

# Probate Planning Strategies to Minimize Estate Administration Tax

**Presented by:** Lindsay Ann Histrop, J.D., LL.M., T.E.P.



## Why Probate a Will?

---

- A probated will – formally known in Ontario as a Certificate of Appointment of Estate Trustee with a Will – is proof of the executor’s authority
- Probated will is generally needed for the executor to deal with certain assets of the deceased
- Generally needed transfers of real estate, securities, bank deposits, etc.
- May also be needed for other assets

# Probate Tax in Ontario

---

- Probate tax is levied under the *Estate Administration Tax Act, 1998* (“EATA”)
- Estate Administration Tax (“EAT”) must be paid in order for the court to probate the will
- Two “brackets”
  - 0.5% on first \$50,000 of the value of the estate
  - 1.5% on the value of the estate in excess of \$50,000

# Probate Tax in Ontario

---

- “Value of the estate” – defined with reference to the *Estates Act*
- Generally, the value of the assets in the estate being submitted for probate
- Can deduct encumbrances on real property, but no other debts

## Why Plan for Probate Tax?

---

- Cost of probate in Ontario is essentially \$15,000 for every \$1 million of assets in the estate
- EAT is not a deductible income tax expense of the estate or the deceased
- EAT is not “recovered” by being added to the adjusted cost base of the assets in the hands of the estate/beneficiaries

# Probate Tax Planning Strategies and Issues

---

1. Joint ownership
2. Beneficiary designations
3. Multiple wills
4. Powers of appointment
5. Bare trust declarations
6. Self benefit trust
7. Alter ego and joint partner trusts
8. Grandfathering of certain real estate transfers
9. Principal Residence trust
10. Lifetime gifting programs
11. Probating wills outside Ontario
12. Death bed transfers

# 1. Joint Ownership

---

- True joint ownership – property owned legally and beneficially by two or more persons
- Typically, spouses may hold beneficial and legal title jointly
- Property held as joint tenancy automatically transfers legal title by right of survivorship on death of joint owner

# 1. Joint Ownership

---

- Joint property does not require probate as legal title transfers outside the estate
- If surviving joint title holder holds on trust for the transferor and his/her estate, the value of the property is subject to EAT if a probate is required for other assets
- Presumption of resulting trust applies to new joint owner, unless the transfer is to a spouse or minor child in which case there is a presumption of advancement

# 1. Joint Ownership

---

- Owner of property may make a gift of “right of survivorship” of beneficial and legal title on death
- Concept introduced by the Supreme Court of Canada in the *Pecore v. Pecore*, [2007]1 S.C.R. 795, 2007 SCC
- Property held in this manner will transfer legal and beneficial title automatically by right of survivorship on death and therefore the assets passes outside of the will

# 1. Joint Ownership

---

- ***Since Pecore:***
- *Sawdon Estate v. Sawdon*, 2014 ONCA 101
- W. and S., 2 of 5 children were named joint holders of a bank account with A (their father)
- W. and S. were told by their father to share the funds with all 5 children on father's death
- Held that father created a trust of the right of survivorship such that W. and S. held the right of survivorship on trust for all 5 children

# 1. Joint Ownership

---

- Disadvantages
  - True joint ownership involves a partial transfer of ownership to the new joint owner – triggers a disposition of capital property for income tax purposes
  - Transfer of beneficial ownership prior to death – transferor may not be ready to give up ownership
  - Principal residence transferred to joint name with intended beneficiary on death - a portion of accrued capital gain may be taxable on a future disposition - income tax liability may exceed probate tax savings

# 1. Joint Ownership

---

- Disadvantages ...cont'd
  - Joint ownership with one child where there is more than one child can lead to disputes over intention of transferor *Kyle Estate v. Kyle*, 2017 BCCA 329
  - If joint owner holds on trust for the transferor, the property continues to be an asset of the estate for probate tax purposes if probate required for other assets
  - Placing a child on title as joint owner can expose the transferor to the child's creditors, including family law claims *Barber v. Magee*, 2017 ONCA 558

