

Probate Fees: Death and Taxes

Probate Fees can be described as the convergence of life's two certainties, death and taxes. Most of us would like to avoid both of these certainties as much as possible and this is certainly true when it comes to how much we will pay in probate. However, this area of the law can be complex and it is important to know your options ahead of time. Some smart planning can decrease both the amount your loved ones will pay as well as reduce potential conflict. This article will explain what probate fees are, briefly describe some strategies to minimize them, and identify common pitfalls.

What are they?

Probate is the process in which courts certify that an individual has the right to administer the estate of a deceased person. This occurs regardless of whether a person dies with or without a will and a Certificate of Appointment is issued in either circumstance. This certificate acts as proof to third parties, such as banks, that the individual can act on behalf of the estate.

While submitting a will to probate is not strictly required by law, a certificate of appointment is needed to deal with some assets. For example, most banks will not allow funds in an account to be distributed without one.

Probate fees are levied by the provincial government on the value of the estate when it grants a certificate to appoint an estate trustee. In Ontario the fees are \$5 for each \$1000 up to \$50,000 and 1.5% thereafter. Therefore, the fee for an estate of \$1 Million would be \$14,500. Ontario's fees are the highest in Canada and some provinces, such as Quebec and Alberta, cap the amount. In Alberta the maximum fee is \$400 regardless of the size of the estate.

Clearly probate can be a costly but essential part of dealing with the assets of the deceased. There are several strategies to reduce the amount paid in probate and which are appropriate can vary depending on personal factors. Outlined below are some of the most common strategies.

Jointly Held Assets

When an asset is held in joint tenancy title passes automatically upon the death of the first joint owner. As a result the asset does not form part of the deceased owner's estate and is not subject to probate. It is important to ensure that the intentions of the testator are clear that the asset is meant to be held jointly.

A joint tenancy is not ideal for all situations, especially outside of a spousal or single child-parent relationship. The co-operation of each joint tenant is required to dispose of the asset which results in a loss of flexibility and control on the part of the original owner. In larger families this may lead to conflict over how or whether to dispose of the asset, the most obvious example being a vacation property.

Further, the jointly held asset will also be exposed to the creditors of all joint tenants. As an example, if a parent decided to place their home in joint tenancy with a child and that child got into financial difficulty, creditors could seek to enforce their debts against the home.

Finally, capital gains tax must also be paid when a real estate asset is transferred into joint tenancy with someone who is not a spouse. For example, the transfer of a cottage could give rise to immediate capital gains.

Transferring Assets to a Trust

Assets that are transferred into a trust are no longer owned by the individual and instead become property of the trust. As a result, on the death of the testator or testatrix the assets do not form part of the estate and are not subject to probate. However, trusts are also taxed and if the size of the estate is modest it may cost more to set up and administer a trust than simply paying probate. There are many options when it comes to setting up a trust and tailoring one to your specific situation is important.

Naming beneficiaries

In the case of insurance policies, RRSPs, pension plans, and other financial plans naming a beneficiary other than the estate will ensure that the proceeds pass directly to the beneficiary and will not form part of the estate. This step is perhaps the easiest way to reduce probate. A substitute beneficiary should be named to guard against the beneficiary pre-deceasing the policy-holder. Again, this works best with a spouse or parent-only child situation. In other situations potential problems can develop including separating the tax liability which is the obligation of the estate from the distribution of the asset.

Lifetime Gifts

Gifts while the person is still alive will also reduce the overall value of the estate. It goes without saying however, that doing so removes the assets from the control of the original owner. Gifts may also trigger tax liability in certain circumstances.

Your Choices

The choice of probate tax strategy is highly dependant on the circumstances of the individual. The size of the estate, the number of beneficiaries, the relationships between those beneficiaries, and many other details need careful consideration. In some cases the easiest and least costly option is to just pay the probate fees, while in others even modest steps can save thousands of dollars. Seeking legal advice and crafting a strategy that best fits your unique situation is money well spent

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