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When results count.



# Topics

- Introduction
- Powers of Attorney for Property
- Personal Directives
- Guardianship of Minors
- Registered Disability Savings Plans
- Taxes on Death
- Wills
- What is a Trust?
- Taxation of Trusts
- Inter Vivos Trusts
- Testamentary Trusts
- Henson Trusts



# Introduction

- Estate planning is planning directed at:
  - Accumulating wealth
  - Transferring wealth to succeeding generations
  - Protecting wealth from unnecessary income and probate taxes and from creditors and others challenging the estate plan



# Introduction

- “Spouse” includes common-law partners (same or opposite sex) under the *Income Tax Act* (one year cohabitation test) for tax purposes and “registered domestic partners” (same or opposite sex) under the *Vital Statistics Act* for property and inheritance purposes in Nova Scotia
- Two main areas of estate planning:
  - Planning for incapacity
  - Planning for death



# Power of Attorney for Property

- To address your mental incapacity
- A delegation of authority to another
- Can be a general power or a specific/restricted power
- Governed by the *Powers of Attorney Act*
- Since 1988 can be “enduring”
- If enduring, power continues through subsequent incapacity
- Substitute attorneys can be named
- Governed by law of agency
- Attorney must act in best interests of grantor at all times
- Appointing another person as attorney does not remove the grantor’s ability to act on his or her own behalf, provided the grantor is still competent
- Default if no power of attorney for property is adult guardianship under the *Incompetent Persons Act*



# Personal Directives

- The *Personal Directives Act* came into force on April 1, 2010
- Replaced the *Medical Consent Act*
- Provides for persons over 19 (or under 19 if they are “mature minors”) to appoint a delegate (person over 19) as a substitute decision maker with respect to healthcare and personal care decisions
- Replaces healthcare directives, powers of attorney for healthcare and advance directives
- Also authorizes a “living will” (an expression of final wishes in the event of a terminal illness)
- Can only appoint one delegate at a time, but substitute delegates can be named
- Can also express wishes as to care options
- Must be in writing, signed by the person giving the authorization and witnessed by a person who is not the delegate or the spouse of the delegate



# Personal Directives (Cont'd)

- Default if no personal directive in place is a series of substitute decision makers in order of precedence as follows:
  - spouse
  - child
  - parent
  - sibling
  - grandparent
  - grandchild
  - aunt or uncle
  - niece or nephew
  - other relative



# Guardianship of Minors

- Guardianship of minors governed by *Guardianship Act* in Nova Scotia
- Addresses cases where both parents are deceased or unable to care for minor children
- Split between guardians of the person and guardians of the property of minors
- Parents are presumed to be guardians of the person of their minor children and can appoint in a written document a successor guardian of the person
- Can be done in a will or in a separate document witnessed by two persons
- If a guardian of property is required (because minor has assets in his or her own name), court application by proposed guardian (even if parent) is required, along with a bond
- Proper planning using trusts can avoid this situation (more later)





# Registered Disability Savings Plans

- Registered Disability Savings Plans (RDSPs) were introduced in the 2007 Federal Budget
- Available for a person resident in Canada who is eligible to receive the disability tax credit (severe and prolonged impairment in physical or mental functions)
- RDSPs can only have one beneficiary and each individual can only have one RDSP
- Issued by financial institutions to the “holder”
- If the beneficiary is a minor, parent or guardian is the holder
- If the beneficiary is an adult, the holder must be the beneficiary if legally competent
- If not legally competent, a guardian may open the plan for that beneficiary as holder
- Contributions to the RDSP can be made by anyone until the year in which the beneficiary reaches age 59
- Unlike an RRSP, contributions are not tax deductible



# Registered Disability Savings Plans (Cont'd)

- Lifetime limit of contributions is \$200,000
- Government provides matching grants (dependent on net family income) under the Canada Disability Savings Grant and the Canada Disabilities Savings Bond (max that can be received is \$70,000)
- Payments out of the RDSP must go to the beneficiary or the beneficiary's estate upon the beneficiary's death – contributions cannot be refunded to the contributor
- Payments out of the RDSP can begin anytime before the end of the year in which the beneficiary turns 60
- The issuer may allow the holder to request payments be made to a beneficiary prior to age 60
- Payments are subject to annual maximums calculated based on age of the beneficiary and the value of the plan's assets
- Contributions are received by the beneficiary tax-free, but the grant and the bond, and the investment income earned in the plan are taxable in the hands of the beneficiary when paid out



