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PROBATE FEES

What are probate fees?

Probate fees are an amount payable when a person applies to court for a Certificate of Appointment of Estate Trustee (previously called Letters Probate or Letters of Administration). All provinces except Quebec have probate fees, although those in Ontario are currently the highest. Probate fees are based on the value of the estate under administration:

- \$5 for each \$1,000 or part thereof up to \$50,000; and
- \$15 for each \$1,000 or part thereof above \$50,000.

For example, the probate fees payable on an estate of \$1,000,000 would be \$14,500.

On October 22, 1998, the Supreme Court of Canada determined that probate fees were unconstitutional because of the way they had been legislated. However, the Ontario government quickly enacted the *Estate Administration Tax Act, 1998*, to retroactively cure the problem. As a result of the Act, probate fees are now officially called an “estate administration tax”.

Why is a court appointment necessary?

An executor named in a Will takes his or her authority from the Will from the moment of death. However, occasionally there may be some dispute between beneficiaries as to what constitutes the Will of the deceased, and the executor will have to prove that the document under which he or she takes his or her authority is the last valid Will made by the deceased.

More often, third parties holding assets for the benefit of the estate will require court confirmation that they are paying the assets to the appropriate person. The Ontario *Trustee Act* provides that anybody dealing with a person who has obtained his or her authority to represent an estate from a court may be fully discharged in making payment to such person. If a third party pays assets to a person without court authority, on the other hand, and it turns out to be the wrong person, the third party may be liable to pay the same amount again to the correct person.

How can I minimize probate fees?

The good news is that the Ontario government took no steps to close loopholes that can be used to minimize probate fees. For example:

- If your assets are all of certain types (e.g. land registered in the Registry System, or private company shares), your executors or administrators may not have to apply for a Certificate of Appointment of Estate Trustee at all, which means that no probate fees will be payable. However, for many assets, a Certificate is required as evidence of the authority of your executors or administrators to act.
- If some of your assets can be transferred without a Certificate, you may be able to deal with these assets in one Will, which will not be admitted to probate, and deal with your remaining assets in another Will. The use of multiple wills to reduce probate fees has been approved by the Ontario Court.
- You can prevent the proceeds of insurance policies from passing through your estate by designating a beneficiary other than your estate in the policy document itself. (It is not clear that the same rule applies to the proceeds of RRSPs, RRIFs and pension plans.)

- You can give away some of your property to your intended beneficiaries while you are still alive. However, there may be tax consequences of doing so, such as the realization of a capital gain or the attribution back to you of income or capital gains for tax purposes.
- You can create a trust for your beneficiaries, retaining a right to the income earned in the trust during your lifetime, or a right to revoke the trust. Again, there may be tax consequences to consider.
- Mortgages on real estate are the only liability that will be deducted from the value of your property for the purpose of calculating probate fees. However, if other assets are subject to liabilities (for example, if you have taken out a loan to purchase securities), it may be possible to transfer these assets into a corporation and pay probate fees on the net value of the assets, as reflected in the value of the shares, rather than the gross value. This is a sophisticated arrangement that requires detailed tax advice.
- Instead of leaving your entire estate to your spouse, so that the assets will be subject to probate fees once in your estate and once in your spouse's estate, you might leave a portion of your estate directly to your children or other beneficiaries.
- You might move some of your assets to a jurisdiction with lower probate fees than Ontario and deal with these assets in a separate Will.
- Property held in joint ownership or joint tenancy with another person passes to the surviving joint owner directly and not through your estate, unless the joint ownership was for convenience only and you did not intend to make a gift. However, joint ownership has a number of disadvantages:
 1. The transfer of part of your interest in capital property is a disposition for tax purposes, and income tax will be payable immediately on any capital gain on the property interest transferred.
 2. Any income received on the joint property after the transfer will be taxed equally to all joint owners.
 3. Upon your death, your remaining interest in the capital property will be deemed disposed of, and the income tax on any accrued capital gain may be payable by your estate, and not necessarily by the joint owner who gets the property.
 4. The above tax consequences do not generally apply where the transfer was to a spouse. However, if the joint owner is your spouse, or a child, niece or nephew under 18 years of age, the income and/or capital gains from the property may be attributed back to you during your lifetime for tax purposes even though they are received and enjoyed by the joint owner.
 5. Disputes may arise between you and the joint owner because you will need his or her consent to deal with the property.
 6. You may be exposed to the claims of the joint owner's creditors or spouse to the extent of the value of your joint interest in the property.
 7. If you hold all your assets jointly, you will not be able to provide for any other beneficiaries because there will be no assets passing through your estate.
 8. If you are married but hold your matrimonial home jointly with someone other than your spouse, the joint tenancy will be severed by law on your death.
 9. If the property is your principal residence and the joint owner doesn't live there, only your half of any capital gain on the residence will be eligible for the principal residence exemption for years after the transfer, and your co-owner will have to pay tax on his or her part of any capital gain when the property is disposed of either during your lifetime or upon your death.
 10. You will not be able to create trusts in your Will to save on income taxes or limit a beneficiary's access to the property.
 11. If the property is real property subject to a mortgage, some land transfer tax will be payable at the time the property is transferred into joint tenancy.

Please contact Laura Kerr at (613) 614-7140 or lkerr@estateslaw.ca to find out more about how you can save on probate fees and other expenses, and leave a larger inheritance for your loved ones.