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Probate, Trusts, and Powers of Attorney *Power Play Blog 2.2*

Within the comprehensive planning process, the Pro's Process, that we engage in with our clients, there are components that may cause confusion or at the very least merit further explanation. I will cover a few of those in this blog.

When we discuss putting a trust in place, owning property jointly, or any number of other similar strategies, avoiding probate costs is one of the reasons for doing so. What exactly is probate? Whether in Canada or in the U.S., probate is the legal process needed to formally transfer a property to the beneficiaries of the deceased. Probate is based on provincial and/or state law, so therefore varies based on the jurisdiction of the deceased at time of death. For many people the word probate itself, conjures up images of long, drawn-out battles with family members, often involving the airing of "dirty laundry" to the public. In reality, it isn't like that for most of us, but knowing what probate is and does as well as the costs involved, are things of which you should be aware.

If there is a will, probate begins with the executor presenting the document to the courts for validation. If there is no will (the deceased has died intestate) the court will appoint someone to take it from there. There are formalized steps to be followed that are beyond the scope of this blog, something with which the executor will need to be familiar.

Often discussed in the planning process, is the establishment of a testamentary trust to benefit heirs – a trust for example for minor children who are not yet capable of managing money. A revocable trust is used often and one of its purposes is to avoid probate. The establishment of a revocable trust can be substantially less costly than probate fees, so therefore becomes cost-effective. While avoiding probate costs may indeed be one of your goals, establishing a trust should have a broader purpose than merely the avoidance of probate.

The types of assets that are typically NOT included in the probate calculation are items in qualified retirement plans (RSP, 401k, Roth IRA's), life insurance proceeds, and any asset where a beneficiary (other than the estate) is named. These designations supersede any provision you may have established in a will.

There is one important step not to be overlooked should you choose to use trusts as part of your estate planning. Making arrangements to fund those trusts – that is, making sure there is money for the beneficiaries use – is key. Trusts can be used by the trustee (the person in charge of dispersing the funds of the trust) during the lifetime of the grantor (the person who created the trust), during incapacity of the grantor, or for some time in the future for use of the beneficiaries, such as minor children. If there is no trust, and if the assets are held in the name of the grantor at death and no beneficiary has been named, then those assets must flow through the will, and will likely incur probate fees. By funding the trust, either during your lifetime or upon your death by designating your trust as beneficiary of certain assets, such as life

insurance proceeds, the trustee has immediate access to funds. This will allow timelier and more cost-effective access to funds by your ultimate beneficiaries.

Among the simplest and most useful documents we add to your estate plan are a Power of Attorney (PoA) or an Advance Directive. These documents are relevant in almost all US states and Canadian provinces. They are very basic documents that give another person(s) whom you trust, the right to transact business or make medical decisions on your behalf if you are physically or mentally unable to do so for yourself. Utilizing a living will or powers of attorney can help avoid arguments and allow for the deceased's last wishes to be carried out.

To be effective, the PoA must be durable (US terminology) or enduring (Canadian terminology) which means it will be valid even after you become incapacitated. It is important to remember the PoA ceases to be valid upon your death – at which time your valid will takes effect. Generally, lawyers recommend two separate PoAs – one for general financial needs and one for medical needs. In the case of financial needs, there may be situations concerning your assets (bill payments, property maintenance, etc.) that must be accounted for even when you are physically unable to attend to those issues personally. In sudden medical situations, the PoA will help loved ones and medical professionals make decisions based on your personal communicated wishes. The designated attorney under the PoA therefore takes your place, ensuring your health care wishes are carried out and in place for a time when you may be unable to make decisions on your own.

Wash your hands, stay safe, and remember, we at ONE are here to help.