Probate planning

In some countries, including the United States, a death (or estate) tax is imposed on an individual's assets and is calculated at the date of death. There is no death tax in Canada.* However, probate tax (or fees) is imposed on the value of parts of a deceased's estate assets. Probate tax is determined provincially.

Probate – the process

Probate is a court proceeding which results in judicial approval (by granting Letters Probate, Certificate of Appointment of Estate Trustee in a Will, depending on the province) of the authority of the executors named in a Will, to deal with the assets of a deceased individual. 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: (i) the Will is not being contested; (ii) there is no other Will in existence; and (iii) the executor's authority to act has been recognized by the court.

Where there is no Will, or where there is a Will but there is no named executor who is able 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 proceeding similar to the issuance of Letters Probate.

Advantages of obtaining probate

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

Proof of executor's authority to third parties
This is crucial, because the executor's duties include dealing with the assets of the deceased person. Third parties may require probate to ensure that they are dealing with the authorized executor, as protection from claims that funds were paid out to the wrong party. Third parties include financial institutions, the Canada Revenue Agency (the CRA), other government agencies, land registry offices, and transfer agents.

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 name(s) registered on title. Probate tax or fees may be payable under the laws of the jurisdiction where the land is located.

Creation of time limits on claims against the estate
Certain claims allowed against an estate (such as claims for dependants' relief or family law claims) may be time-limited 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.

Estate Litigation
Probate would be required if the estate is involved in a lawsuit.

The cost of probate

The cost of probate is technically a tax, or a fee (for purposes of this article the term probate tax will be used), the amount of which is determined by each province. In some provinces probate tax is a fixed amount, while in others it is a prescribed rate applied to the gross value of the world wide estate to be distributed under the Will (as declared on the Application for probate), or both. In some provinces, a flat fee is charged regardless of the size of the estate. In Quebec, the cost of probate is not dependent on the value of the estate; however, in certain circumstances there is a small administration fee charged. Where a prescribed rate is used, for example in Nova Scotia, Ontario and British Columbia, and even if only one asset of the estate requires probate, the prescribed rate is applied to all the assets in the declared estate (except land located outside that province). For example, in British Columbia, probate tax is comprised of approximately 1.4% of the gross value of all property which is personally owned,

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wherever located in the world and, 1.4% of the value of real estate located in B.C. which is owned personally (less the amount of a mortgage, if any). See Table A for provincial probate tax rates.

Reducing probate tax

In Nova Scotia, British Columbia and Ontario, careful probate planning can reduce the value of the probateable estate 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 tax planning. Note that assets which pass directly to named beneficiaries, for example funds in registered plans or proceeds of death under life insurance policies do not form part of the estate and are not subject to probate tax. (see further discussion below). However, unless a contrary intervention is expressed in the Will, the tax associated with registered plans which are paid to designated beneficiaries directly, is to be paid by the estate. This requires liquidity in the estate.

Some probate planning strategies are:

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 tax on the value of those assets at death. Note however that, 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 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 and tax occurring, to the donor.

Joint ownership of assets

Property held in joint tenancy with right of survivorship ("JTWROS") with another person will pass to the surviving joint tenant by operation of law. The deceased person's Will will not govern the succession of this property because it will not comprise part of the deceased's estate. As a result, the jointly held asset will not be subject to probate tax. However, transferring assets from sole ownership into JTWROS with anyone other than a spouse, 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) is a deemed disposition at fair market value, triggering capital gain tax payable and a sharing of subsequent annual tax reporting by all joint tenants. Note also that such a transfer to a spouse or related minors may trigger attribution rules, as previously discussed with respect to gifting.

Spouses 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 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, 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, and absent the attribution rules, each joint tenant must include taxable income in his or her annual income tax return with respect to his or her share of the jointly held property, subsequent to the transfer of beneficial interest in the property. Some of the non-tax related complications include exposure of the property to creditors of all the joint tenants, loss of control of the property transferred to JTWROS, and, potentially, misuse of the property by any of the joint tenants. Perhaps the most negative consequence of holding property in JTWROS among more than two individuals is that only the last surviving tenant or his or her heirs or beneficiaries, will take all.

All previously deceased joint tenants' heirs or beneficiaries will have been excluded, disinherited, with respect to the property.

Transfer assets to inter-vivos trusts

Another way to reduce the value of your estate that is subject to probate tax 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, for example, 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 can occur on a tax-deferred basis, until second death.

It is important to note that an inter-vivos trust pays tax at the top rate. Income distribution to spouse or minor beneficiaries may be subject to attribution rules, depending on circumstances.

