Estate Planning In Saskatchewan

(Last Revised April, 2005, by Allan Haubrich)

The following is general information only, regarding some of the issues relating to estate planning in Saskatchewan. You should seek specific legal advice as each person's situation will vary.

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1. General Estate Planning

Will planning is an important and essential aspect of estate planning. A will is the document which directs the distribution of a person's estate. A will assists in estate administration reducing delay, expense and intervention by the courts.

If a person dies without a will (intestate), then that person's net estate will be divided in accordance with the intestate statute established in each province of Canada. In Saskatchewan, the distribution is set out in *The Intestate Succession Act.* How an estate will be divided depends upon who the closest relatives are such as spouse, children, parents, etc.

The intestacy rules may result in assets going to beneficiaries other than those whom a person wishes to benefit and in proportions and at ages which may not reflect that person's wishes. In addition, the estate may be administered by persons other than those the deceased might have chosen. Tax inefficiencies are inevitable in the unplanned situation.

A will avoids these problems and ensures that the person's directions regarding the distribution of their property are carried out. The will appoints the executor of choice to administer the estate.

In Saskatchewan, *The Wills Act* recognizes the validity of "holograph" wills which are wills written entirely in the testator's handwriting (ie. not typed) and signed and dated by the testator. However, a formal will prepared by professionals and formally executed with two witnesses is advisable.

A will can provide for trusts for young children, dependent adults, children and others. Custodians (guardians) are appointed for young children. Instructions are set out for transfer of specific properties to beneficiaries. The will can include powers and desires. The will can provide for alternate executors.

Even if a person has a will, it should be reviewed regularly, having regard to changing assets and circumstances (ie. divorce, marriage, co-habitation). For example, a will executed prior to marriage becomes null and void upon subsequent marriage unless it contains a declaration that was made in contemplation of that marriage. Now, similarly, a two year co-habitation with a same or opposite sex spouse can nullify a will. In the event of a divorce after a will has been executed, the will remains valid but any gifts to a former spouse are revoked absent a contrary intention.

Often, a person should coordinate his or her estate planning with another.

In many cases, a spouse or common law spouse will be the marital partner with a significant portion of the family wealth. In such a case, careful consideration to the terms of the spouse's or partner's will is recommended. For example, it may be advisable that assets owned by the spouse at the spouse's death go not directly to the surviving spouse, but to a trust for the surviving spouse's benefit. If deferral and minimization of tax on death is desirable, a trust which qualifies as a "spousal trust" under the *Income Tax Act* would be advisable. If tax minimization and deferral is not an issue, a trust for the benefit of beneficiaries such as the surviving spouse, children, and grandchildren may be considered.

A will should provide for alternative beneficiaries if a beneficiary predeceases the will maker.

Sometimes a person does not wish to receive an inheritance from parents outright. It may be advisable to encourage your parent's to leave their inheritance to you in a trust.

2. Probate and Legal Fees

Letters probate are a court order confirming the validity of a will and the authority of the executors to administer the estate of the deceased. A will does not always need to be probated. Probate becomes necessary if land is owned by the deceased in the Province. Probate is necessary if a financial institution requires it. Sometimes probate is obtained to protect the executor.

Saskatchewan probate fees are $7.00 on each $1,000.00 of estate assets. For example, in an estate having assets of $200,000.00, the probate fees would be $1,400.00.

Saskatchewan legal fees for an estate are prescribed by court rules and vary depending upon the value of the estate. The court rules are as follows:

- $300.00 on the first $10,000.00 or portion thereof;
- 2% on the next $90,000.00 or portion thereof;

- 1.5% on the next $400,000.00 or portion thereof;
- 1% on the next $500,000.00 or portion thereof;
- one-half of 1% on any amount exceeding $1,000,000.00.

In an estate of $200,000.00, legal fees would be $3,600.00 plus disbursements, P.S.T. and G.S.T.

The value of the estate is the total value of all assets of the estate to be administered. It does not include property held in joint tenancy, gifts made while living, insurance, annuities, pensions not payable to the estate and other assets or benefits not required to pass through the hands of the personal representative. You are permitted to deduct from the value of the estate a mortgage or agreement for sale relating to that land, in excess of any insurance payable to discharge the mortgage or agreement for sale. No other debts are deductible from the value of the estate.

