DUAL WILLS – A NEW(ISH) ESTATE PLANNING TOOL

Dual wills are an estate planning tool available in several jurisdictions. Until the *Wills, Estates and Succession Act* (*WESA*) came into force on March 31, 2014, their application in British Columbia was far more limited than it was in other jurisdictions.

Under our previous legislation, executors and administrators applying in British Columbia for a grant of probate or a grant of administration, were required to inform the Probate Registry of the value of all of the deceased person's assets, irrespective of their nature, location or value, that "…pass(ed) to the deceased's personal representative on the deceased's death."[1] In contrast, the *WESA* only requires an applicant to disclose the property "…that passes to the applicant in his or her capacity as the deceased person's personal representative..."[2] The effect of this small change is quite significant and should allow for assets not passing through a specific representative's hands to remain free of the probate process initiated by that representative.

THE BASICS

When dual wills are used for a will maker, the assets anticipated to require probate are most commonly dealt with in a primary will. Assets that are known not to require probate are dealt with in a secondary will. It is imperative that each of the two wills references the other, that any revocation clause in the wills revokes only prior wills but does not have the effect of nullifying the other dual will and that the executors and alternate executors chosen in each of the two wills are not the same individuals.

PROBATE AVOIDANCE

Lawyers, financial planners, accountants and other professional advisors routinely field questions from clients relating to their desire to avoid having assets probated after their death. Where couples are concerned, avoiding probate can frequently be as straightforward as holding assets jointly. Unfortunately, in blended families and following the death of the first spouse to die, jointures become fraught with risks of their own and are generally avoided by estate planning and wealth preservation professionals.

With the use of dual wills, clients can achieve the swift and probate fee free transfer of certain assets. Not all assets held solely in the name of a deceased require probate as a matter-of-course. Personal effects, corporate shares and shareholder loans are some examples of assets that may pass freely, given certain circumstances. Investment and bank accounts may pass without probate, but this is not always the case and individual institutions may change their policies with respect to such transfers at any time. Finally, land is an oft-cited example of an asset that cannot be transferred without probate.

[1] *Estate Administration Act*, RSBC 1996, c 122, s.111(1)(b)
[2] *Wills, Estates and Succession Act*, SBC 2009, c 13, s.122(1)(b)

When utilizing the dual will approach, it is important to include in the secondary will only those assets that can transfer outside of the probate process with certainty. If any one asset dealt with in the secondary will requires probate, then all of the assets bequeathed in the secondary will, will be subject to probate. For this reason, it is common to see secondary wills capturing only the shares a will maker holds in privately held incorporated companies, along with associated shareholder loans.

PRIVACY

Another benefit of using dual wills is privacy. When an application is made to the Probate Registry, it becomes a publicly searchable document. For a nominal fee, the financial information that forms the basis of an estate grant application can be accessed by virtually anyone. Small and mid-sized businesses operating in close-knit and competitive markets, particularly those recently impacted by the loss of a principal, can benefit from the opportunity to keep valuation data confidential during a transition period.

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Clients can expect to pay more to set up a dual will estate plan, as the Articles of their company(ies) will need to be reviewed and two testamentary documents will ultimately be created. In some cases, a recommendation may also be made to amend the language found in the Articles.

For clients not wishing or needing to establish an *inter vivos* trust, dual wills can be appealing as a cost-saving measure despite initial set-up costs. British Columbia currently has one of the highest probate fee rates in the country, at approximately 1.4% of gross estate value. For every $1,000,000 probated, our clients should expect their estates to pay $14,000 in probate fees.

Single Will Scenario

Assets	House	$1,000,000	
	Privately Held Company	$2,000,000	
	Other Investments	$1,000,000	
Total Value Assess for Probate Fees		$4,000,000	X 1.4% = $56,000

Dual Will Scenario

Assets	House	$1,000,000	
	Privately Held Company	$2,000,000	(not probated)
	Other Investments	$1,000,000	
Total Value Assess for Probate Fees		$2,000,000	X 1.4% = $28,000

SUMMARY

Dual wills are not for everyone, nor are they the first line of defence for many clients who do choose to utilize them. Occasionally clients hold shares that have been issued jointly, to ensure a seamless roll to a surviving spouse upon the death of the first spouse; only following the death of the last spouse will the secondary will take effect to transfer the shares to a broader group of beneficiaries.

Dual wills require control over the Board of Directors of the target company, to ensure the authority of the executor named in the secondary will is recognized without the need for an estate grant. If the will maker is the sole Director of the target company, or if the Articles do not support the recognition of an executor's authority without a grant of probate, modifications will need to be made in order for this type of estate planning to be effective.

Finally, and perhaps most ominously, as no grant of probate will be issued, there will be no limitation period applicable to the assets passing under the secondary will, for the purposes of wills variation style claims.