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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 that it is clear in the drafting 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 by Will or in the plan itself. In Quebec, a beneficiary designation for registered accounts is not made on the Plan document but is made through the Will using the language "successor annuitant". 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, depending on the manner in which the designation is drafted and the province or territory in which the deceased resided.

Testamentary Trusts (created in a Will)
If an individual leaves assets outright to a beneficiary 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 when the beneficiary, if still owning the same assets, dies. To avoid paying probate tax twice on the same assets, the assets can be left in a trust established under the individual's Will. As a result, no probate tax would be charged upon the second (i.e., the beneficiary's) death.

Ontario-specific strategies and issues

Use of multiple wills – assets in same jurisdiction (applicable in Ontario only)
In Ontario, another planning technique to reduce probate costs is the use of Multiple Wills to deal with assets located in a single jurisdiction. It involves drafting a Secondary, or Private Will, to dispose of specific assets for which probate is not normally required (namely, assets held in a trust, shares of a privately held corporation, and Personal Effects), and a Primary, or Public Will, to deal with all other assets. The Primary Will specifically excludes the assets referred to in the Secondary Will. The intended result is that, at death, probate taxes would only be paid on the assets administered through the Primary Will. An additional advantage to Multiple Wills is privacy. Since the Secondary Will is not submitted to court for probate, it is not in the public domain.

If an individual holds assets in multiple jurisdictions, he or she 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 overall probate tax savings depending on the jurisdictions in question. Use of the Multiple Will strategy is not available in other provinces with the exception of British Columbia where it is available only in very limited circumstances. The drafting of Multiple Wills is complicated. Professional advice should be sought before pursuing any one of the Multiple Wills strategies.

Legislative changes in Ontario potentially affecting probate tax
In Ontario, based on new Legislative reform, the Minister of Revenue ("MNR") can assess the value of the deceased's estate for purposes of imposing probate tax for a period of four years after the date of the probate application to court. Due to the new laws, an executor would be required to keep detailed records of the deceased's assets and their value, perhaps including valuable Personal Effects, for probate tax purposes. It is yet unclear what practical consequences this legislative change will have in the administration of estates in Ontario, and whether or not this will impact the effectiveness of the use of Multiple Wills, in Ontario.

Conclusion

The probate tax consideration is not always the most important factor in the overall succession plan. While there are a number of ways in which probate taxes 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 the estate has been depleted (for probate planning purposes) the less opportunity there is to create testamentary trusts 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. 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.

Continued

BMO Financial Group publishes reports on a variety of investing, tax and estate planning topics. Readers of this article may also be interested in Joint Ownership of Property: Pros & Cons

For more information, speak with your BMO financial professional.

Table A

Estimated Probate Taxes and Fees in Canada[1]

Province	Rates	Estimated probate tax (or fee) charged on assets of $1,000,000
British Columbia	No fee up to $10,000	$13,658
	$208 for estates between $10,000 to $25,000	
	$208 + $6 per thousand for estates between $25,001 and $50,000	
	In excess of $50,000 1.4%	
Alberta	$25 for estates up to $10,000	$400
	$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	
	In excess of $250,000 $400 flat fee	
Saskatchewan	0.7%	$7,000
Manitoba	$70 for the first $10,000 or less	$7,000
	In excess of $10,000 0.7%	
Ontario	$5 per $1,000 up to $50,000	$14,500
	In excess of $50,000 1.5%	
Quebec	Notarial Wills – No fee	$93/$104 Flat Fee
	If the applicant is an individual, a flat fee of $93 for an English form Will	
	If the applicant is a corporation or institution, a flat fee of $104.	
	The value of the estate has no bearing on the fee.	
New Brunswick	$25 for estates up to $5,000	$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	
	In excess of $20,000 0.5%	

Estimated Probate Taxes and Fees in Canada[1]

Province	Rates	Estimated probate tax (or fee) charged on assets of $1,000,000
Nova Scotia	$78.54 for estates not exceeding $10,000	$15,770
	$197.48 for estates between $10,001 and $25,000	
	$328.65 for estates between $25,001 and $50,000	
	$920.07 for estates between $50,001 and $100,000	
	$920.07 + 1.65% of amount in excess of $100,000	
Prince Edward Island	$50 for first $10,000	$4,015
	$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 + 0.4% of amount in excess of $100,000	
	plus $15 for Royal Gazette fee (applies to all estates)	
Newfoundland	$60 for estates not exceeding $1,000	$5,055
	$60 + 0.5% of amount in excess of $1,000	
Yukon	No fee on estates less than $25,000	$140
	In excess of $25,000 $140 flat fee	
Northwest Territories and Nunavut	$25 for estates up to $10,000	$400
	$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	
	In excess of $250,000 $400 flat fee	

[1] As of March 12, 2014.

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