# 1. Joint Ownership

---

- Rebutting presumption of resulting trust will depend on evidence of the intention of the deceased transferor
- Banking documents are not conclusive, and most often not helpful
- Financial institutions typically consider only the legal title when dealing with joint ownership
- Written declaration of intention is recommended for all jointly owned property

## 2. Beneficiary Designations

---

- Available for life insurance and registered plans (RRSP, RRIF) and Tax Free Savings Accounts
- Where beneficiaries designated in the plan document or the owner's will, proceeds are paid directly to beneficiary and do not form part of the estate; are not included in value of estate for EAT
- Beneficiary declarations in wills authorized by *Insurance Act*, s. 129 and *Succession Law Reform Act* ("SLRA"), Part III, s. 51

## 2. Beneficiary Designations

---

- Designations in a will override prior dated beneficiary designations made directly in plan documents or prior wills
- If the estate or executor is named beneficiary, proceeds will form part of estate and be subject to EAT
- Properly drafted designations made in a will can attach trust provisions to the designation where the beneficiaries are minors or of tender age
- Include gift over provisions if first named beneficiary predeceases

## 2. Beneficiary Designations

---

- Tax mismatch – Income tax is payable on death in respect of RRSP and estate is liable, but proceeds paid under a designation are paid directly to beneficiary  
*Morrison v. Morrison*, 2015 ABQB 769
- Cash from RRSP paid directly to a beneficiary not available to estate to fund tax on the RRSP
- Will should address the payment of tax on RRSP proceeds and provide for an equalization among beneficiaries if appropriate

### 3. Multiple Wills

---

- The use of multiple wills and grants of limited probate were approved by the Ontario Court of Appeal in *Granovsky Estate v. Ontario, 1998 14913 (ON SC)*
- Typically, a “Primary” will deals with assets that will require probate (and EAT); a “Secondary” will deals with assets that do not require probate
- Normally, assets such as personal articles, private company shares and loans to private companies and family members do not require probate

### 3. Multiple Wills

---

- Multiple wills can be paired with bare trust declarations to minimize the assets that pass under the probated will
- Care required to specifically exclude/include assets intended for non probate will
- Multiple wills can create interpretation issues and more complex administration; drafting is complex
- Wills that are mirror-images of each other (identical executors and residual beneficiaries) can eliminate some of the complexity

### 3. Multiple Wills

---

- Disadvantages
  - Problems arise if the beneficiaries are different and there is no direction as to what assets should bear the payment of debts
  - If executors or beneficiaries are different, negotiation may be required when determining which assets form part of which estate
  - Problems also arise if assets in one will are insufficient to satisfy all the legacies and bequests

### 3. Multiple Wills

---

- Limitation period for Dependents' relief claims under the *Succession Law Reform Act* is 6 months after probate
- If a will is not probated, then this 6 month clock never starts running
- No assurance that the probate rules will not change, but little downside in preparing multiple wills
- Non probate will avoids need to file an Estate Administration Return and risk audit under the EATA in respect of the non probated assets

## 4. Powers of Appointment

---

- Special and general powers of appointment
- Exercise of special powers of appointment under a Will are not subject to EAT
- Exercise of a general power of appointment under a Will will be subject to EAT based on the value of the assets subject to the appointment
- Consider including general powers of appointment in the non probate will in order to avoid EAT

## 5. Bare Trust Declarations

---

- Legal title may be transferred to a bare trustee private corporation coupled with a bare trust declaration by the corporation; beneficial ownership retained by the individual legal owner of the shares in the bare nominee corporation
- On death of individual, legal title does not have to be changed and beneficial ownership may be transferred without probate

## 5. Bare Trust Declarations

---

- Caution - Value of assets held in bare trust must be included in the value of the estate for probate tax purposes if there is only one will and probate is needed for any other asset(s)
- May be used for eg. for investment accounts, bank accounts, art work, vehicles and real estate
- Bare trust should be coupled with a non probate will for private company shares specifically including those held on bare trust

## 5. Bare Trust Declarations

---

- Drawbacks include expense of incorporating the bare trustee corporation, cost and inconvenience of annual corporate filings
- May be undesirable for personal reasons to hold the assets in a bare nominee company name

