

ONTARIO PROBATE TAX

WHAT IS “PROBATE”?

It is a court certificate confirming that the estate trustee named in your Will is authorized to deal with your assets. (It is also called a “certificate of appointment of estate trustee”)

WHAT DOES IT COST?

The probate tax (aka “Estate Administration Tax”) is about 1.5% of your estate’s value less real estate encumbrances. There are also legal costs to apply to the court for a certificate.

WILL YOUR ESTATE TRUSTEE (aka EXECUTOR) NEED PROBATE?

It depends on what you own.

If you own real estate, significant bank accounts, or publicly-traded securities registered in your name, your estate trustee will need probate.

Some assets don’t require probate:

- Your personal and household effects, and vehicles.
- Shares in a private company, if the company is properly organized.
- An asset that you own jointly with someone else (for example, your spouse or child). If the other person survives you, he or she can register surviving title ownership on filing a notarial copy of your death certificate.
- Life insurance, RSPs, RIFs: - provided your spouse is the named beneficiary, or if he or she doesn’t survive you, someone else noted as a “contingent” beneficiary survives you.

If your estate trustee needs probate for some of your assets, the tax is normally calculated on the value of all of your estate assets (less real estate encumbrances), not just those requiring probate.

HOW CAN I ARRANGE MY ESTATE TO REDUCE OR ELIMINATE THE COST OF PROBATE?

Some people use a combination of the following:

JOINT OWNERSHIP:

- Hold title to assets jointly with someone else, such as your spouse and/or child

If you don’t want your survivor(s) to keep the jointly-held assets after you die but you want them to share the assets with other beneficiaries, they can sign an acknowledgment now that they have no beneficial interest in the assets, that they will deal with the assets entirely as you direct while you are alive, and entirely as your estate trustee directs when you die without asking for probate. (This is sometimes called a “bare” or “naked” trust.)

Without a bare trust acknowledgment, adding another person as a jointly-titled owner would normally be treated for tax purposes as a “disposition” by you of one-half of the value of the asset. (There is, however, a tax rollover between spouses.) Capital gains and land transfer tax would be payable by you. So, careful planning is required.

As to your RRSP, RRIF and life insurance, you can name someone, such as your child, as the contingent beneficiary if your spouse dies before you, and your child can sign an acknowledgment now about how to deal with the proceeds on your death.

TWO WILLS:

- You can have two Wills: one for assets that require probate, and the second for everything else. The probate tax will be calculated only on the value of assets administered in the first Will. Both Wills could have similar distribution plans.

AN “ALTER-EGO” OR “JOINT-PARTNER” TRUST:

- If you are 65 or older, you can, while you are alive, transfer your assets to an “alter-ego” trust, or if you wish to share the trust with your spouse, to a “joint-partner trust”. When you die, the assets can be distributed in a plan similar to your Will. You won’t need to probate the trust. And you can reserve to yourself the power to later change or revoke the trust.

You can be the sole trustee while you are alive, or you and your spouse can be the trustees. You should provide “management succession” for when you become incapable of managing property or die.

To qualify for a tax-free transfer of assets into the trust, only you or your spouse can receive anything from the trust while you are alive (income or capital). The at-death deemed disposition rules will apply when you die, but the capital gains tax will be payable by your alter-ego trust without the advantage of the graduated rates of tax that an individual pays.

A PRIVATE HOLDING COMPANY:

- The surviving directors of your private company would normally not require probate of your Will to transfer your shares in the company to your beneficiaries. However, using a private company has special tax considerations when transferring assets into and out from the company. Again, this requires careful corporate and estate planning.

CAUTION:

- This memorandum is for general discussion purposes only. We can only advise you about your estate when we meet and fully review your situation.