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FINANCIAL ADVISORY SUPPORT

Understanding Probate

Upon your death, the person responsible for administering your estate according to your wishes will most likely be appointed in your Will. In common law provinces, the person you appoint in your Will who is responsible for administering your estate is generally referred to as an "executor"; although, in Ontario such a person is called an "estate trustee", and in Quebec the administrator of your estate is referred as a "liquidator". For consistency, throughout the remainder of this article, the person responsible for administering the estate of a deceased will be referred to as an "executor".

The duties your executor will have to complete include making your funeral arrangements (unless you reside in Quebec where your family is responsible for your funeral arrangements unless your Will provides otherwise), collecting your assets, notifying your creditors, paying your liabilities and distributing your remaining assets to your beneficiaries. Your executor takes their authority from your Will and therefore may act for your estate from the moment of your death. However, in Quebec, authority of your executor may also come from the law. Often there is little that your executor can do prior to going through the process of applying for a grant of probate at the appropriate provincial Superior Court. Your executor may only be able to pay some of your estate's immediate expenses, by gaining access to funds held in your account at the discretion of the financial institution where your accounts are held, until the executor receives a grant of probate, when required.

This article will briefly explain the probate process, detail the importance of your executor securing a grant of probate, discuss certain probate avoidance strategies particular to provinces where minimizing probate taxes is relevant, explore additional considerations and provide a table of the probate tax rates for all Canadian provinces and territories.

About probate

What is probate?

Probate is the process through which the court certifies that your executor has the right to administer your estate. The process is initiated by your executor, who takes charge of your property after your death and makes a full inventory of all the assets of your estate. If you reside in a common law province, your executor may make an application for a grant of probate to the Superior Court in the relevant jurisdiction. Generally your executor will retain a solicitor to make this application. If your executor resides outside of Canada, a requirement for the executor to post a bond, before being permitted to administer your estate, may be imposed by the Superior Court. If your executor resides in a province other than the province where probate is being sought, the executor may not be required to post a bond. It is advisable that you do not appoint an executor that resides outside of Canada to avoid the requirement of the executor having to post a bond. The end result of the process is the furnishing of a grant of probate to your executor by the court.

If you reside in Quebec and have a notarial Will, there is no requirement to probate your Will upon your death. However if you have a holographic Will or a Will made in the presence of witnesses, your Will must be probated upon your death. Generally a notary will file the relevant documents before the Court and subsequently receive a probate judgment.

In common law provinces the grant of probate is a document that proves that your Will has been probated and certifies that the administration of your property after your death has been committed to the executor who is named in your Will. In Quebec a probate judgment confirms that the Court acknowledges that the Will is the Will of the deceased, that it is the last Will of the deceased and that the Will is valid according to Quebec Law.

Across Canada, the probate process can typically take anywhere from two to eight weeks, depending on the complexity of your estate. In common law provinces, if there is no challenge to the validity of your Will, then the proceedings are referred to as proceedings in “common form” and are typically an administrative process. However in the event that there are any challenges to your Will or claims against your estate, the proceedings are referred to as proceedings in “solemn form”, which means that the proceedings will occur in front of a judge. In Quebec the proceedings are generally referred to the “Greffier de la cour” unless they are challenged, at which time they occur in front of a judge.

In preparation of the inventory of the assets of the estate for the purpose of determining the gross value of the estate for calculating probate taxes, which is specific to provinces other than Quebec, debts generally are not deducted from the gross value of the assets, but encumbrances on real property, including tax arrears, are generally deductible when determining the probate tax payable. Real estate situated in a foreign jurisdiction is usually not included in the calculation of probate taxes. Please refer to Appendix 1 for a chart of the probate tax rates in the various provinces and territories.

Requirement for probate

There is no general legal requirement that your Will be submitted by your executor for probate. However in order to transfer certain types of assets upon your death, such as real estate in certain jurisdictions, legal statutes require that a grant of probate be furnished. A grant of probate may also be required by a third party, such as a financial institution, in order to allow your executor to manage and/or transfer your assets, even if the assets at the financial institution are the only assets in your estate and you only have a single beneficiary of your estate. For this reason, in executing probate avoiding strategies, it is important for you to understand under what circumstances a financial institution might request probate. Despite your best efforts in implementing probate avoidance strategies, a subsequent request by a financial institution may lead to potentially more of your assets being subject to probate taxes.