## 6. Self Benefit Trust

---

- Self benefit trust must have only one beneficiary during the lifetime of the transferor/settlors.  
73(1.01)(c)(ii), *Income Tax Act* (Canada) (“ITA”)
- Transfer of assets to the trust must not result in a change in the beneficial ownership
- After the transfer there can be no absolute or contingent right of a person other than the settlor
- Proceeds of a self benefit trust should be included in a non probate will to avoid paying EAT

## 7. Alter Ego and Joint Partner Trusts

---

- Assets held in alter ego and joint partner trusts do not require probate because they are owned by the trust and not by the deceased - these trust assets will not form part of the deceased's estate
- The transfer of trust assets is governed by the terms of the trust and not by the will of the deceased beneficiary
- On death of settlor (alter ego) or both spouses (joint partner), the assets in the trust pass to remainder beneficiaries according to the trust

## 7. Alter Ego and Joint Partner Trust

---

- Requirements for alter ego trust are set out in subsections 73(1.01) and (1.02) of the ITA
  - Settlor must be resident in Canada and at least 65 years of age
  - Trust must be created after 1999
  - Settlor must be entitled to receive all income during the settlor's lifetime
  - No person other than the settlor can be entitled to receive capital during the settlor's lifetime
  - The trust cannot make an election under subparagraph 104(4)(a)(ii.1) of the Income Tax Act

## 7. Alter Ego and Joint Partner Trust

---

- Requirements for joint partner trust are generally the same as for alter ego trust, except:
  - Settlor and settlor's spouse must be entitled to receive all income during their lifetimes
  - No person other than the settlor or the settlor's spouse can be entitled to receive capital during their lifetimes
  - No limitation re election under subparagraph 104(4)(a)(ii.1)

## 7. Alter Ego and Joint Partner Trust

---

- Advantage – Centralization of property and continuity of management
  - Where the settlor's property is situated in multiple jurisdictions, each requiring a will, the transfer to a trust may simplify the process of passing the property
  - Can avoid complexity, multiple layers of fees, and loss of time
  - On death of the settlor, there is no delay in administration caused by the need to seek probate
  - Care must be taken in foreign jurisdictions that may not recognize trusts or that may not permit trustees to own land

## 7. Alter Ego and Joint Partner Trusts

---

- Advantage – Confidentiality
  - Requirement of filing estate administration return and possible audit exposure under the EATA are avoided through the use of an alter ego or joint partner trust
  - Probated wills are public documents, while trusts are not, ensuring privacy

## 7. Alter Ego and Joint Partner Trusts

---

- Advantage – Substitute decision making
  - As an alternative to reliance on powers of attorney (“POA”) for incapacity, the well crafted alter ego trust can provide a structure that continues seamlessly if the settlor becomes incapacitated
  - POA expires on death, whereas a trust does not
  - Trust provides all of the same powers to manage property, plus additional powers
  - Trust provides more flexibility in tailoring trustee’s powers

## 7. Alter Ego and Joint Partner Trusts

---

- Greater certainty re standard of care owed
- Greater recognition of authority across jurisdictional boundaries
- Disadvantage – Limited creditor protection
  - Fully discretionary trusts protect assets against claims by the creditors of beneficiaries
  - With alter ego and joint partner trusts, the beneficiary must be entitled to all of the income of the trust, limiting the creditor protection of the trust

## 7. Alter Ego and Joint Partner Trusts

---

- Transfers to trust may be challenged under *Fraudulent Conveyances Act*
- Trustee in bankruptcy may apply to have insolvent settlor who is also trustee removed
- Disadvantage – Cost and complexity
  - Establishing and administering alter ego and joint partner trusts can be expensive and time consuming
  - Separate tax returns must be filed for the trust each year

## 7. Alter Ego and Joint Partner Trusts

---

- Can make day to day dealings with financial institutions more cumbersome
- Not always recommended or desirable for “young” seniors
- On death of the settlor(s), tax in the alter ego and joint partner trust is imposed at top marginal rates

