

Estate Essentials: Ways to Reduce Estate Administration Tax

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In our last post, "[What Is Probate and Why Should You Know About It?](#)", Sanaya Mistry explained the basics of the Estate Administration Tax ("EAT") payable when applying for probate. The EAT can add up to a significant amount of money, but depending on the type of assets in the Estate, it may be possible to reduce the amount of EAT by effective estate planning.

Multiple Wills

Not all assets require probate to allow an estate trustee to deal with them. Depending on the types of assets in the estate it is possible to create multiple wills – one will that deals with assets that require probate (e.g. real estate) and another will that deals with assets that do not (e.g. personal property, shares in private corporations). Since EAT is only payable with respect to the assets subject to the will being submitted for probate, the use of multiple wills can significantly reduce the amount of tax that would otherwise be payable.

The use of multiple wills is not appropriate in all cases however. The costs of employing this strategy may exceed the benefit, since it increases the upfront legal costs. Legal advice is required to determine whether it makes sense to use multiple wills. If the wills are not drafted carefully, there may be errors or inconsistencies between the documents which may lead to both wills being probated (thereby negating the purpose of having two wills) or worse, a court application to interpret the provisions of the wills, leading to additional legal expenses and delays in the administration of the estate.

Joint Tenancy

Another strategy to avoid EAT is to transfer assets into joint tenancy with the intended beneficiary, so that upon death of the original owner the asset automatically passes to the surviving joint tenant by right of survivorship. A proto-typical example is a parent who adds their child on title to the parent's home as a joint tenant. When the parent dies, title to the home automatically passes to the child outside of the parent's estate. Accordingly, no EAT is paid on the value of the home.

However, what at first appears to be an elegant solution for simplifying the administration of an estate and avoiding EAT is actually fraught with risks and should be carefully considered with the assistance of a lawyer.

Although legal title to the property automatically passes to the surviving joint tenant, the beneficial interest in the property presumptively remains with the deceased's estate. This is called the presumption of resulting trust (see [Pecore v Pecore](#), 2007 SCC 17). The consequence of this legal doctrine is that even though an asset may legally pass to the surviving joint tenant, it may nonetheless be possible for the estate, or other beneficiaries of the estate, to claim that property as an estate asset and thereby subject it to EAT. To avoid this outcome, care should be taken to fully document the reasons why the property is being transferred into joint tenancy, and in some cases, a deed of gift should be executed to confirm that the intention for legal and beneficial interest in the property to pass to the surviving joint tenant.

Besides the potential for costly litigation after death, there may be other immediate consequences from transferring property into joint tenancy. In the case of real property, the new owner will have the same rights of possession as the existing owner, which might not be desirable. More importantly, the new joint tenant could sever the joint tenancy and seek a partition and sale of the asset, potentially leading to the loss of the asset. There may also be unexpected tax consequences if real property is transferred into joint tenancy that could exceed the cost of any EAT payable on the asset.

In the case of joint bank accounts, any new account holders will have immediate access to the funds, which presents an opportunity for theft and financial abuse. To the extent the new account holder deals with the funds in the account, they may be obligated to account for their dealings with the account after the death of original owner. An innocent beneficiary may nonetheless find themselves having to incur significant legal fees defending accusations of improper conduct simply because they were added to an account with the intention of simplifying the administration of the estate.

There are many valid reasons why an asset should be placed in joint tenancy, but if the objective is to simply to avoid paying EAT on the asset after death, the risks might outweigh the benefits.

Other Methods

Other avenues to avoid EAT involve moving assets out of the estate before death or ensuring that they do not enter the estate after death.

Gifting assets while alive is one viable option, but if the gift is significant it may be prudent to execute a deed of gift to confirm the intention to gift and defend against any attempts by disgruntled beneficiaries to claw the gift back into the estate. Depending on the nature of the asset being gifted there may also be income tax consequences to the person making the gift, which should be considered.

Similarly, various types of trusts can be used to move funds out of the estate prior to death. Bare trusts involve transferring legal title to a trustee, who has an obligation to distribute the asset(s) at the direction of the beneficiary. Joint partner trusts, spousal trusts or alter ego trusts can be used to hold assets for the benefit of the person during their lifetime and then be distributed to their beneficiaries after death without the requirement for probate.

Any RRSPs, TFSAs and insurance policies should have designated beneficiaries so that the assets may pass outside of the estate after death and therefore avoid EAT.

Conclusion

There are multiple ways to reduce EAT, but the right approach depends on the circumstances. Any of our excellent estate planning lawyers would be happy to discuss what would work best for you.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.



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