saved by a well-organized estate.

Probate avoidance strategies will be more attractive to those who live in or have real property (land) in “high probate” jurisdictions than those in “low probate” jurisdictions. Since the fees are dictated by the Provinces probate charges vary from province to province.

B. Purpose of the Grant of Probate

To fully understand the strategy behind avoiding probate fees, it is helpful to understand why probate is necessary. A probate application is typically made by the executor appointed under the will. The executor draws authority to deal with the deceased’s property from the will itself. Some third parties want more than the assurance of the will. Banks, investment companies and land titles offices require court sanction to the executor’s right to administer the estate. The court charges probate fees to approve or sanction the will and appointment of the

executor or executors by granting a Grant of Probate. Any strategy which allows an institution or governmental agency to transfer an asset to an executor or intended beneficiary without requiring probate of the will avoids probate charges.

This paper will outline some of the more common methods of probate avoidance.

C. Direct Beneficiary Designations

Certain types of assets provide for their designated transfer to named individuals without the need to be included in the probate process and therefore avoid probate fees. Two types of such assets are life insurance proceeds and RRSP or RRIF proceeds.

1. Life Insurance - The legislation of various Provinces and Territories across Canada allow life insurance proceeds to be paid directly to designated beneficiaries by way of beneficiary designation. Where that occurs, the insurance money does not form part of the estate and is paid directly to the individuals designated as beneficiaries. The proceeds are free from both claims by creditors of the estate and from probate fees. Designation of a beneficiary can be done in the will, clearly spelling out that the proceeds are to pass outside of the estate, or in an insurance declaration outside of the will. Whether the designation is made in the will or on the policy itself, it can be

changed at any time before the death of the insured while the insured has capacity to make such a designation.

2. RRSPs and RRIFs – *The Retirement Plan Beneficiaries Act* of Manitoba provides that RRSPs and RRIFs can have designated beneficiaries. Where there is a spouse and dependant beneficiaries, these assets can be passed on to the beneficiaries without triggering the income taxes that are inherent in RRSP and RRIF accounts upon the death of the plan or fund holder. This is a simple and effective method of avoiding probate charges.

C. Joint Ownership

Many assets are capable of being jointly held. In planning for probate avoidance a person can transfer an asset that they own into joint names with another individual. When one of the owners of a jointly held property dies, the surviving owner(s) is entitled to become the sole owner(s) of the property by right of survivorship. The rule arises, in the case of real property, from *The Law of Property Act*. In the case of an investment account or bank account, the terms of the account policy dictates whether there are rights of survivorship in the account.

When planning for probate avoidance through joint ownership, there are a number of advantages and disadvantages to consider.

1. Bank Accounts - Transferring a bank account into joint names with rights of survivorship can be a quick and simple way of passing liquid assets from one generation to the next without. If the terms of the account agreement specify that there are rights of survivorship in the account, when the transferring parent dies, the child with joint ownership assumes the legal right to the account and all of the money that is there. If the parent has any concerns about putting their cash savings into the hands of their child, this is not an option. There are situations where it works effectively.

There are situations where the bank account is transferred into joint names but is not intended to be jointly "owned". For convenience they will make funds available to a care provider so that the transferor doesn't have to worry about the paying the bills. If the intention is not to transfer the beneficial ownership of the account into joint names and thereby leave survivorship rights to the assets in the account, that should clearly be spelled out and an alternate arrangement to joint ownership should be considered.

2. Investment Accounts – Transferring an investment account into joint ownership with rights of survivorship can be another effective probate avoidance technique. It allows for the smooth transition of the asset from spouse to another or one generation to the next. The surviving owner will be the sole owner upon the death of either of them.

The same prohibition regarding the transfer of beneficial ownership as was mentioned with regard to joint bank accounts applies to joint investment accounts.

3. Shares – In Manitoba shares can be owned jointly. This is not widely known among share purchasers. Just like any other jointly held property, where one of the owners dies *The Corporations Act* provides that the shares will be transmitted into the name(s) of the surviving owner(s) on proof of death.

As well as simply avoiding probate charges, this may in some circumstances avoid the complicated and sometimes expensive valuation process that is required for probate purposes.

4. Land - For many people their homes and other real property are the most significant assets accumulated during their lifetimes. Real property owned in joint tenancy will pass outside of the estate without probate fees to the survivor. On a \$300,000 home, \$1,800 in probate fees will be avoided through the implementation of this strategy. To properly transfer the property to joint tenancy, an agreement should be made between the parties to clearly set out the terms of the transfer. If it is purely a transfer for the purpose of probate avoidance then that should be stated in the agreement. If the person receiving the benefit of the transfer is not to be allowed to pledge the property

as security, that should be spelled out. A lawyer with experience in providing advice with regard to this method of probate avoidance should be consulted before the transfer.

In cases where real property is held in tenancy in common, on the death of one owner, only that share to which the survivor is legally entitled to passes to the survivor.

Transferring homes into joint names is a controversial probate avoidance technique. It is not always appropriate in the circumstances. Outlined below are some of the inherent disadvantages to the transfer. In discussing these disadvantages we assume that the property is owned by the parent Alice whose husband has predeceased and she has one son, Sam.

