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Probate Fees and Taxes

Although common in many countries, there are currently no estate taxes or succession duties in Canada. Instead, Canadians may be liable for personal income taxes as well as probate costs on death.

Income taxes arise because there is a deemed disposition of all capital assets on death, which results in the realization of accrued capital gains on property and investments. The market value of all RRSPs and RRIFs owned at death are also included as part of income. These potential income taxes can be deferred if there is a surviving spouse who inherits the capital property, RRSP and RRIF, and takes advantage of certain tax-free rollovers.

This article discusses probate and suggests ideas on how to reduce probate costs, which vary significantly among the provinces and territories. Planning to reduce probate costs has become a very important part of the estate planning process and as a result, individuals should speak to their legal advisor about their personal situation.

What is Probate?

Probate is judicial evidence of the authority of the executors named in a Will to deal with the assets of the deceased. The legal source of the executors' authority is the Will itself and not probate. However, probate provides comfort and protection from liability to financial institutions and others that: (i) the Will is not being contested; (ii) there is no other Will in existence; and (iii) the persons with whom they are dealing are the authorized executors.

Where there is no Will, or where there is a Will but there is no named executor who is alive, competent and willing to act, then no one has authority to act on behalf of the estate. In these circumstances, the court appoints a person to administer the estate and issues Letters of Administration (in Ontario, a *Certificate of Appointment of Estate Trustee with or without a Will*) in a procedure similar to the issuance of Letters Probate.

When Probate is Required

The necessity for probate is generally determined by the nature of the assets held by the deceased, statutory requirements for the sale or transfer of certain assets and the state of the deceased's financial affairs. For instance, financial institutions holding assets in the name of the deceased will generally require probate before transferring ownership of those assets to the executors and ultimately to the beneficiaries of the estate. Probate may also be necessary in order for the executors to deal with land located in particular jurisdictions and fees may be payable under the laws of the jurisdiction where the land is located. Probate may also be required where the executors are suing third parties on behalf of the estate.

The Cost of Probate

In most provinces, the cost of probate (referred to as probate fees or probate tax depending on the province) is determined by the value of the estate to be distributed under the Will. Even if only one asset of the estate requires probate, then the value of the entire estate must be set out to determine the amount of probate tax payable.

In Quebec, the cost of probate is not dependant on the value of the estate; however, in certain circumstances there is a small administration fee charged. In other provinces, there may be a maximum fee that is charged regardless of the size of the estate.

In Ontario, the calculation of the value of an estate for probate tax (i.e., estate administration tax) purposes is determined on the gross value of all of the personal property of the deceased, wherever located, and of all real property located in Ontario. There is no deduction for personal debt, other than for mortgages on personally held real estate

Applicable probate tax rates or fees for all provinces are set out on the final page.

Planning to Reduce Probate Taxes

Careful probate fee planning may reduce the value of the probateable estate by ensuring that some assets pass outside the Will. However, probate fee planning should be carried out in a manner that does not disrupt the intended scheme of distribution of a person's assets. For example, if certain assets pass directly to named beneficiaries, is the distribution of assets set out in the Will still appropriate? Consideration should also be given to income tax consequences and related planning opportunities which may be inconsistent with probate fee planning.

Life Insurance Policies

In general, a life insurance policy that is payable to a named beneficiary does not form part of a deceased's estate for probate tax purposes. The designation of a beneficiary of a life insurance policy can also generally be made by Will, provided it is clear the life insurance policy (and its proceeds) do not form part of the estate. A further advantage of a life insurance policy is that the proceeds are usually available for payment shortly after death and, if the policy has a designated beneficiary, are not subject to claims by the creditors of the deceased.

RRSPs and RRIFs

In general, an owner of an RRSP or RRIF can designate a beneficiary either by Will or in the plan itself. Where there is a beneficiary designation in the plan, the plan administrator can usually pay out proceeds directly to the designated beneficiary of the plan. In these circumstances, the plan assets do not form part of the value of the estate for probate purposes. If a beneficiary designation is made in the Will, the assets in the plan may or may not be subject to probate, depending on the manner in which the designation is drafted and the province or territory in which the deceased resided.

Gifts of Assets

Gifts of cash or other assets to family members prior to death may be an option to consider in some circumstances. Since a gift is considered a disposition at fair market value, adverse income tax consequences may arise for the person making the gift when the gifted asset has appreciated in value. Another tax consequence which can arise when a gift is made to a spouse or a related minor child is the attribution of income earned on the gifted asset back to the donor.

Joint Ownership of Assets

Property held in joint ownership (not as tenants in common) with another person will pass to the surviving joint owner by operation of law and not pursuant to the terms of the deceased person's Will. The jointly held asset will not form part of deceased's estate and will not be subject to probate tax.

However, transferring assets from sole ownership into joint ownership will not exclude the assets from the estate unless there is a clear gift of the interest in the property to the co-owner. This may be evidenced by, among other things, a deemed disposition at fair market value and a sharing of the tax reporting by all joint owners.

Spouses will often hold assets jointly so that all property passes to the survivor on the first death with no requirement to obtain probate and to pay probate fees. Since passing assets between spouses occurs on a tax-deferred basis, this can be an effective way to hold assets for a couple although there may be other considerations (see our article *Joint Ownership of Property: Pros & Cons* for more information).

However, adverse tax consequences may arise for individuals who decide to hold their own accounts jointly with other family members, including the deemed disposition that arises at the time of transfer and on the death of a joint owner. Consideration must also be given to potential family problems which may develop from the loss of control over assets transferred into joint ownership. For example, misuse of funds or the marital problems of a child co-owner may give rise to creditor claims against the assets transferred into joint ownership.