# Registered Disability Savings Plans (Cont'd)

- Nova Scotia has amended the Employment Support and Income Assistance Regulations to provide that an RDSP is not an applicable asset of an applicant or recipient for purposes of determining financial eligibility, and income withdrawn is not chargeable income
- If the RDSP is terminated or deregistered, or upon the death of the beneficiary, all government grants and bonds paid into the plan during the preceding ten years must be repaid to the government
- If the beneficiary no longer has a severe and prolonged impairment in mental functions, then the RDSP must be closed and any funds in the RDSP (after repayment of applicable government grants and bonds) paid to the beneficiary by December 31 of the year following
- On the beneficiary's death, all amounts are paid out to the beneficiary's estate and the plan is terminated by December 31 of the year following the beneficiary's death, after repayment of applicable government grants and bonds



# Taxes on Death

- Capital property deemed disposed of at fair market value on death
- Tax-free rollover to a spouse is available (tax deferral)
- Transfer to spouse can be outright or in a trust (spousal trust)
- RRSPs/RRIFs fully taxable as income unless spouse is the designated beneficiary
- Note: Can also “rollover” RRSPs/RRIFs to a financially dependent child with a mental or physical infirmity to the child’s RRSP or to purchase a life annuity for that child
- Proposed amendments would allow rollover of an RRSP/RRIF to an RDSP – not law yet
- Only addresses first spouse to die – taxes are payable when the second spouse dies



# Taxes on Death (Cont'd)

- There are ways to address this:
  - Life insurance to fund the tax liability
  - Charitable gifts in your will to offset income tax otherwise payable
- Note: If the estate assets include marketable securities, consider gifting those securities directly to the charity which eliminates the capital gain on those securities
- Testamentary trusts (trusts created in your will) receive favourable tax treatment (the trust pays tax at graduated rates as a separate taxpayer)



# Wills

- The building block of your estate plan
- Choice of executor(s)/trustee(s) is the most important decision
- Executor(s)/trustee(s) acts as your personal representative and is a fiduciary
- Various duties, including:
  - Takes control of your property
  - Pays debts and taxes
  - Distributes property according to the will
  - Administers any ongoing trusts



# Wills (Cont'd)

- Topics to consider for will planning include:
  - Personal and household effects
  - Funeral arrangements
  - Specific gifts of items or money (including charitable gifts)
  - Primary beneficiary (typically spouse)
  - Secondary beneficiary(s) (typically children and/or grandchildren)
  - Alternative beneficiary(s) (extended family or charities)
- Will review – every 3-5 years or sooner if circumstances change
- Alternative is intestacy
- Administrator (not executor) appointed pursuant to the *Probate Act* based on defined order (next of kin resident in Nova Scotia have priority) and with a bond
- Assets distributed pursuant to *Intestate Succession Act* to next of kin (no trusts)



# What is a Trust?

- A legal relationship whereby one person (the settlor) transfers property to another person (the trustee) to hold for the benefit of others (the beneficiaries)
- The settlor, trustee and beneficiary can all be the same person, but usually two or more persons fill those roles
- A formal trust agreement or trust deed is typically required
- Testamentary trusts are established in a will
- Not a separate legal person
- Deemed a person for income tax purposes
- Trustee is a fiduciary and must always act impartially and in the best interests of the beneficiaries





# What is a Trust? (Cont'd)

- Trusts can be revocable or irrevocable, fixed interest or discretionary
- Investments by the trustees can be limited or expanded in the trust agreement or left to the “prudent investor” standard in the *Trustee Act*
- Trusts are private (unlike a probated will) and so preserve confidentiality
- Trust assets are generally free from claims by creditors, including those challenging an estate plan
- A very flexible tool for estate planning
- The main drawback is the settlor’s loss of control over the assets transferred to the trust



# Taxation of Trusts

- Detailed and specific rules in the *Income Tax Act*
- Exceptions to almost every rule
- The settlor generally pays tax on accrued capital gains on assets settled to the trust – a disposition for tax purposes
- Income retained in a trust is taxed at the top marginal rate for individuals
- Income paid or payable to beneficiaries is taxed in the hands of those beneficiaries
- The trust received a deduction for all amounts paid or made payable to the beneficiaries



