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Family Law Considerations for the Wills and Estates Practitioner

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Tax Considerations When Planning for Death and Incapacity

Family Law Considerations for the Wills and Estates Practitioner

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TAX CONSIDERATIONS WHEN PLANNING FOR DEATH AND INCAPACITY

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HEADNOTE

How family law considerations affect the taxation of an estate, and tips to consider when drafting Wills for addressing common tax issues that arise for clients;

Common tax considerations when planning for death (or incapacity); and

Strategies to avoid traps (unintentional tax) and drafting tips to help address issues when they arise.

INTRODUCTION: COMMON TAX CONSIDERATIONS

Most clients ask me the same question: “Is there such a thing as a ‘death tax’ in Canada?” The answer, surprising to most clients (and Canadians alike), is yes – there are many forms of ‘death taxes’ in Canada. Both federal income taxes and provincial fees may apply to a deceased (or their estate). Of course, once this sad news is delivered, the next question invariably posed is, “So, how can I (we) avoid these death taxes?” To which my answer is simple: “Just live forever or spend it all before you die.”

All humour aside, it is important for all Wills and Estates practitioners to understand the basic tax implications of death in order to deliver competent counsel when drafting Wills and Enduring Powers of Attorney for clients. This is even more the case when family law considerations come into play. It is crucial to understand your client’s particular and unique family dynamics. This aids all practitioners in drafting comprehensive estate documents that meets their client’s wishes and desires (estate planning) and also addresses common tax considerations (potential traps) that can unintentionally or invariably arise on the client’s death or incapacity.¹

PART ONE: AN OVERVIEW OF TAXES ON DEATH AND INCAPACITY

Canadian Income Tax on Death²

There are several basic tax considerations that Wills and Estates practitioners should be aware of that arise on death. When an individual dies, all of their ordinary income received in the year and prior to death, for example, their employment income, dividends and other investment income, is taxed in their hands.³ This income is included on the deceased’s final personal income tax return.

¹ The author notes that a detailed review of all tax issues and planning associated with death is well beyond the scope of this paper and presentation. The author has chosen to highlight a select few issues that may present and that legal practitioners should consider when addressing family relationships and drafting Wills and Enduring Powers of Attorney (herein, an “EPA”).

² All references throughout this paper to legislation is to the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) as amended (herein, “ITA”), unless otherwise noted. All references herein to the Canada Revenue Agency shall be to the “CRA”.

³All references herein to the deceased individual shall be to the “deceased”. See s. 70(1) for the taxation of such income to the deceased.