3. Avoiding Probate

Estate planning steps can be taken to reduce or eliminate probate fees. Some examples are:

- Jointly owned assets pass by operation of law to the surviving joint tenant and would not form part of the estate.
- Designation of a beneficiary under life insurance policies, R.R.S.P.s, R.R.I.F.s and pensions will allow payment directly to the beneficiary without probate fees.
- Property transferred to a trust ceases to belong to the transferor and therefore would not be included in the value of their estate.
- In Canada alter-ego trusts and joint partner trusts are now available if you are 65 years of age. These trusts allow you to retain control over your property but affords creditor protection and avoids probate fees.
- Land situate outside Saskatchewan, and other assets situate outside Saskatchewan where the deceased died while domiciled outside Saskatchewan, are not subject to Saskatchewan probate fees. The executor will likely be required to probate or "resealing" the Saskatchewan grant of probate in the other jurisdiction to deal with the land. Resealing essentially is equivalent to letters probate in another jurisdiction. Probate fees will be charged in the jurisdiction in which the resealing is sought.

Any steps to avoid probate may create additional legal and income tax implications either immediately or on death. No planning should be considered without consulting a lawyer.

4. Powers of Attorney (Property and Personal)

In Saskatchewan we have a new Act, *The Powers of Attorney Act, 2002.*

In Saskatchewan, a person may, in writing, appoint another person or persons (the "attorney") to manage his/her financial affairs in the event of incapacity. *The Powers of Attorney Act, 2002* for Saskatchewan provides that such authority may continue when the grantor lacks capacity (enduring).

Without a power of attorney, in the event of an individual's incapacity, there is no one with legal authority to manage that person's financial affairs (including bank accounts, investment decisions, use of property, etc.). Powers of Attorney can now name an alternate power of attorney in the event of the death, incapacity or signing off in writing of your first choice of attorney. Powers of Attorney can be effective immediately or conditional upon incapacity.

It is increasingly common for older persons to sign powers of attorney at the same time as they sign their Wills. While a power of attorney can always be revoked, it is still an extremely powerful document and should only be given to someone you trust.

In Saskatchewan you can now appoint a power of attorney to make personal decisions and include decisions such as living arrangements not including health care decisions. You can do this in the same document.

5. Guardianship Orders

Where there is significant incapacity, *The Adult Guardianship and Co-decision-making Act* enables a person with sufficient interest (ie. a spouse, adult child or relative, etc.) to apply to the Court to become "property guardian" and/or personal guardian of the incapacitated adult. Depending on the circumstances, the Court can grant the property guardian a wide scope of authority to manage the estate of the dependent adult. The Court can grant the personal guardian with authority to make personal decisions for the adult. Alternatively, if a certificate of mental incapacity is issued, the Public Trustee of Saskatchewan can assume control of the assets.

6. The Family Home and Other Significant Assets

In Saskatchewan, the "family home" is the property owned by, or leased to, one or both of the spouses as a family home. Which spouse has legal title to the property is irrelevant. In a spousal breakdown the family home or its value must be divided equally between the spouses except in rare circumstances. Spouse includes married spouses and two persons who have cohabitated for two years.

The spouse with custody of the children may be granted exclusive possession of the home for such period as the Court thinks fit. This order only delays the division of the asset. Non-occupying spouses do not lose their equity interest in the home. Only the right to possession is lost during the period of the order. Such an order can last years, for example, where children require the use of the family home in order to have a stable environment.

Spouses can, at any time prior to or during a marriage (or cohabitation), enter into an interspousal contract dealing with the possession, status, or ownership of property (including the family home) and its distribution upon death or relationship breakdown. All property dealt with by an interspousal contract is exempt from distribution under *The Family Property Act* provided the contract meets the requirements of the *Act*.

If there is no interspousal contract, the rights of each spouse to a division of family property is governed by *The Family Property Act*. Each spouse is entitled to share equally in the increase in value of "family property" between the date of marriage or after cohabitating two years and either the date of an application for a division or the date of trial depending on the discretion of the Court. It is irrelevant when a property is registered in the name of one spouse only.

Subject to the interspousal contract, a spouse's equity in the family home is not at risk by title being registered in the name of the partner's spouse. The family home and household furnishings or their value are fully divisible not just the increase in value.

Saskatchewan law provides exemptions from seizure by most secured creditors. The most significant exemption is the debtor's home and $32,000.00 is placed on this exemption. The $32,000.00 is meaningless as long as the debtor continues to own and occupy the property as the home is exempt from seizure.

A writ of execution will not attach to a home registered jointly in the names of both spouses. Bankruptcy changes the situation. Bankruptcy severs a joint tenancy and allows the bankrupt's interest in the home to be attached. A trustee in bankruptcy may claim an interest in an expensive home and seize any equity over and above the exemption amount if the home is later sold.

