

## Wills & Estates

Everyone wants to assume that their family will be the one that is able to “work things out” in terms of Estate planning and Estate administration. Fortunately, many families are able to do just that. Regrettably, not every family can “work things out” and that is where lawyers come in. “The Great Wealth Transfer” is currently working its way through many families in our society. In the media, in Canada and elsewhere, we hear about Estate disputes and mental capacity issues where dementia and other ailments have made it impossible for someone to manage their own affairs and others have to step in.

Not every lawyer is equipped and trained to work effectively in this environment where the dollar numbers can run high and the emotions run even higher.

As a core part of our industry-leading Private Client practice, the Wills & Estates lawyers at Blaney McMurtry are well situated through background, experience and training, to assist clients through the pitfalls of Will and trust planning, Estate administration, planning for and if necessary managing through mental incapacity and all forms of contested Estate matters. In an era of complex family formations and arrangements, sensitivity to the dynamics of blended families and multi-generational family structures is essential and readily available. Estate planning includes a wide range of Wills, trusts, charitable donations, business and cross-border considerations for clients who are either citizens elsewhere or have assets elsewhere or both, and Blaney McMurtry has the expertise to provide advice and prepare the necessary materials to implement sophisticated succession plans.

Many elements of Estate planning involve family law concerns such as domestic contracts, custody and support and property division issues, and tax and corporate reorganizations. Blaney McMurtry as a full service law firm is uniquely able to provide assistance in all of those fields, and the partner who meets a client is the one who will maintain supervision of the whole process where several practice groups, such as corporate commercial, real estate and family law, become involved.

Estate administrations can be complex, particularly when there are unusual assets and holdings in multiple jurisdictions. With the broad experience of our Estate lawyers, we can assist in the often complicated administration processes through the courts and through financial institutions, and where international asset issues arise, Blaney McMurtry has access to a wide variety of legal expertise around the world through its TAGLaw connections.

Because not all Estates are administered amiably, Estate litigation is a major and growing area. Blaney McMurtry is well fixed to handle all forms of contested Estate matters, from challenges to the validity of Wills, support and other property claims, Will interpretation matters, Estate accounting and contested adult guardianship and power of attorney matters. In all such matters, court is an option but not the only option, and all forms of alternate dispute resolutions mechanisms are available and encouraged. Blaney McMurtry's lawyers can act as counsel in formal and more informal mediation settings and various members of the firm are available to act as mediators to facilitate dispute resolutions.

## ESTATE PLANNING - FAQ

### **Are there income taxes to pay when one spouse dies?**

When the surviving spouse is entitled to receive all of the assets of an estate, or the surviving spouse takes the account that was joint between the 2 of them with right of survivorship, there is no immediate income tax consequence because the surviving spouse takes on the tax cost of the deceased spouse.

### **What other taxes are there when one spouse dies?**

If there are assets that are owned in the name of one spouse alone, such as bank accounts, investment accounts and real estate, then a Certificate of Appointment of Estate Trustee will be needed and Estate Administration Tax based on the value of the assets must be paid.

### **Are there taxes on the family home (matrimonial home)?**

If a home is owned by one spouse alone, and not held in joint tenancy between the spouses, it cannot be transferred without a Certificate of Appointment and Estate Administration Tax is payable on the value of the property at the date of death. As long as the property has only been used as the only principal residence of the couple, there is no income tax payable on any increase in the value of the house.

### **What happens to the family home if it is in joint names and one spouse dies?**

If the family home or any other property is owned jointly by both spouses, the survivor of the 2 continues as the owner. When one joint owner dies, a document called a Survivorship Application should be registered on the title to show that only one of the registered owners is still alive.

### **What is Probate and what is a Certificate of Appointment of Estate Trustee?**

Probate is technically a court process that confirms the validity of a will. The certificate of the court is relied on by third parties like financial institutions and land registry offices to confirm that the will can be relied upon and the named Estate Trustee has proper authority to act on behalf of the estate. A Certificate of Appointment of Estate Trustee with a Will is issued by the court to the person named in a will as the Executor or Estate Trustee. To obtain a Certificate of

Appointment of Estate Trustee with a Will, the normal course is to file the original will with an affidavit of execution sworn by one of the witnesses to the will, along with the proper forms required by the court to identify all of the details about the deceased, the will, the estate trustees and the beneficiaries, along with the Estate Administration Tax payment that must accompany the application. Normally the process amounts to filing documents and funds at the court office in the place where the deceased lived, and it is rarely necessary for anyone to actually appear in open court.

### **Are there Estate Taxes in Ontario?**

There are no estate taxes or succession duties in Canada. There is an Estate Administration Tax that is payable in Ontario (originally known as a Probate fee) when the Application for a Certificate of Appointment of Estate Trustee is filed in the court. The rate is 1.5% of the estate value over \$50,000.00. There is no estate administration tax payable on the first \$50,000.00 or for an estate of under \$50,000.00. All assets that are owned by the deceased alone are subject to this tax. Jointly held assets that pass to the survivor, assets held in trust for someone else, assets with named beneficiaries like RRSP or RRIF accounts with designated beneficiaries, life insurance with a named beneficiary or a TFSA with a named beneficiary are not included in the estate value as the basis for the tax calculation. Mortgages on real estate in Ontario are deducted from the land value but unsecured debts are not a deduction. Real estate outside of Ontario is not included.

### **What happens when both spouses have died?**

When the second spouse dies, all assets become part of the estate of the second to die and they are frozen pending the issuance of a certificate of appointment of estate trustee (probate) to the named executors. This usually takes between 3 to 5 months from the time that the paper work is filed with the court by the lawyer for the executors.

