

Probate Planning 101



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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 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 administered under the 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 if they own them individually and they pass to the other on first death).

Intuitively, it seems unfair to pay probate fees on assets that do not otherwise require a probated Will to affect 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.

Jointly Held Assets

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 and there are a variety of other non-tax issues that come with joint ownership of assets.

The Use of Multiple Wills

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.

Bare Trustee Corporation Planning

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 would have otherwise been owing upon death will be avoided.

Conclusion

A comprehensive tax and estate plan can reduce – or even eliminate – probate fees that might otherwise be owing upon death. In many cases, the savings can be significant and can be achieved on a cost-effective basis. The failure to consider probate planning options – and tax options in general – can undermine even the best estate plan.

If you have any questions or would like information on estate planning and tax planning for estates, contact [Matthew Getzler](mailto:mgetzler@mindengross.com) in our Wills and Estates Group at mgetzler@mindengross.com.

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