Transfer Assets to a Trust

Another way for an individual to reduce the value of his or her estate that is subject to probate is to transfer assets to an *inter vivos* trust (i.e., a trust created during lifetime) prior to his or her death. The general rule is that there is a deemed disposition at fair market value of all assets transferred to such a trust unless the transfer is to a trust for the benefit of the individual's spouse or to a trust

where the individual is the beneficiary during his or her lifetime and other beneficiaries are named to take the trust assets upon the individual's death. These exceptions can be utilized by the use of an *alter-ego* trust or a *joint partner* trust, both of which are available to individuals aged 65 or older, and both of which allow a tax-deferred transfer of property to the trust. Only the individual, or in the case of a joint partner trust, the individual and a spouse can be beneficiaries of such a trust during their lifetimes.

An inter vivos trust pays tax at the top marginal rate for individuals and is subject to the same income attribution rules as a gift of assets when any of the trust income or capital gains are paid or made payable to a beneficiary who is a spouse or minor child. A disadvantage of this type of trust is that it does not become a testamentary trust after the death of the individual who transfers property to it and therefore does not have the advantage of the marginal tax rates applicable to testamentary trusts.

Transferring Debt To a Corporation

In general, other than mortgages on personally held real estate, personal debts are not deductible in determining the value of a probateable estate. Where money has been borrowed to purchase investments, there may be a considerable advantage to transferring those investments and the related debt to a corporation. At death, the assets which would pass through the estate would be the shares of the company and the debts of the corporation would be taken into account in valuing those shares for probate purposes.

Multiple Wills - Assets in Same Jurisdiction

An innovative planning technique to reduce probate costs is the use of multiple Wills to deal with assets in a single jurisdiction. It involves drafting a separate Will to dispose of specific assets for which probate is not normally required and a general Will to deal with all other assets. The general Will specifically excludes the assets referred to in the separate Will. The intended result is that, at death, probate taxes would only be paid on the assets administered through the general Will.

If an individual holds assets in multiple jurisdictions, he or she may wish to execute multiple Wills, each governing the assets situate in a different jurisdiction. This multiple Will technique may result in overall probate tax savings depending on the jurisdictions in question. However, professional advice should be sought before pursuing such a course of action.

Trusts in a Will

If an individual leaves assets outright to a spouse in his or her Will, probate taxes will be payable on the death of the individual and may be payable again on the same assets on the death of the spouse. To avoid a second probate on the same assets on the death of the surviving spouse, the assets can be left to a *spousal trust* established under the individual's Will. The terms of the trust would provide that all of the income of the trust (and capital of the trust at the discretion of the trustees) would be payable to the spouse. On the spouse's death, the trust would be able to transfer the remaining capital to the ultimate beneficiaries without requiring a second probate.

Summary

There are a number of ways in which probate fees or taxes can be reduced or even eliminated. It is important, however, to balance the benefits of this type of planning with the potential side effects, complexity and costs which may be involved.

This publication is not intended to be a comprehensive review of all tax and estate laws. Readers should seek professional legal advice to determine how their estate planning goals can best be met within the rules of their province or territory of residence.

Your BMO Nesbitt Burns Investment Advisor can help introduce you to a tax professional.

Probate Taxes and Fees in Canada*		
Province	**Rates**	**Fee on Assets of $1,000,000**
British Columbia	No fee up to $10,000; $208 for estates between $10,000 to $25,000; $208 + $6 per thousand for estates between $25,001 and $50,000; $14 per thousand thereafter (no maximum).	$13,658
Alberta	$25 for estates up to $10,000; $100 for estates between $10,001 and $25,000; $200 for estates between $25,001 and $125,000; $300 for estates between $125,001 and $250,000; $400 for estates over $250,000.	$400
Saskatchewan	$7 per thousand (no maximum).	$7,000
Manitoba	$70 for the first $10,000 or less $70 for the first $10,000 $7 per $1,000 thereafter (no maximum).	$7,000
Ontario	$5 per $1,000 up to $50,000; $15 per $1,000 thereafter (no maximum).	$14,500
Quebec	Notarial Wills - No fee. If the applicant is an individual, a flat fee of $93 for English form Wills. If the applicant is a corporation or institution, a flat fee of $104. The value of the estate has no bearing on the fee.	$93/$104 Flat Fee
New Brunswick	$25 for estates up to $5,000; $50 for estates between $5,001 to $10,000; $75 for estates between $10,001 to $15,000; $100 for estates between $15,001 and $20,000; $5 per thousand thereafter (no maximum).	$5,000
Nova Scotia	$74.76 for estates not exceeding $10,000; $187.97 for estates between $10,001 and $25,000; $312.92 for estates between $25,001 and $50,000; $875.76 for estates between $50,001 and $100,000; $875.76 + $14.79 per thousand thereafter (no maximum).	$14,186
Prince Edward	$50 for first $10,000; $100 for estates between $10,001 and $25,000; $200 for estates between $25,001 and $50,000; $400 for estates between $50,001 and $100,000; $400 + $4 per thousand thereafter (no maximum); plus $15 for Royal Gazette fee (applies to all estates).	$4,015
Newfoundland	$60 for estates not exceeding $1,000; $60 + $0.50 for each additional $100 above $1,000	$5,060
Yukon	No fee on estates less than $25,000; $0.50 for each additional $100 above $1,000	$140
Northwest Territories and Nunavut	$25 for estates up to $10,000; $100 for estates between $10,001 and $25,000; $200 for estates between $25,001 and $125,000; $300 for estates between $125,001 and $250,000; $400 for estates over $250,000	$400

* Current as of February 2010.

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