Beautiful BC (except when you die): Estate Planning Solutions for Albertans with Assets in BC

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For many Albertans, the dream of owning property or retiring in BC is part of their life plan. No more shoveling. No more scraping ice. However, for estate planning purposes, the two provinces are surprisingly different. Albertans need to know about these differences, and, where possible, do some planning to reduce the costs and uncertainty- both financial and emotional- of their estate plan.

How are Alberta and BC Different?

There are 2 fundamental ways that Alberta and BC are different for estate planning purposes: probate fees and who can vary a will (dependants' relief).

Probate: In Alberta the maximum probate fee payable to the Alberta government is $525. In BC, it is roughly 1.4% of the value of the estate, with no upper limit ($0 on the first $25,000; $6 per $1000 on the next $25,000; and $14 on anything more than $50,000). For example, a $2 Million estate in Alberta will have a probate fee of $525. In BC, the fee will be $27,450. Given the real estate values in BC, it is easy to imagine very high probate fees, possibly without easily accessible cash to pay the fees.

Wills Variation: In both provinces, we can mostly leave our property to whomever we want in our wills, EXCEPT that we must adequately provide for our dependants. In Alberta, dependants are defined as our spouse or common law partner of 3 years or more (Adult Interdependent Partner), our minor children, and our adult, disabled children (and our grandchildren if we are raising them). In BC, dependants are defined as spouse or common law partner of 2 years or more, and our children, regardless of age or ability.

There is a fundamental philosophical difference between the two provinces on our moral obligations to our family: in Alberta, once the will maker's children are 18 and able, the legal and moral obligation ends. In BC, the will maker's obligation to justly and adequately provide for his children lasts the children's entire lifetime. This has resulted in considerable litigation by adult children in BC. It is particularly problematic where there are competing claims by spouses and adult children, or among adult children and charities. The court can vary the will to provide what it thinks is "adequate, just and equitable in the circumstances" and, "like a snow flake", it is different depending on the facts of each case (as per Justice Williams in Smith v. Smith 2009 BCSC 1737 at paragraph 75).

The end result? Uncertainty, delay and possibly higher costs- financially and emotionally- after

death. Or, one could argue, greater deference to the time honoured tradition of passing wealth down through the blood lines.

Which Laws Apply to Which Assets?

Where we have property in both BC and Alberta, which property is governed by which probate procedure and fees, and which property is subject to a possible claim by an adult, independent child?

There are 3 factors to consider: what type of property is it? Where do we live permanently (our domicile)? And what types of law are we dealing with?

For estate purposes, there are essentially two types of property: land (immovables) and everything else (movables). Our domicile is where we consider our permanent home to be.

For estate purposes we must refer to at least two types of laws: administrative or procedural laws (the requirements, formatting and payment of fees for probate); and substantive laws (the right of an adult independent child to make a moral claim against a parent's estate).

For probate procedure and fees, land is governed by the laws of where it is located, regardless of where we are domiciled. So if we are domiciled in Alberta but own a condo in Kelowna, BC, our executor will need to get a grant of probate in BC, plus pay the 1.4 % of the value of the land in fees, before he can administer the land.

For wills' variation claims, land is also governed by the laws of where it is located, regardless of where we are domiciled. So, once again, if we are domiciled in Alberta but own land in BC, the BC land may be subject to a claim by one of our adult independent children. The claim would be commenced and determined in BC, according to what the BC courts deem is adequate, just and equitable in the circumstances (having regard to what the adult child received in Alberta or elsewhere, or by way of survivorship). Our executor would need to obtain a BC grant of probate, plus serve all adult children with notice of their potential claim, then wait at least 210 days before making any distribution. Those adult children will have 180 days from the grant of probate to commence their claim in BC, and 30 days after that to serve the claim on the executor.

For all property other than land, we look to where we are domiciled to determine probate procedure and fees, plus potential for a wills variation claim. So if we are domiciled in Alberta but own shares in a private BC corporation, or have other non-land investments in BC, Alberta law will govern all our property for both probate and wills variation matters. On the other hand, if we own shares in a private Alberta company then retire in BC, the value of those Alberta shares will form part of our estate for BC probate fees and claims by adult independent children.

So What can we do to Reduce Costs and Increase Certainty?