# Taxation of Trusts (Cont'd)

- If the trust is revocable, or if the settlor retains significant control over the trust assets, all income (including capital gains) is taxed in the hands of the settlor
- If the trust is irrevocable and the beneficiaries are under 18 years of age, income (interest and dividends) is taxed in the hands of the settlor, but capital gains can be taxed in the hands of the minor beneficiaries
- Detailed rules apply to the “attribution” of income to the settlor, spouses and minors
- All property held by a trust is deemed to be disposed of every 21 years after the year the trust was created and any resulting capital gain (or loss) calculated and taxed



# Inter Vivos Trusts

- Any trust created by a settlor during her lifetime
- Property transferred to the trust will trigger a capital gain
- Trust is taxed as described earlier
- May permit the transfer of assets on death without having those assets pass through probate under the will
- Negative tax implications often make it an unattractive alternative
- Could be useful for non-income producing assets such as a cottage property that has not appreciated much since acquisition
- Preserves continuity of ownership



# Testamentary Trusts

- Established in the settlor's will at the time of her death
- Assets pass through the settlor's estate, but are then transferred to or held by the trustee of the testamentary trust
- Probate tax (1.523% in Nova Scotia) is payable on those assets
- Income tax savings far outweigh the probate tax over time
- Testamentary trust can take advantage of the graduated tax rates in the *Income Tax Act*
- Different than an inter vivos trust which pays tax at the highest marginal rate
- Depending on type of income earned in the trust and province of residence of the trust for tax purposes, tax savings can exceed \$10,000 per year



# Testamentary Trusts (Cont'd)

- Can be combined with a spousal trust to create a testamentary spousal trust
- Useful in many situations:
  - Spouses who have significant income of their own
  - Adult children who have significant income of their own (separate trusts for each child are best)
  - To protect assets from marriage breakdown
  - To preserve continuity of ownership ( i.e. cottage property, family business)
  - To benefit charity after assets are no longer needed to support family
- Access to capital can be as tight or as loose as required
- As little as \$100,000 placed in a testamentary trust can be tax effective if there are no trustee fees taken and the only extra cost is filing a tax return



# Testamentary Trusts (Cont'd)

- Note: Can also create testamentary trusts funded by the death benefit under a life insurance policy or from the payout of the proceeds of an RRSP or RRIF
- Specific rules must be followed, and the tax implications of the RRSP/RRIF trust must be addressed



# Henson Trusts

- A form of inter vivos or testamentary trust for disabled beneficiaries
- Testamentary Henson trust is more common
- A purely discretionary trust which does not vest any of the trust assets in the hands of the beneficiary
- Preserves the value of any social benefits being received by that beneficiary
- Taxation of a Henson trust is generally the same as a regular inter vivos or testamentary trust as described earlier
- However, if the trust's beneficiary is eligible for a disability tax credit or a dependant tax credit because of the beneficiary's mental or physical infirmity, then a "preferred beneficiary election" under the *Income Tax Act* is available to tax some or all of the income of the trust in the hands of that beneficiary





# Henson Trusts (Cont'd)

- The beneficiary must be a child, grandchild or great grandchild of the settlor or the settlor's spouse or common law partner
- Term “mental or physical infirmity” is not defined in the *ITA*, but generally means for a dependency that it must be brought about solely by reason of the infirmity, and the degree of infirmity must be such that the person is dependent for a considerable period of time
- Key to a Henson trust is language ensuring that the assets do not vest in the beneficiary (neither income nor capital) – the trustees have absolute discretion to distribute income and capital
- Trust may include other discretionary beneficiaries for greater protection, although traditional Henson trust language does not do this
- Beneficiary cannot claim or demand payments from the trust



# Henson Trusts (Cont'd)

- However, trustees can use assets of the trust to improve the quality of life of the beneficiary by paying for expenses (trips, clothes, etc.) while government support and access to government programming continues
- Consideration of the trustees is fundamental – choosing correctly is critical
- Consider judgment of the trustee, care and skill in investment and other decisions and potential conflicts of interest (i.e. siblings who might be residual beneficiaries after the disabled beneficiary's death)
- Do Henson trusts work in Nova Scotia?
- Key word in the Nova Scotia Regulations is that, “assistance shall not be granted where it is feasible for the applicant or recipient to obtain support” from a trust



# Henson Trusts (Cont'd)

- The Department of Community Services Policy Manual refers to having “access” to funds in trust
- Provided trust is drafted properly, it will not be “feasible” for the beneficiary to obtain support from the trust and therefore it will not reduce or affect access to financial support or related programs



# Conclusion

- Estate planning is a customized process
- What works for one person will not work for another
- The key is to use the various tools available to achieve your specific goals by creating a customized plan that is best for your personal circumstances



# QUESTIONS?

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