

Make a Will Month:

You, too, can minimize Probate Fees or avoid them altogether



Jennifer Katz
Associate – Wills and Estates Group
Minden Gross LLP
T. 416.369.4147
jkatz@mindengross.com

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In Ontario, the administration of an estate often, but not always, requires a probated Will. Probate is the process where an estate trustee applies to the court for a Certificate of Appointment that serves as proof of authority for the estate trustee to administer the deceased's estate and confirms the validity of the deceased's last Will and Testament. The court charges a probate fee (or an estate administration tax) of approximately 1.5% of the fair market value of the assets administered under the Will (~\$15,000 for every \$1 million of assets) in exchange for granting the Certificate of Appointment. Depending on the value of the estate, this can be a sizeable fee.

Since not all assets require a probated Will to affect their transfer (see "Dual Wills" below), there are estate planning opportunities that can be implemented to minimize the probate fees payable on death or even eliminate them altogether.

Joint Ownership of Assets

A simple way to minimize probate fees is to hold assets jointly with another person. This strategy is most commonly used for and recommended between spouses. On the first spouse's death, the asset will pass automatically to the surviving spouse without the requirement to pay probate fees. Holding assets jointly serves to avoid paying probate fees on multiple occasions; however, it does not entirely eliminate the payment of probate fees since probate fees will still be payable on the last to die of the joint holders.

There are a number of potential unintended consequences to owning assets jointly, especially between parents and children, which should be explored with a Wills and Estates professional before changing the ownership of any asset.

Beneficiary Designations on Eligible Assets

Certain assets, such as life insurance policies and registered investment accounts (e.g., RRSPs, RRIFs, and TFSAs), allow the owner to designate a beneficiary of the asset. Where a beneficiary is properly designated, these assets do not form part of the deceased's estate and are therefore not subject to probate fees. Rather, the assets pass directly to the designated beneficiary. The designations can be made directly with the policy provider or financial institution, or included in the Will.

Dual Wills

Another common probate planning strategy is the use of dual (or multiple) Wills. The dual Will structure serves to segregate assets between two Wills. One is a "public" Will for those assets that require probate to affect transfer (i.e., personally-owned real estate, non-registered bank/investment accounts). The other is a "private" Will for those assets that typically do not require probate to affect transfer (i.e., private company shares and personal property). Only the fair market value of the assets outlined under the "public" Will are subject to probate fees.

Bare Trustee Corporation Planning

Once the dual Will structure is in place, there are more opportunities for probate savings through "bare trustee corporation planning." This planning involves transferring the legal title of assets that commonly require probate (such as personally-owned real estate and non-registered bank/investment accounts) to a nominee corporation. The legal and beneficial interest in the asset is segregated, such that the corporation becomes the legal and registered owner of the asset, while the testator continues to be the beneficial owner of the asset. The corporation holds title to the asset "in trust" for the testator.

On the testator's death, legal ownership of the asset remains with the corporation. As a result, no change in title is required (and thus, no probated Will is required). The beneficial ownership of the asset is transferred per the testator's wishes under their "private" Will.

As mentioned above, this strategy should only be used when coupled with dual Wills. If a testator only has one Will and **any** of the testator's assets require probate, their estate trustee will be required to disclose – and pay probate fees based on – the value of **all** of the testator's assets, even ones for which probate could have otherwise been avoided.

Conclusion

It is often possible to minimize, if not entirely avoid, probate fees on death. If you wish to discuss any of the above in greater detail, or would like any additional information on estate planning, contact Jennifer Katz at jkatz@mindengross.com or any lawyer in our Wills and Estates Group.