## 8. Real Estate Grandfathering

---

- Section 124 of the *Land Titles Act* states that the fact of a person having become entitled to land or a charge in consequence of the death of a registered owner shall be proved in the manner specified by the Director of Titles
- Director of Titles issued a memo in 2000 confirming that a first dealing after the conversion to Land Titles may be exempted from requiring a certificate of appointment of estate trustee
- If probate required for any other asset, EAT is payable on the value of the real estate, regardless of this grandfathering

## 9. Principal Residence Trust

---

- Disposition of “principal residence” is generally tax free for an individual
- Principal residence exemption provided in paragraph 40(2)(b) of the ITA
- “Principal residence” defined in section 54
- Residence held in a trust will not form part of estate for probate purposes because it is property of the trust, avoiding EAT

## 9. Principal Residence Trust

---

- Jan. 2017: new rules restrict ability of the trust and beneficiary to claim the exemption
- New Rules: In order to claim the exemption:
- Trust must be an alter ego trust, a spousal or common-law partner trust, a joint spousal or common-law partner trust, or certain trusts for the exclusive benefit of the settlor during the settlor's lifetime (referred to as an "exclusive benefit trust")

## 9. Principal Residence Trust

---

- Certain other testamentary qualified disability trusts and principal residence trusts for minor children whose parents are deceased may also qualify for the principal residence exemption
- Tax neutral use of a principal residence trust has been severely curtailed
- Preserving the principal residence exemption usually more important than saving EAT

## 10. Probating Wills Outside Ontario

---

- To the extent that the deceased has assets in other provinces, probate may be available in those provinces as an alternative to an Ontario probate
- Probate fees and procedures vary across the provinces
- May need multiple wills including a separate will for real estate in Ontario as would otherwise need to reseal the out-of-province grant in order to transfer Ontario situs real property
- Grants from other provinces generally accepted by financial institutions in Ontario

# 10. Probating Wills Outside Ontario

For some provinces and territories, different rates may apply to smaller estates (less than \$50,000).

	Fee schedule (value over \$50,000)	Example fees		
		\$500,000 value	\$2,000,000 value	\$5,000,000 value
Alberta	\$200 to \$400	\$400		
British Columbia	\$350 + 1.4% of portion > \$50,000	\$6,650	\$27,650	\$69,650
Manitoba	\$70 + 0.7% of portion > \$10,000	\$3,500	\$14,000	\$35,000
New Brunswick	0.5% of estate	\$2,500	\$10,000	\$25,000
Newfoundland and Labrador	\$90 + 0.5% of portion > \$1,000	\$2,585	\$10,085	\$25,085
Northwest Territories	\$200 to \$400	\$400		
Nova Scotia	\$973 + 1.645% of portion > \$100,000	\$7,553	\$32,228	\$81,578
Nunavut	\$200 to \$400	\$400		
Ontario	\$250 + 1.5% of portion > \$50,000	\$7,000	\$29,500	\$74,500
Prince Edward Island	\$400 + 0.4% of portion > \$100,000	\$2,000	\$8,000	\$20,000
Quebec	Nominal fee			
Saskatchewan	0.7% of estate	\$3,500	\$14,000	\$35,000
Yukon	\$140	\$140		

Although Quebec does not levy probate fees, wills (other than notarial wills) must be authenticated by the Superior Court of Quebec. A nominal fee applies.



## 11. “Death Bed” Transfers

---

- Attorneys acting under a POA cannot make testamentary dispositions s. 7(2) of the *Substitute Decisions Act*
- Courts have allowed attorneys to engage in planning for the benefit of the incapacitated individual, so long as such planning is not inconsistent with the individual’s existing testamentary intentions and does not jeopardize the individual’s welfare while living: *O'Hagan v. O'Hagan*, 2000 BCCA 79

## 11. “Death Bed” Transfers

---

- To the extent that assets are validly transferred by an attorney while the individual is still alive, those assets will not form part of the individual’s estate for probate tax purposes



**Questions?**



# Contact Us

---

Lindsay A. Histrop, J.D., LL.M., T.E.P.



T **416.865.6683**



E **lhistrop@grllp.com**



W **grllp.com**



**@grllp**

