Probate Planning

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While there are no death or estate taxes in Canada, provincial probate fees (also referred to as probate taxes) may be imposed on the value of parts of a deceased's estate assets. This article explains the process, advantages, and costs of probate, and provides strategies to minimize probate taxes with probate-planning strategies.

Probate – the process

Probate is a court proceeding which results in judicial approval of the authority of the executors named in a Will to deal with the assets of a deceased individual. This approval is done by granting **Letters Probate** or a **Certificate of Appointment of Estate Trustee with a Will**, depending on the province. Although the legal source of an executor's authority is the Will itself, probate provides comfort and protection from liability to third parties, such as financial institutions and land-registry offices.

Probate confirms that:

1. The Will is not being contested;
2. There is no other Will in existence; and
3. The executor's authority to act has been recognized by the court.

Regardless of whether there is no Will, or if there is a Will without a named executor who is able and willing to act, no individual has the 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 proceeding similar to the issuance of "Letters Probate."

Advantages of obtaining probate

The requirement for a probate is generally determined by the nature of the assets held by the deceased, at the date of death. Reasons for obtaining a probate include:

1. **Receiving proof of the executor's authority for third parties**
   This is crucial because the executor's duties include dealing with the assets of the deceased person. Third parties may require a probate to ensure they are dealing with the authorized executor and to protect them from claims that funds were paid to the wrong party. Third parties include financial institutions, the Canada Revenue Agency ("CRA"), Land Registry offices, other government agencies and transfer agents.
2. **Experiencing ease when the estate includes a land transfer**
   Although there are some exceptions to this rule, land registry offices generally require probate in order to change the name(s) registered on the title to the land. Probate fees may be payable under the laws of the jurisdiction where the land is located.
3. **Granting time limits on claims against the estate**
   Certain claims allowed against an estate, (such as claims for dependents' relief or family law claims) may have time limits, and depending on the jurisdiction, the limitation period may be measured against the date that probate was granted. Without the grant date, the time-period for such claims may never expire.
4. **Estate litigation**
   Probate would be required if the estate is involved in a lawsuit.

The cost of probate

While the cost of probate is technically a tax, for the purposes of this article the term "probate fees" will be used. The amount of the fees is determined by each province. In some provinces probate fees are a fixed amount regardless of the size of the estate. In other provinces, they are a prescribed rate applied to the gross value of the estate to be distributed under the Will (as declared in the "Application for Letters Probate"), or both.

In the province of Quebec, although payment of probate fees is not necessarily required, if the Will is not received and signed in front of a notary, a verification of the Will from the court is necessary, and may have a cost.

Where a prescribed rate is used and only one asset of the estate requires a probate, the prescribed rate is applied to all assets in the declared estate. This would be the case for the provinces of British Columbia, Saskatchewan, Ontario, and

Nova Scotia. For example, in Saskatchewan, probate fees are comprised of 0.7% of the gross value of all personally owned property, wherever located in the world; and 0.7% of the value of personally owned real estate in Saskatchewan (less the amount of a mortgage, if any).

Provincial Probate Fees (For Estates Over $50,000)[1]	
Alberta	$275 to $525
British Columbia	$150 + 1.4% of portion >$50,000
Manitoba	Nil
New Brunswick	$100 + 0.5% of portion >$20,000
Newfoundland & Labrador	$60 + 0.6% of portion >$1,000
NWT	$215 to $435
Nova Scotia	$1,003 + 1.695% of portion >$100,000
Nunavut	$200 to $400
Ontario	1.5% of portion >$50,000
PEI	$400 + 0.4% of portion >$100,000
Quebec	Nominal fee[2]
Saskatchewan	0.7% of estate
Yukon	$140

Reducing probate tax

In provinces with higher prescribed rate probate fees such as British Columbia, Ontario, and Nova Scotia, careful probate planning may be used to reduce the value of the estate subject to probate fees by ensuring that some assets pass outside the Will. However, probate planning should be carried out in a manner that does not disrupt the intended distribution of a person's assets. Consideration should also be given to income tax consequences and related planning opportunities which may be inconsistent with probate planning. Assets which pass directly to named beneficiaries (such as funds in registered plans or death benefits under life insurance policies), do not form part of the estate and are not subject to probate fees (see **Probate planning strategies** section for more details).