The importance of probate

A grant of probate confirms the fact that your executor has the authority to administer the assets of your estate. If your executor is administering the assets of your estate using your probated Will and in the future a successful third party claim is made against your estate alleging that the existing Will is not your last Will and testament, your executor may not be subject to personal liability. If your executor administers your estate with an unprobated Will, your executor may be subject to personal liability in the event of a successful claim against your estate subsequent to the transfer of estate assets to your beneficiaries. If your executor does not have a grant of probate and transfers assets to your beneficiaries, your executor may be personally liable to return the assets or their equivalent value to your estate.

The grant of probate also starts the clock for a dependant to make a claim against your estate for support. The limitation period to make this application is usually six months from the date of the grant of probate, subject to some exceptions. Without probate the estate may continue to be susceptible to dependant relief claims. Residents of Quebec should be aware that the limitation period for a dependant relief claim starts from the date of death. Also potential claims, such as the partition of the family patrimony, can be made within one year of the date of death.

Minimizing probate taxes

If you are a resident of a province with a relatively high probate tax, such as Ontario, Nova Scotia or British Columbia, you may consider planning your financial affairs in order to minimize or avoid probate taxes. Since there are no probate taxes assessed in Quebec and very low probate taxes assessed in Alberta, these strategies may not be relevant to you if you reside in Quebec or Alberta, unless your objective is other than probate avoidance. Probate avoidance strategies to consider include designating beneficiaries on registered plans, using multiple Wills and holding assets jointly with right of survivorship, where applicable.

Naming a designated beneficiary on RSPs, RIFs and insurance policies

The strategy of naming a designated beneficiary on RSPs, RIFs and insurance policies is a relatively simple and often used strategy for avoiding probate. If you designate a beneficiary on your RSPs, RIFs and insurance policies, upon your death, these assets may be excluded from your estate, possibly eliminating or minimizing probate taxes upon your death. If you reside in Quebec you cannot designate a named beneficiary on a registered plan unless it is issued by an insurance company, or the plan meets the requirement of a trust according to civil law.

Several Canadian legal cases have brought into question the certainty of avoiding probate taxes by naming a designated beneficiary on RSPs and RIFs. These cases have suggested that a beneficiary designation on these plans may not be determinative of the beneficial owner of the proceeds of the registered plan on the death of the annuitant. This means that if there is a successful challenge by a third party on your death claiming that you did not intend to gift the proceeds of the registered plan to the designated beneficiary, then such proceeds may become part of your estate and be subject to probate tax. In particular, it is possible that your executor may challenge the ownership of the proceeds that are paid to the designated beneficiary if your executor is of the opinion that it was not your intention for the assets in your registered plan to go to your designated beneficiary. A successful claim by your executor may lead to the proceeds becoming part of your estate and as such being subject to probate.

Naming a designated beneficiary on RSPs, RIFs and insurance policies can be done on the application document with the financial institution as well as in your Will. This is important as there may be circumstances in which you may want to designate a beneficiary in the Will as opposed to on the application document. An example of such a situation would be when you have minor beneficiaries and you want to have the flexibility of creating a trust for the assets instead of having the assets paid to the court until the minor becomes an adult.

The issue arises as to whether designating a beneficiary in a Will causes the proceeds of the registered plan and insurance policy to form part of your estate on your death. This might happen as the most recently made designation is typically the one that remains effective to the extent of any inconsistencies. Such an outcome may cause the registered assets and the insurance proceeds to be subject to probate taxes. This would lead to an outcome that was never intended by you. Your lawyer has the ability to prevent this outcome from occurring by making the beneficiary designation in the section of the Will that does not contain the dispositive clauses. This section is typically found in the top part of the Will prior to your instructions in your Will that transfers your assets to your executor to be held in trust. This would prevent the assets from forming part of your estate and would thus avoid probate taxes. You should be aware that designating a beneficiary of RSPs, RIFs and insurance policies in your Will raises other potential issues such as inconsistencies in designation between the application documents and your Will.

