

## UNDERSTANDING PROBATE

When an individual dies intestate (that is, without a Will), under the laws of intestate succession the person's estate is divided among that person's relatives, regardless of how remote. Where there are no relatives, the entire estate will fall to the government. When an individual has a Will, all authority and property rights are governed by that Will, which take effect at the moment of death.

Technically, a properly drawn Will requires no further act to justify its legal existence. However, as a result of the often secretive nature of Wills largely, and the fact that the deceased is no longer available to verify the authenticity of his or her own Will, third parties will frequently require a level of certainty when dealing with a deceased person's estate. This certainty is provided by the probate process, which involves submitting the deceased's Will to the courts for verification.

If there is no Will, the courts must appoint an individual referred to as an administrator.

Until recently, the court fees associated with an application to the courts for probate, and for administration, were known as "probate fees". With the exception of assets held jointly with a right of survivorship, court fees are calculated on the value of all personal property owned by the deceased person anywhere in the world, and on all real property situated in the province of application. Life insurance that has been designated to a person other than the estate is not included. With the exception of a mortgage on real property, debts (such as funeral expenses or credit card balances) are not generally deductible from the gross value of a person's estate.

### Probate Taxes

Canadian courts have legalized what used to be called provincial probate fees. The Supreme Court of Canada declared them to be taxes. The provinces revised their laws to make them provincial taxes. There is no probate tax act but that is a common name to describe the provincial taxes.

The basis for calculating probate tax varies from jurisdiction to jurisdiction. In Ontario, for example, the rate is only \$250<sup>1</sup> for the first \$50,000 of the value of the estate and

---

<sup>1</sup> Technically, \$5 per \$1,000 (or part thereof) on the first \$50,000 value *plus* \$15 per \$1,000 (or part thereof) over \$50,000.

1.5% thereafter. [*Note to user of this article: Substitute the name of your province and the applicable rate.*]

There are a wide variety of options available to individuals who wish to reduce the probate taxes on their estates. The more popular options include giving assets to others prior to death, settling assets in inter vivos trusts, ensuring that separate beneficiary designations are in place for such things as insurance policies and RRSPs, and holding property jointly with others.

All of these methods are designed to keep the assets out of the estate, allowing them to pass “outside” of the Will upon death. When a deceased person’s assets pass outside of his or her Will, the size of the estate is reduced and so are the probate taxes that would otherwise be payable.

Although these methods will lower the “probate value” of an estate, so too will they reduce a person’s control over his or her own assets prior to death. In some cases, such as holding property jointly with spouses and/or children, this will expose his or her assets to the claims of divorcing children-in-law and creditors who would not otherwise have claims against such property.

Having spouses hold the family residence as joint tenants generally makes good sense. But holding the same property jointly with children generally makes no sense at all. Not only will a parent have lost the opportunity to redirect a child’s share of the property in cases where the child dies before the parent, but the property may also become exposed to the potential matrimonial and creditor claims of that child during his or her life. Even more significant is the fact that the exemption from capital gain tax liability available on the family residence is severely compromised when the property is owned by individuals who do not live in it.

As with all good planning, individuals who are concerned about probate taxes should consult their estate-planning advisor to assist them in assessing the pros and cons of various options involved in “probate planning.”