There are 3 main tools we can use to eliminate (or reduce) BC probate fees and reduce the risks and cost- both financial and emotional- of a claim by an adult independent child: create inter vivos trusts, use joint ownership; and/or use multiple wills. The first two tools remove the property from the estate, and the third tool creates a ‘separate’ estate for each will.

Inter Vivos Trusts

The BC courts have consistently confirmed that planning which includes transfer of all property into an inter vivos trust is proper and appropriate estate planning, even where its primary purpose is to avoid probate fees or potential wills variation claims. If the trust is properly set up and managed, its ‘contents’ are safe. They are not estate assets.

Before we get too energetic in settling inter vivos trusts, we must be mindful of unintended tax consequences: we are changing ownership of the property, so we will be deemed to have sold it at fair market value, thus triggering any capital gains. Plus, on any BC land, we will need to pay Property Transfer Tax of 1% on the first $200,000 of value, and 2% on the remainder. (There is no such similar property transfer tax in Alberta.)

If we are 65 or older, CRA will allow us to roll our assets into most inter vivos trusts (for example, alter ego trusts and joint partner trusts) without triggering tax. If we are not yet 65, we might create the trust now (with appropriate clauses), and then when we buy the land in BC, put the land into the trust. Later, when we turn 65, we could transfer the trust property into an alter ego trust. We will have to pay the property transfer tax once, when we buy the property, no matter what, but this way we won’t have to pay it twice.

There are also a few exemptions to the Property Transfer Tax we might use. If we transfer our primary residence into the trust, we are exempt from paying the Property Transfer Tax if we transfer it to a ‘related person’ (for example, spouse, child or grandchild), as trustee. Then we can change the trustee back to ourselves. If the property is recreational property, we can transfer it to a ‘related person’ as trustee (and then back to us as next trustee) without paying the Property Transfer Tax IF the total value of the property is less than $275,000 (plus a few other requirements such as size of the lot). If the recreational property is worth more, the full fair market value of the property is subject to Property Transfer Tax.

Joint Ownership

In BC and Alberta, jointly owned property passes outside the estate to the survivor. So in either province we can avoid probate by holding the property jointly with someone else (and completing the requisite declarations and/ or deeds so our intentions are clear). But this type of ownership introduces a whole other set of potential problems that must be weighed against the benefits. Firstly, we lose control of our property. If we want to sell it, we need the other’s consent. Secondly, the property may become vulnerable to claims against the joint holder (for example, creditor or

matrimonial claims). Thirdly, it may not flow to the beneficiaries as we would like (say, if A and B own it jointly; A dies, it all goes to B; but what we really wanted was for A's part to go to her children). Or, there may be inconsistency between our will and how we hold our property.

Multiple Wills

We might consider having more than one will. Each will deals with certain, defined property. Alberta property might be governed by an Alberta will; BC property by a BC will. We must name different executors in each will, since the executor must swear an affidavit listing the assets and liabilities within his administration. This might work well for land, but not necessarily for other property. Other property is governed by the law of the domicile where we lived at date of death, for both probate fees and dependants' relief. So if we retire to BC, we need to be very sure that the 'other property' is very clearly defined in our Alberta will, and excluded in our BC will. This can be challenging as our property changes or our capacity to change our will deteriorates.

In Ontario, multiple wills have been very popular since 1998, when their courts explicitly sanctioned the technique as a proper and suitable estate planning tool to avoid probate and dependants' relief claims. In BC, the wording under the new Wills, Estates and Succession Act (WESA, 2014) has been updated to open the door explicitly to multiple wills planning, but it has not yet been judicially tested.

In the end there are costs and benefits of each estate planning tool. However, if we consider some of the options early in the process (maybe even before we buy the BC land?) we might be able to save some money and reduce uncertainty down the road. If we already own the BC property, we can still do some very worthwhile planning to preserve the estate and to reduce costs, delay and uncertainty. Inter vivos trusts are particularly flexible and useful, and are a very popular choice in BC.

Conclusion

The Japanese aesthetic, wabi-sabi may apply to the imperfect beauty of the allure of BC. With awareness and planning, we can take advantage of some of the benefits of BC estate laws, while keeping financial costs and the emotional toll of uncertainty in check. Shakespeare, as always, said it well: "Better three hours too soon than a minute too late."

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