7. Registered Retirement Plans (R.R.S.P.'s and R.R.I.F.'s)

A common asset owned by an individual is a Registered Retirement Savings Plan (R.R.S.P.) It is also one of the most important since it is to be used after retirement. It can also be a significant amount. An R.R.S.P. is converted to a Registered Retirement Income Fund (R.R.I.F.) by age 69. Both R.R.S.P.'s and R.R.I.F.'s plans are protected from creditors. Saskatchewan has recently passed *The Registered Plan (Retirement Income) Exemption Act* which exempts the plans from bankruptcy and other enforcement proceedings.

Payments out of the plans to the plan holder or his or her estate are not exempt from creditors except to the extent allowed by *The Attachment of Debts Act*. If creditors are a concern one should consider designating a beneficiary of your registered plan. As there are tax considerations to designating a beneficiary other than a spouse, income tax consequences should be considered before any such designation is made.

If an individual contributes funds to an R.R.S.P. at a time when he or she is insolvent, with the effect of defeating creditors, such contributions are available to creditors pursuant to *The Fraudulent Preferences Act* of Saskatchewan. The onus is on the creditors challenging the contribution to prove that the contribution contravened that Act.

8. Life Insurance Policies

Similarly, a life insurance policy and its proceeds can be protected from judgment creditors and trustees in bankruptcy by naming certain beneficiaries rather than the insured's estate.

Protection from Judgment Creditors

Pursuant to *The Saskatchewan Insurance Act*, while a life insurance policy is in force, it is unavailable to judgment creditors. After a policy matures, the proceeds of a policy payable to a named beneficiary (rather than to the insured's estate) do not form part of the insured's assets and thus may not be seized by a judgment creditor of the insured, either by garnishment proceedings or by the Sheriff under an execution.

Protection from Trustee in Bankruptcy

A trustee in bankruptcy can force the surrender of an insurance policy belonging to the bankrupt if the policy contains a cash-in feature. The trustee in bankruptcy can also exercise any other right that the insured had, including the right to change the beneficiary. The right to change beneficiaries is restricted, however, if the policy is payable to one of two categories of beneficiaries which are protected under *The Saskatchewan Insurance Act*, namely, certain family members (a spouse, child, grandchild or parent) and irrevocably designated beneficiaries.

Canada Revenue Agency

Canada Revenue Agency takes the position that it is not affected by restrictions imposed by provincial law, such as those described above. Accordingly, specific legal advice should be sought with respect to claims by Canada Revenue Agency.

9. Trusts

A person who has received or anticipates receiving substantial assets (from family or otherwise) might consider putting the assets into a discretionary family trust, or asking the donor of the assets to do so directly. The assets in such a trust will not be the property of the individual who establishes the trust (the "Settlor") and therefore will not be subject to attachment by the Settlor's judgment creditors or by the trustee in bankruptcy. The trustees of the trust could be authorized to make discretionary distributions of income or capital to or for the benefit of the specified beneficiaries (usually family members). The Settlor can be a beneficiary of such a trust. It is common in such discretionary trusts to provide that the trustees are prohibited from making any substantial distribution to any beneficiary who is insolvent, but may make maintenance distributions for that person's benefit.

The Settlor does lose "control" of the assets put into the trust, as the distribution of any trust capital or income is dependent on the decision of the trustees.

Occasionally, a person may be interested in establishing an offshore trust. Offshore trusts can either be established as family trusts, or as a revocable trust for the benefit of the Settlor. It is unlikely any

special income tax benefit is derived from an offshore trust, since Canadians must report all their income on a world-wide basis. Such trusts are used as part of an overall strategy of asset preservation. If, for example, a person is concerned about political or economic instability, future inheritance taxes, or other similar or unknown future events which may affect his or her assets, he or she may choose to protect assets through an offshore trust.

A number of issues must be considered in establishing a trust to hold assets such as choosing current and future trustees and beneficiaries, the purposes for which the trust funds are to be used, tax issues and the lack of control that the contributing party will have over the trust assets.

Life insurance is an example where substantial assets may be received directly by an individual which may not be appropriate for estate planning purposes. Family trusts which receive the insurance proceeds directly are one option to consider in this situation.

10. Contacting a Lawyer on This Subject

If you wish to speak to a lawyer on any matter raised by this article, please contact one of the lawyers in our Estate Planning Group. At our Saskatoon office call (306) 652-7575 or at our Regina office call (306) 569-9000.