

Probate Planning



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Probate is the process by which an individual's Will is certified by a provincial court, if necessary. Where an individual holds certain assets in his or her own name, a probated Will is ordinarily required in order for the estate trustees to deal with a variety of those assets (such as bank/investment accounts and Canadian real estate). For its services, the court charges a probate fee based on a percentage of the fair market value of the individual's assets under the probated Will (~1.5% in Ontario – or roughly \$15,000 for every \$1 million of assets). To make matters worse, assets may be subject to probate fees on multiple occasions (i.e., both spouses may be subject to probate fees on the same assets).

Intuitively, it seems unfair to pay probate fees on assets that do not otherwise require a probated Will to effect their transfer (such as shares of privately-held family corporations or personal property). Thankfully, there are a number of probate planning opportunities to help reduce these fees.

One of the most common forms of probate planning is holding assets jointly with another person. The impact of holding assets jointly is that probate fees are not paid until the death of the last to die of the joint holders. While this is an effective means of avoiding probate fees on multiple occasions, this form of probate planning does not have the effect of eliminating probate fees in their entirety.

Another common, and more effective, form of probate planning is the use of "multiple Wills" – one Will that deals with those assets for which a probated Will is required (often called a "public Will") and another Will that deals with those assets for which a probated Will is not required (often called a "private Will"). When multiple Wills are used, only the fair market value of those assets that form part of the public Will are subject to probate fees. Probate fees can accordingly be avoided to the extent of the fair market value of those assets forming part of the private Will.

A more advanced type of probate planning combines multiple Wills with the transfer to a "bare trustee corporation" of legal title to (but not beneficial ownership in) certain assets that might otherwise require a probated Will upon death (such as bank/investment accounts and Canadian

real estate). Where properly implemented, the transferred assets will form part of the private Will (and not the public Will which it would have otherwise formed part of) and probate fees that may have otherwise been owing upon death will be avoided.

A number of changes to the way in which probate fees are collected were introduced at the start of 2013. It does not currently appear that these changes have impacted the use of multiple Wills or bare trustee corporation planning, but it is possible that changes may be made to these practices in the future.