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MULTIPLE WILL PLANNING FOR PRIVATE COMPANY SHARES

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Richards Buell Sutton Wealth Preservation Newsletter

Recent changes in British Columbia under the Wills, Estates and Succession Act ("WESA") provide business owners with a new opportunity to reduce the probate fees that would otherwise be payable upon their deaths.

PROBATE

Probate of a Will gives the executors of a deceased the court-sanctioned authority to deal with the estate assets, so that the assets can then be distributed according to the terms of the Will. Please note that probate of a Will is not mandatory, and is generally only required when the holder of an asset of the deceased requires it before releasing the asset to the executor. For example, banks have different policies on amounts for which probate will be required, and many times they will release smaller accounts without probate. Similarly, probate is not required to obtain control of household assets. Conversely, probate is always required when dealing with land which is not held jointly with someone else, as the Land Title Registry will not transmit the title of a property to an executor without it.

If probate is required to transmit any asset, all of the assets of a deceased will normally have to be listed and disclosed in the probate application, including the estate assets for which probate would not have been required for transmittal. This means that probate fees will be payable on the total of all of the assets. Probate fees in British Columbia are 1.4% of the gross estate for assets over $50,000.00, with no maximum. A rule of thumb is that there is $14,000 payable towards probate fees for every $1,000,000 of gross estate assets.

Let us assume that Sam is running a successful business, and currently has the following assets that will flow through his or her Will:

ASSET

House – $2,000,000

Investments – $1,000,000

Private Company Shares – $2,000,000

Total – $5,000,000

Due to the assets above, Sam's estate would pay approximately $70,000 in probate fees (1.4% x $5,000,000).

MULTIPLE WILL PLANNING

A result of the new WESA legislation is that "Multiple Wills" can now be utilized to deal with the assets of a deceased in British Columbia. Essentially, this means that one's assets can be divided between two Wills and dealt with separately.

Pursuant to the Business Corporations Act of British Columbia, the directors of private companies have the power to transfer the title of the private company shares of a deceased to an executor without probate being required. The combination of this with the new WESA provisions means that a new permissible planning option is available:

1. Sam's assets could be directed by two separate Multiple Wills.
2. The first Will would specifically list and deal with Sam's private company shares (which we would call the "Non-Probate Will"). Sam's private company shares would then be disconnected and removed from the balance of Sam's assets.
3. The remainder of Sam's assets would be directed by Sam's second Will (which we would call the "Probate Will").

4. Upon Sam's death:

   (a) Sam's private company shares would be governed by Sam's Non-Probate Will, and Sam's executors would follow the procedure in the Business Corporations Act to distribute these shares, without probate being required, as Sam has directed in the Non-Probate Will; and

   (b) the balance of Sam's assets would flow through the Probate Will, and, although probate would be required to deal with these remaining assets, probate fees would only be payable on the value of the remaining assets:

ASSET

House – $2,000,000

Investments – $1,000,000

Private Company Shares – $2,000,000 (Removed, as governed by Non-Probate Will)

Total – $3,000,000

With the deduction of the private company shares, probate fees would only be payable on the remaining value of $3,000,000, and so would now be reduced to approximately $42,000 (1.4% x $3,000,000), for **total savings of approximately $28,000**.

Some important points to consider:

1. In order for the planning to work with the private company shares, the directors must consent to the transfer of the shares without probate. Accordingly, it is imperative that the business owner has, individually or through his or her family, controlling interest in the relevant private company. If the business owner is a minority shareholder and the other shareholders are not cooperative, there is a risk that the directors of the company might require probate to deal with the shares, which would undo all of the planning and the potential savings.

2. Due to the wording in the WESA, different executors are required for each Will for the planning to be effective.

3. Careful drafting and coordination is required between the Multiple Wills, as there are now two Wills which must work together. Although both Wills usually have the same distribution terms for the assets, each Will must specifically identify which assets it governs, and the Wills should be clear regarding which one is to be primarily responsible for estate debts. If changes are later required to one Will, it is very likely both will need to be changed.

4. Clients should weigh the expected probate fee savings versus the extra costs to have the Multiple Will planning implemented.

5. Finally, there is more privacy afforded to the asset values in the Non-Probate Will, since it will bypass probate. Probating a Will is a public process, and a requirement of the probate application is to list

all of the assets passing under that Will and their values. This information is available to any member of the public upon payment of a nominal fee.

CONCLUSION

We would be happy to review your estate plan and discuss how Multiple Wills could be of benefit to you and your family. Please contact Rick Montens or Tim H.R. Brown at (604) 682-3664.