Some disadvantages to this technique are:

- o Loss of Independence - If Alice wants to sell the house or mortgage it, she can do so without the Sam's agreement or signature. Provided the house remains in Alice's name, she is the boss. As soon as it is in joint names, Sam is a partner. If they have a falling out, Sam can even force a court ordered sale of the home, or at least try. The legal fees to stop him would be ugly.

- Loss of Flexibility – Alice can rewrite her Will every week. Sam won't even know. Once the house is in joint names, it cannot be undone without the son's knowledge and permission.

- Transfer Costs Wasted on Early Sale – If Alice decides to sell the house later (to move into a condo, or senior's complex) then the entire up front expense of \$435.00 for putting the home in joint names was a waste.

- Exposure to Creditors – If the title is in joint names, and Sam is sued or goes bankrupt, a judgment might become registered against the home or there may be other action taken by creditors. Alice may not be prepared to risk this.

- Unequal Division of Estate – Another pitfall is encountered if the joint ownership strategy is employed in the wrong circumstances. If Alice has other children, he may want to ensure that everyone is treated equally when he dies. The jointly owned property will pass to Sam and Sam alone on Alice's death.

- Loss of Opportunity to Invest – If Alice keeps title in her name she saves the \$215.00 she would have spent in changing the title while she was alive. Invested at 5% over the following 30 years before she dies, this

\$215.00 will become \$537.50. This may be a minor consideration but still forms a consideration.

None of the above begins to address the income tax considerations that can apply if the property is not a principal residence, now or later.

Putting the home in joint names should be viewed cautiously.

D. Gifts

Parents often take potential estate assets and make gifts of them to their children while they are still alive. The driving motivation may be to avoid probate fees by reducing the amount of assets included in the inventory of the estate on the death of the parent.

It is easy to imagine the inherent danger in this probate avoidance technique. If the parent gives up a substantial portion of their assets and the children take it without assuming the financial responsibility of the parent, it can be disastrous. It can and does however work very well in many situations, particularly where the child is responsible and the child's financial obligation and commitment to the parent is properly documented.

There is also an issue with regard to the capital gains that may be triggered on a gift of certain assets. If a capital property is gifted, CCRA will deem the transfer to have been made (if not to the spouse) at the fair market value of the asset. If this is greater than the cost of the asset to the person making the gift, there will be a capital gains tax assessed. This may be an important consideration for the person making the gift if they are not in a position to pay the tax at the time.

E. Thirty Day Survivor Clause

Some lawyers will as, a matter of course, include a thirty day survivorship clause with regard to the testator's spouses in most of the wills that they prepare. This can be a simple and effective probate avoidance measure. If a testator dies and then following his or her death their spouse dies within the prescribed 30 day period, the testator's estate will not pass to the spouse's estate. The alternate beneficiary provisions of the will determine the distribution. Without the 30 day clause, the assets in the first estate would have to be probated twice, once in the testator's estate and a second time in the spouse's estate.

F. Indemnity Agreements for Post Mortem Probate Avoidance

Indemnity agreements are made where an asset holder will transfer an asset and reserve the right to the return of the value of that asset from the person to whom the asset is transferred. It is best described by way of an example:

Example: Bob and Carol are husband and wife. Bob is the sole owner of an investment account held through a major Canadian bank. Bob's will leaves Carol as the executor and sole beneficiary. Bob dies leaving a significant investment account as the sole asset of the estate. In these circumstances the will usually has to be probated because the bank will require the authority of the court together with the will in order to transfer the asset to Carol. The circumstances are so straightforward in this case that the bank may sometimes agree to a transfer the asset without a grant of probate (the court's sanction). The bank may transfer the account into Carol's name if she agrees to reimburse the bank if anyone comes forward at any point in the future to say that the transfer should not have been made. Carol is then in a position where she has the benefit of Bob's estate and as the executor has to decide whether to file for a grant of probate in spite of having the assets transferred into her name.

There is controversy with regard to this strategy. Some in the legal community view it as a legitimate probate avoidance strategy while others view it as an "evasion" strategy. The simple difference between avoidance and evasion is that

an avoidance strategy will work even when the legal authority (the Probate Division of the Court of Queen's Bench) is aware of all the circumstances of the case. Probate evasion is where the strategy will not avoid probate charges when the legal authority is apprised of all the circumstances.

At best, this is probate avoidance mechanism that is not certain. It is always recommended that due consideration be given to these matters while the account holder is still able to consider the options of avoiding probate fees in the circumstances.

G. 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.

H. Conclusion

Direct beneficiary designations for insurance proceeds and RRSPs, joint ownership for bank accounts, investment accounts, shares, and land, and gifts during life can all be effective methods of probate avoidance. Great care should be taken for each of these steps. Consulting with an investment advisor, an estate planner or a lawyer with experience in the area can enhance this process and ensure that some of the pitfalls to these strategies are avoided.

By: Jacob D. Giesbrecht
Inkster Christie Hughes
Wealth and Succession Practice Group
700-444 St. Mary Ave.
Winnipeg MB R3C 3T1
Ph. 947-6801
Fax. 947-6800

INKSTER CHRISTIE HUGHES
Wealth and Succession Practice Group

Inkster Christie Hughes Wealth and Succession Practice Group assists clients in structuring and restructuring their wealth on an ongoing basis, and in passing wealth from generation to generation.

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.

We serve private individuals, local, national and international corporations, pension funds, trusts, trust companies, banks, planned giving departments and other institutional and non-institutional clients.