Unless a contrary intention is expressed in the Will, the income tax liability associated with registered plans, which are paid to designated beneficiaries directly, is to be paid by the estate. This requires liquidity in the estate to avoid incurring interest charges imposed by the CRA for late income tax payments.

Probate planning strategies

Gifts of assets

Gifting cash or other assets to family members prior to death may be an option to consider in some circumstances, in order to avoid the potential probate fees on the value of those assets at death. Note, depending on the nature of the assets, since a gift is considered a disposition at fair market value, adverse income tax consequences may arise. Another income tax consequence can arise when a gift is made to a spouse/common-law partner or a related child who is a minor, and the attribution of income earned on the gifted asset. The attribution rules transfer the taxation of investment income (and capital gains in the case of a gift to a spouse/common-law partner) back to the person who made the gift, regardless of whose name is on the investment.

Joint ownership of assets

Property held in Joint Tenancy With Right Of Survivorship ("JTWROS") with another person may pass to the surviving joint tenant by operation of law. The deceased person's Will may not govern the succession of this property because it may not comprise part of the deceased's estate. As a result, the jointly held asset may not be subject to probate fees. Transferring assets from sole ownership into JTWROS with anyone other than a spouse/common-law partner, will not exclude the assets from the estate unless there is a clear intention to transfer the beneficial interest in the asset by way of a written declaration of such an intention. Note that the transfer to JTWROS of capital assets (with someone other than a spouse/common-law partner) may be a deemed disposition at fair market value, triggering capital gains tax payable and a sharing of subsequent annual tax reporting, by all joint tenants. Such a transfer to a spouse/common-law partner or related minors may trigger attribution rules with respect of gifting, as previously discussed.

Spouses/common-law partners often hold assets jointly so that property passes to the survivor on the first death with no requirement to obtain probate. Since passing assets between spouses/common-law partners occurs on a tax-deferred basis, this can be an effective way for a couple to hold assets. However, there are other considerations, some tax related and some non-tax related, which, in many circumstances, would render the ownership structure of JTWROS for probate planning purposes, too risky, with potential adverse consequences. For example, where individuals hold accounts jointly with family members other than spouses/common-law partners, the initial transfer of beneficial interest triggering capital gains tax (if any), would cause the tax to be payable in the taxation year of the transfer, without a deferral of that tax as discussed above.

In addition, absent the attribution rules, each joint tenant must include taxable income in their annual income tax return with respect to their share of the jointly held property, subsequent to the transfer of beneficial interest in the property.

Some of the non-tax related complications include:

1. Exposure of the property to creditors of all the joint tenants;
2. Loss of control of the property transferred to JTWROS; and
3. Potential misuse of the property by any of the joint tenants

When more than two individuals hold a property in JTWROS, the last surviving tenant, or their heirs or beneficiaries, will obtain full ownership of the property. All previously deceased joint tenants' heirs or beneficiaries will be excluded.

Transfer assets to Inter-vivos Trusts

Another way to reduce the value of your estate that is subject to probate fees, is to transfer assets to an Inter-vivos Trust (a trust created during your lifetime). The general rule is that there is a deemed disposition at fair market value of all assets transferred to such a trust (such as a Discretionary Family Trust for the benefit of your children and grandchildren). If you are 65 years or older, a transfer of property to a trust for the benefit of you and/or your spouse/common-law partner can occur on a tax-deferred basis, until the second death.

It is important to note that an Inter-vivos Trust pays tax at the highest rate. Income distributions to a spouse/common-law partner or minor beneficiaries may be subject to attribution rules, depending on the circumstances.

