

PROBATE FEES AND TAXES

In Canada, there is currently no estate tax or succession duty as is common in many countries. Instead, Canadians may have personal income taxes as well as probate costs to pay on death. Income taxes arise because there is a deemed disposition of all assets on death resulting in the realization of accrued capital gains on property and investments. The market value of all RRSPs or RRIFs owned at the time of death is also included in income. This income tax can be deferred if there is a surviving spouse who inherits the property and takes advantage of certain tax-free rollovers.

This article discusses probate and ideas on how to reduce probate costs. Probate costs vary significantly among the provinces and territories and planning to reduce probate costs has become a very important part of an estate plan. 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 source of the authority is the Will itself and not probate. Probate provides comfort and protection from liability to financial institutions and others that there is not another Will in existence, that the Will is not being contested and that they are dealing with the authorized executors.

Where there is no Will, or where there is no executor named, alive or competent and willing to act, then no one has authority to act. 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 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. Also, probate may be necessary in order for the executors to deal with land located in any jurisdiction and fees may be payable under the laws of the province where the land is located. Probate is also required where the executors are suing third parties.

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. In Quebec, there is no probate; however, 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. The calculation of the value of an estate for probate 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 the province of residence. There is no deduction for personal debt, other than for mortgages on personally held real estate. If one asset of the estate requires probate, the value of the entire estate must be set out to determine the amount of probate tax. The applicable provincial probate tax rates or fees are set out on the back page.

Planning to Reduce Probate Taxes

Probate fee planning must be carried out in a manner that does not disrupt the scheme of distribution of a person’s assets. Consideration must be given to the income tax consequences and other planning opportunities which may be inconsistent with probate fee planning. For example, if certain assets pass



directly to named beneficiaries, is the distribution in the will still appropriate? Careful planning, however, may reduce the probateable estate by ensuring that some assets pass outside the Will.

Life Insurance Policies

A life insurance policy that is payable to a named beneficiary does not form part of the estate. A designation of a beneficiary can also be made by Will provided it is clear the policy is not part of the estate. A further advantage of life insurance is that it is usually available for payment shortly after death and, if it has a designated beneficiary, it is not subject to claims by the creditors of the deceased.

RRSPs and RRIFs

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 will be subject to probate.

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, it may give rise to adverse income tax consequences to the person making the gift where a gifted asset has accrued appreciation. The recipient of the gift receives it at the fair market value on the date of the gift. Another tax consequence which can arise on a gift to a spouse or a related minor child is the attribution of income earned on the gifted assets back to the donor.

Joint Ownership of Assets

Property held in joint ownership (not tenants in common) with another person will pass to the surviving joint owner by operation of law and outside of the Will. The jointly held asset does not form part of the estate and is not subject to probate tax. 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

is evidenced by a deemed disposition at fair market value and a sharing of the tax reporting by all joint owners except for a spouse. Spouses will often hold assets jointly so all property passes to the survivor on the first death with no requirement to obtain probate and paying 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. Adverse tax consequences may arise in making an account joint with other family members. 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.

Transfer Assets to a Trust

Another way to reduce the value of an estate that would be subject to probate is to transfer assets to an inter-vivos trust (i.e. a trust created during your lifetime). The general rule is that there is a deemed disposition at fair market value of assets transferred to such a trust unless the transfer is to a trust for the benefit of a spouse or to a trust of which you are the beneficiary during your lifetime and your family members become beneficiaries upon your death. This can be accomplished by using an “alter-ego” trust or a “joint partner” trust.

Alter-ego and joint partner trusts are available for individuals aged 65 or older and 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 lifetime.

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 gain is paid or made payable to a beneficiary that is a spouse or minor child. A

disadvantage of this type of trust is that it does not become a testamentary trust (taxed at marginal rates) after you die.

Transferring Debt To a Corporation

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 placing those investments and the related debt into a corporation. At death, the assets which pass to the estate are the shares of the company and the debts of the corporation would be taken into account in valuing those shares for probate purposes.

Separate Wills - Assets in Different Jurisdictions

If the estate is reasonably large, it may be worthwhile to transfer assets to a private company established in a low probate province such as Alberta. Separate wills could be prepared – one in Alberta dealing specifically with the shares of the Alberta holding company and another in the province of residence dealing with all other assets. If it is necessary to probate the Alberta Will, the shares of the Alberta corporation would be subject to probate in Alberta at the lower rate (i.e. at a maximum of \$400). Care must be taken, however, to ensure that the shares are not considered to be assets situated in the province of residence and that neither Will inadvertently revokes the other. In addition, it may be necessary to name an executor in Alberta in order to avoid costly bonding requirements. There may be costs associated with compensating the Alberta executor.

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.

Trusts in a Will

If assets are left outright to a spouse, probate taxes will be payable at death and may be payable again on the same assets at 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 Will. The terms of the trust would provide that all income and capital (at the discretion of the Trustee) of the trust is 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 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.

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	\$50 for the first \$10,000 \$6 per \$1,000 thereafter (no maximum).	\$5,990
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 \$89 for English form Wills. If the applicant is a corporation or institution, a flat fee of \$99. The value of the estate has no bearing on the fee.	No fee. \$89/\$99
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	\$70 for estates not exceeding \$10,000; \$176 for estates between \$10,001 and \$25,000; \$293 for estates between \$25,001 and \$50,000; \$820 for estates between \$50,001 and \$100,000; \$820 + \$13.85 per thousand thereafter (no maximum).	\$13,285
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	\$85 for estates not exceeding \$1,000; \$75 + \$5 per thousand (no maximum).	\$5,120
Yukon	No fee on estates less than \$25,000; \$140 for estates over \$25,000.	\$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 April 2004.

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