### **What happens to a TFSA on death?**

When the holder of a TFSA (Tax Free Savings Account) has died, the funds can pass to a designated beneficiary without tax, whether that beneficiary is a spouse or not. Generally the funds cannot be put into a TFSA for the beneficiary, but they pass to the named beneficiary without tax in any event. A TFSA is not subject to taxation on the income that was earned while in the fund regardless of the named beneficiary and regardless of how the funds are used by the beneficiary. If the designations are done correctly, a TFSA account can keep its status if the spouse is the beneficiary. For any other beneficiary, the recipient beneficiary cannot put the proceeds into his or her TFSA unless there is unused contribution room. Otherwise there will be a resulting over-contribution and that does create tax problems.

### **What about “in trust” bank accounts for grandchildren and other beneficiaries?**

Unless an account that is being held “in trust” for grandchildren, nieces and nephews, etc. has been set up in a formal way with some kind of written declaration of trust, a bank account of this

sort if probably not much more than an account in the name of one or both grandparents who have an intention between themselves to pay the funds eventually to their grandchildren. Particularly if the named holders are reporting the interest on the account, it most likely belongs to them, and will be part of their own estates. When the second account holder dies, (if the account is set up as a joint account) the will of the survivor needs to identify what to do with the money in the account.

### **What happens to a RRIF (Registered Retirement Income Fund) or RRSP (Registered Retirement Savings Plan) when the account holder dies?**

If one spouse is named as the successor annuitant for the account of the other, on death the transition to payments to the survivor is a fairly seamless transition. There could be a moderate delay while new arrangements are made for on-going payments but there should not be anything more than that.

### **What happens to a RRIF or RRSP when the surviving annuitant dies?**

Beneficiaries can be designated to receive any remaining money in a RRIF or RRSP after both spouses have died, and the funds will go directly to the named beneficiary. They are not part of the estate and not part of the calculation of the estate value on which Estate Administration Tax is paid. However, all RRIF or RRSP amounts remaining at death when there is no surviving spouse are fully taxable at death and the estate of the holder is liable to pay the tax, even if there is a named beneficiary receiving the money. The financial institution holding the RRIF or RRSP does not withhold tax and the overall liability for the tax does not fall to the designated beneficiary unless there is no money left in the estate to pay the tax. That is a liability that no amount of estate planning is going to avoid.

### **What happens to bank accounts held jointly by two spouses when one spouse dies?**

Legally, a joint bank account passes to the surviving holder and there should be no need for the survivor to do anything other than present a proof of death certificate to have the name removed from the accounts. Some banks insist that the bank documents themselves must not only state that the account is joint, but that it is "joint with right of survivorship" before they will automatically just remove the name of the deceased spouse and otherwise leave the account intact.

### **What happens to safe deposit boxes on death?**

If a safe deposit box at a bank or trust company is in the names of both spouses, or one spouse and one child for example, the survivor of the 2 holders should be able to access the box in any event. If both holders have died and the executor has to gain access, the protocol in most banks is that the box is allowed to be opened by the executor once he or she proves who they are and that they are named in a will, but the box is opened only to allow an inventory of the contents to be made. Nothing other than a will can be removed until the certificate of appointment has been issued to the executor.

### **What about the family cottage, it is taxable?**

Secondary residences, whether summer cottages, ski chalet's, hobby farms, vacation condominiums or any other form of recreational or investment property do not have any exemptions in terms of capital gains taxation. The net increase in the value of the property from the time of its purchase until the death of the second spouse (if it was owned jointly by the spouses or passes to the survivor by a will provision) is a capital gain and 2/3 of it is taxable in the year that the second spouse dies. The value of all capital improvements can be deducted from the gain, but they must be capable of being documented. The value of the property at the death of the second spouse is also subject to Estate Administration Tax because the value must be included in the overall estate value on an application for a Certificate of Appointment of Estate Trustee.

### **Do household contents need to be valued and are they taxable?**

Household contents should be valued because the value has to be reported as part of the estate value for determining Estate Administration Tax on the value of assets on hand at the time of death. The rule for capital gains taxation on personal effects is that there is no tax charged on gains for items that are under \$1,000.00 or where the gain is less than \$1,000.00. Valuable art or jewellery it should be valued, but the valuation should be for sale, not insurance replacement value.

### **How can funeral costs be paid?**

Payment of funeral costs can usually be arranged through the deceased's bank before probate is issued as long as there is enough cash available. The invoice from the funeral director must be provided and payment is made directly to the funeral director or to the credit card holder who paid the bill by credit card. Funerals can be pre-planned as well as fully pre-paid. By law the funeral director must hold the money in a separate trust account that continues whether the funeral home ceases, is bought out, merges, etc. and the services purchased have to be provided for the amount of the purchase price already paid.

### **What happens to my old will when a new one is made?**

A new will automatically and as a function of law revokes a previous will unless there are very specific terms in the new will to continue to maintain terms in the old one. If a lawyer is holding a prior will that is now revoked because of a new one being made, it is usually wise to notify the lawyer holding the old wills. That way the lawyer can take the old one out of safekeeping and return it to be destroyed.

### **Can I name an executor/estate trustee who does not live in Ontario and can I name more than one executor?**

There can be multiple executors, but usually having more than three is not practical. If more than one executor is named, they must all be unanimous unless the will calls for a majority to

determine issues. As long as the named executors are all in Canada or a Commonwealth country, there is no restriction on acting as an Executor in Ontario. If an executor is not living in Canada or a Commonwealth country, he or she would have to get an administration bond to be able to act unless the beneficiaries consent to him or her acting without a bond and a court order is obtained to dispense with a bond.

#### RELATED PRACTICES

- Litigation & Advocacy