Life insurance policies

In general, a life insurance policy that is payable to a named beneficiary does not form part of a deceased estate for probate fee purposes. The designation of a beneficiary of a life insurance policy can be made by Will, provided it is clearly outlined that the life insurance policy (and its proceeds) do not form part of the estate.

Further advantages of a life insurance policy as part of the overall probate planning 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 creditors of the deceased.

Registered plans

In general, an owner of an RRSP, RRIF or TFSA can designate a beneficiary either in a Will or in the plan itself. In Quebec, a beneficiary designation for registered accounts is not made on the plan document but through the Will. 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 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 fees, depending on the manner that the designation is drafted and the province or territory in which the deceased resided.

Testamentary trusts (created in a Will)

If an individual leaves their assets directly to a beneficiary in their Will, probate fees will be payable at the time of the individual's death. The fees may be payable again on the same assets when the beneficiary dies, provided they were still owning the same assets. To avoid paying probate fees twice on the same assets, the assets can be left in a trust – called a Testamentary Trust – established under the individual's Will. As a result, no probate fees will be charged upon the death of the second beneficiary.

Use of multiple Wills

Another planning strategy to reduce probate fees is the use of multiple Wills to administer assets located in a single jurisdiction. In addition to the primary or public Will, a secondary or private Will is drafted to dispose of specific assets for which probate is not normally required (i.e., private company shares, partnership interests, copyrights, an interest in another estate or trust, personal held promissory notes and loans and personal effects). The primary Will addresses all the assets not addressed in the secondary Will and contains wording that specifically excludes the assets referred to in the secondary Will. This strategy is primarily used in Ontario, British Columbia, and New Brunswick, and may be available in other provinces.

The intended result is, at death, probate fees will only be paid on the assets administered through the primary Will. An additional advantage to multiple Wills is maintaining the document's privacy. Since the secondary Will is not submitted to court for probate, it is not in the public domain.

The drafting of multiple Wills is complicated particularly when claims against an estate may be expected. The limitation period for claims against an estate may be measured against the date that probate was granted and may never expire in respect to the assets disposed of in the secondary Will.

If a multiple Will strategy is used in British Columbia, different executors must be named for the primary and secondary Wills. The cost of probate fees should be weighed against the cost of an executor's compensation (which can be upwards of 5% in British Columbia). For example, a spouse/common-law partner

who is the sole executor and beneficiary of an estate, rarely charges compensation. If a separate executor is appointed for the secondary Will and will be paid an executor's compensation, it may be less costly for the spouse/common-law partner to administer the entire estate.

If an individual holds assets in multiple jurisdictions, they may wish to execute multiple Wills (also known as limited Wills), each governing the assets situated in each jurisdiction. This multiple Will technique may result in savings of the overall probate fee depending on the jurisdictions in question. Extra care should be taken to ensure the formal validities are consistent from province to province. For instance, although digital Wills are now recognized in British Columbia, they may not be recognized in all other provinces.

Professional advice should be sought before pursuing any one of the multiple Will strategies.

Seek advice

Probate fees are not always the most important factor in the overall succession plan. While there are various ways in which probate fees can be reduced or even eliminated, it is important to balance the benefits of this type of planning with the potential undesired consequences, complexity and costs which may be involved (noting any potential income tax implications). For example, the more an estate is depleted (for probate planning purposes) the less assets are available to fund testamentary trusts created in the Will. Such depletion of the estate may lead to loss of the beneficiaries' ability to income split, and perhaps more importantly, loss of asset protection.

This publication is not intended to be a comprehensive review of all tax and estate laws. You should seek professional legal advice to determine how you can meet your estate-planning goals within the rules of your province or territory of residence.

For more information, please speak with your BMO financial professional.

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[1] For some provinces and territories, different rates may apply to smaller estates (less than $50,000).

[2] Although Quebec does not levy probate fees, Wills (other than notarial Wills) must be authenticated by a verification procedure by the Superior Court of Quebec. A nominal fee applies.

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