Multiple Wills

The use of a multiple-Will strategy to minimize or avoid probate taxes is generally a successful one, but may fail under certain circumstances. A multiple-Will strategy involves the execution of two Wills. The primary Will consists of the assets that will be subject to probate, while the secondary Will consists of assets (often shares of a private corporation) that will usually not be subject to probate. The multiple-Will strategy is not applicable if you reside in Nova Scotia.

If you were to employ this strategy, upon your death, your executor would arrange for your primary Will to be probated and subject the assets in the primary Will to probate taxes. Your executor would not furnish the secondary Will for probate as in many situations the private company shares can be transferred from your estate to your beneficiary without the director of the corporation requesting a grant of probate to effect the transfer. Typically the value of the shares in the secondary Will will have greatly appreciated; therefore, by not probating the secondary Will, a large amount of probate taxes can be avoided.

There are some situations when a financial institution may request a grant of probate of the secondary Will. A situation where this may occur is when your secondary Will creates an ongoing testamentary trust and assets or income are flowing from a holding company or an operating company to the testamentary trust on an ongoing basis. In order to do this a testamentary trust account has to be opened by the appointed trustee of the trust, who may or may not be your executor. In opening such an account, the financial institution may request a grant of probate as the assets or income is going from your estate to the testamentary trust. Also the executor may face challenges if the executor attempts to negotiate a cheque that has been paid to the estate created by the secondary Will. The financial institution may request a grant of probate as a precondition to the executor opening the estate account and negotiating cheques paid to that account.

Joint with right of survivorship

Transferring assets into joint names with right of survivorship is a commonly used probate avoidance strategy that has often yielded unintended outcomes. The unintended outcomes include the assets being subject to probate tax, the assets being transferred to someone that was not supposed to get the assets and a potentially costly and lengthy administration of your estate. Notwithstanding the simplicity of effecting this probate avoidance strategy, too often disputes pertaining to the ownership of the assets arise upon the death of the transferor. It is recommended that legal advice be sought before effecting this relatively simple strategy.

Generally you can plan for probate avoidance during your lifetime by transferring assets that you own into joint names with another individual such as your adult child. By holding assets jointly with another individual, you create the opportunity to minimize or eliminate probate taxes on your death. The effect of this strategy is that on your death, or the death of the other joint tenant, the jointly held assets are transferred to the surviving tenant through the right of survivorship. As such, the jointly held assets do not go through your estate upon your death, and there are not probate taxes to be paid on these assets.

However if on your death, your executor or a beneficiary challenges the ownership of the assets held jointly prior to your death, or a contradicting clause appears in the Will clouding the ownership of the assets, then a presumption arises that you did not intend to gift the assets to the surviving tenant on your death. If the assets are held in a financial institution, this may lead to the assets being frozen and the financial institution requesting your executor to furnish a grant of probate or court order declaring the ownership of the assets. The surviving tenant may have to establish in court that you intended to gift the assets to them on your death. If the surviving tenant fails to convince the court that you intended to gift the assets on your death, the assets will form part of your estate and will be subject to probate tax.

You can avoid this unintended outcome by documenting your intention as to the ownership of the assets on your death and by providing sufficient evidence to show that you intended to gift the remaining assets, which were held jointly at your death, to the surviving tenant. One way you can accomplish this is to create a memorandum on the day of the transfer, which you can store with your Will, indicating your intention to gift the assets on your death to the surviving joint tenant, or indicating that the surviving tenant was holding the assets in trust for your estate. In the event that such a memorandum was not created at the time the joint account was created, you could still create a memorandum indicating your intentions prior to your death. In the case of a dispute with respect to the ownership of the assets upon your death, this memorandum could be entered into evidence by the surviving tenant to indicate your intention. The memorandum is a personal document and should be stored with your lawyer or with other personal documents. The memorandum becomes relevant in the event that a dispute arises upon your death.

The above comments do not apply to you if you are a resident of Quebec. As a resident of Quebec, you cannot own assets jointly with right of survivorship since “the right of survivor” is not a legal principle in Quebec.

Additional considerations

Foreign grant of probate

If you are a non-resident of Canada with assets situated in Canada, it is quite possible that your executor will have received a grant of probate from your home jurisdiction. Generally when a grant of probate has been received in a foreign jurisdiction, such a grant does not confer authority on your named executor to deal with assets in any of the provinces in Canada. In order for your executor named in the foreign grant to have authority over assets in Canada, your executor typically has to apply to the relevant jurisdiction in Canada to have the foreign grant resealed, or for ancillary letters.

