



FOUNDATION

for Niagara & Hamilton area Christian Schools

Probate and Estate Planning

Probate Planning Tips

Probate is the process of authenticating or proving a *will*. It establishes that a *will* presented to the government or court is not only valid but is in fact the final *will* of the deceased. Third parties such as banks, trust companies, investment dealers, government registries and others are more comfortable dealing with an executor of a probated *will* because they know they are dealing with the true representative of the deceased.

Why Avoid Probate Fees?

As easy as it seems, people often try to avoid probate because it can be time consuming and costly. As well, all documents become public record.

The process of identifying all the assets of the deceased, listing them in a prescribed fashion and filing documents with the appropriate government departments can take months and sometimes years to complete. During this time, the executor cannot settle the estate and cannot usually make disbursements from it. With a long delay, beneficiaries may face financial hardship.

Probate fees vary greatly by province. In most provinces, while not small, they are manageable in terms of overall cost to the estate. When viewed as a filing fee, however, they can be seen as unreasonably high. Probate value is the value of the deceased's assets that will pass through the estate less, in some cases, a reduction for debt associated with an asset such as a mortgage on a home. A few years ago, the Ontario government suddenly tripled probate fees on estates in excess of \$50,000.

Probate fees in Ontario currently are: \$5 on each \$1,000 for the first \$50,000 and \$15 on each \$1,000 over \$50,000.

These fees are paid whenever an asset transfers as a consequence of death. If an individual died and left all assets to a spouse, the assets would face these fees. When the spouse died, the fees would be paid once again. In Ontario, probate fees could amount to \$29,000 on a \$1,000,000 estate.

The final reason for striving to avoid probate is that once filed, the statement of affairs of the deceased, including all assets and liabilities and a copy of the *will*, become available to the public. For high profile and high net worth individuals, a public record could expose the estate to unwanted publicity. For others, it can remove confidentiality and expose private affairs to a broad audience.

Tips to Avoiding or Minimizing Probate Costs

There are a number of proven techniques to avoid or minimize probate costs. Before acting on any of these tips, you should seek the advice of a lawyer or accountant.

Tip #1 - Gift or donate it away while you are alive - As strange as it sounds, if you die without an estate, there is nothing left to probate. If a gift to a spouse, child, grandchild or other beneficiary makes sense and wouldn't jeopardize your well being, you might consider it as a means of avoiding probate. However, take care when giving appreciated capital property because in most cases it will trigger capital gains. If the property gifted produces income and the beneficiary is your spouse, a minor child or a grandchild, you'll continue to include this income in your taxable income (attribution rules, Income Tax Act).

Tip #2 - Register or re-register assets in joint tenancy with rights of survivorship - Assets that are registered in joint tenancy with rights of survivorship become the property of the joint owner on the death of an owner. Many spouses register their family home this way, but any non-registered (i.e. non-RRSP/RRIF) asset can be registered in joint title.

Upon death, the asset does not form part of the estate. When purchasing assets or re-registering assets, care should be taken with regard to attribution rules. In addition, if you're re-registering assets, capital gains could be triggered. Consult your professional advisor before proceeding.

Tip #3 - Establish an inter-vivos trust - An *inter-vivos trust* is a trust that you establish during your lifetime. A trust is created by a donor settling (giving) assets to a trust for the benefit of a beneficiary. The assets of the trust are managed for the beneficiary by the trustees of the trust. By settling a trust during your lifetime, you no longer own the assets. You may, however, be a trustee and exercise a degree of control over the assets. Once settled, however, the assets are trust assets held for the benefit of the beneficiaries. Here you have, in fact, given away the assets, but in a different way than in Tip #1.

Tip #4 - Establish a trust (especially a spousal trust) in your will - While a *spousal trust* will not help reduce your estate for probate, it may allow a beneficiary to avoid probate on his or her death. For example, if John leaves property to a spousal trust for the benefit of his wife Marie during her lifetime, Marie can enjoy the trust property and spend the income from the trust. The property is not, however, in her name, it is simply held in trust for her. When Marie dies, the property passes directly to residual beneficiaries without being included in Marie's estate. An added advantage to this approach is that during Marie's lifetime, she and the spousal trust are separate taxpayers and this usually results in lower overall income taxes compared to all the property and income being held by one taxpayer.

Tip #5 - Invest in estate-friendly investments - Examples are investments in GIC's, Mutual funds and Annuities issued by insurance companies that qualify for transfer at death outside the *will* and therefore eliminate or minimize Probate, Legal and Executor fees....which can amount to as much as 8-9% of the assets, in Ontario. Specific examples include Segregated Funds and Accumulation Annuities which are essentially Mutual Funds and GIC's with a "wrapper" that allows for the addition of primary and secondary beneficiaries. Added benefits include protection from creditors.

Tip #6 - Establish multiple wills - With care and professional drafting by your lawyer, it is possible to separate your assets into groups: assets that must be probated, assets that don't require probate, and assets that can or must be probated in another (hopefully lower cost) jurisdiction. While this approach requires more work, it can substantially reduce the cost of settling your estate. Some assets, such as the shares of a private company, normally do not require probate to be dealt with by an executor. If you own a private company with a significant value, it may be possible for this asset to be dealt with in a separate will and the executor can avoid probate on this asset. Again, legal advice is critical in this strategy.

Concluding Remarks

- Gifting outside of your *will* can significantly reduce probate fees.
- The tips above show a variety of ways in which this can be accomplished legally.
- Christian school supporters can also reduce probate fees by incorporating a planned gift in their estate planning. ***Charitable Gift Annuities are an example of a planned giving tool through which probate can be reduced.***

Your questions are welcome.

Note: for information purposes only.



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