The resealing process typically involves the original grant being reviewed and sealed by the court in the relevant province. No new grant has to be applied for. Resealing is generally required when the grant is from another province in Canada or typically from a country in the British Commonwealth.

An ancillary grant involves the issuing of a new grant in the relevant province in Canada. It is typically required when a foreign grant has been issued in a foreign jurisdiction that is typically not part of the British Commonwealth.

Time limitation on distribution of estate assets

British Columbia has provided in its Wills Variation Act that distribution of the estate assets to the beneficiaries should not occur until six months have passed from the grant of probate of the Will. Questions have been raised as to whether assets held in banks or other financial institutions should not be transferred to the executor or to the solicitor of the executor prior to the end of this period. This may have the impact of delaying the distribution of your estate if you are subject to this legislation in British Columbia. In order to address this concern, your executor may furnish the financial institution with a detailed letter of authorization, authorizing the financial institution to issue a cheque to your executor payable to your estate.

Conclusion

Avoiding probate is not necessarily as simple as it may appear. Utilizing any of the probate avoidance strategies discussed in this article does not guarantee that your goal of avoiding probate taxes will be achieved. Alternatively there may be good reason for your executor to apply for a grant of probate. You should ensure that you seek legal advice when considering your probate strategies and ensure that your intentions are clearly documented in the event of disputes after your death.

Appendix 1 — Probate taxes in Canada*

BRITISH COLUMBIA		**PRINCE EDWARD ISLAND**	
$25,000 and under	NIL	$10,000 and under	$50
		$10,001 – $25,000	$100
Exceeds $25,000 up to and including $50,000	$6/$1,000 in excess of $25,000	$25,001 – $50,000	$200
Exceeds $50,000	$150 + $14/$1,000 in excess of $50,000	$50,001 – $100,000	$400
		Exceeds $100,000	$400 + $4/$1,000 in excess of $100,000
ALBERTA		**NEW BRUNSWICK**	
$10,000 and under	$25	$5,000 and under	$25
Exceeds $10,000 up to and including $25,000	$100	Exceeds $5,000 up to and including $10,000	$50
Exceeds $25,000 up to and including $125,000	$200	Exceeds $10,000 up to and including $15,000	$75
Exceeds $125,000 up to and including $250,000	$300	Exceeds $15,000 up to and including $20,000	$100
Exceeds $250,000	$400	Exceeds $20,000	$5/$1,000 of value of estate
SASKATCHEWAN		**NOVA SCOTIA**	
	$7/$1,000	$10,000 and under	$77
MANITOBA		Exceeds $10,000 up to and including $25,000	$193.61
$10,000 and under	$70	Exceeds $25,000 up to and including $50,000	$322.31
Exceeds $10,000	$70 + $7/$1,000 in excess of $10,000	Exceeds $50,000 up to and including $100,000	$902.03
		Exceeds $100,000	$902.03 + $15.23/$1,000 in excess of $100,000
ONTARIO			
$50,000 and under	$5/$1,000		
Exceeds $50,000	$250 + $15/$1,000 in excess of $50,000		

QUEBEC		**NEWFOUNDLAND & LABRADOR**	
Notarial Will	NIL	$1,000 and under	$60
Non-notarial Will	NIL	Exceeds $1,000	$60 + $0.50/$100 in excess of $100
NORTHWEST TERRITORIES		**NUNAVUT**	
$10,000 and under	$25	$10,000 and under	$25
Exceeds $10,000 up to and including $25,000	$100	Exceeds $10,000 up to and including $25,000	$100
Exceeds $25,000 up to and including $125,000	$200	Exceeds $25,000 up to and including $125,000	$200
Exceeds $125,000 up to and including $250,000	$300	Exceeds $125,000 up to and including $250,000	$300
Exceeds $250,000	$400	Exceeds $250,000	$400
YUKON			
$25,000 and under	NIL		
Exceeds $25,000	$140		

* The probate tax rates were obtained from various provincial and territorial legislative sources. Table was updated in November 2009.