

Beneficiary designations, the Will and probate

For more information on the tax rules and other considerations, please refer to our **Tax & Estate InfoPage** below, which is available on our website.

A *Will* is not an estate plan and an estate plan is more than a *Will*. This may seem to verge on circular logic, but it makes total sense for financial advisors who offer estate-planning services to their clients. There are many tools that can be used to facilitate the succession of your assets, and these will be influenced by a number of factors, including the people who stand to benefit from your estate, the size and characterization of the assets in question and, perhaps most important, your intentions.

An estate plan for individuals who've accumulated most of their wealth through a business will likely look quite different than one for those who've accumulated most of their wealth through registered and non-registered investment plans. Each of those individuals will have different risks and constraints placed upon the distribution of their estate. Ancillary concerns, such as tax planning, family law issues and - of particular concern for residents of Ontario and British Columbia - probate planning, come to the fore after estate-distribution goals are established.

Probate planning to minimize estate costs



Tax & Estate

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Probate serves as proof to financial institutions, advisors and the land registry office that your Will has been certified by the court and that your executor is authorized to represent your estate.

What is probate?

When you die, your Will gives your executor (called an executor in Ontario, Regulator in Quebec) the legal authority to deal with your estate, although your executor is legally entitled to do so, when the time comes, to receive a transfer agent's assets registered in your name such as investments with financial institutions, publicly traded shares and, in some instances, real estate; probate is usually required.

The process of obtaining court certification is known as probate. Probate fees have been in existence since 1906, when they were introduced in Ontario. In Canada, the first legislation dealing with this issue was enacted in 1763 in 1992, the legislation was amended, and the law was re-enacted in 1994 in 2002, the legislation provided an identical form process to probate (with the exception of Quebec), the cost varies under the rules of each province. A 2006 Supreme Court of Canada decision in *Wong v. Shum* (2006) clarified the scope of probate application to certain situations.

This change, introduced in 2002, redefined probate fees. In that case, Mrs. Cull, argued the probate fee of \$2,710 (compared to her late husband's estate and successfully argued before the Supreme Court of Canada that the fee was actually 4.8%.

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Estate

The term "estate" can be confusing unless we have clarity about the context in which it's being used. In terms of succession planning, the estate is generally the sum of everything you own, or that is owed to you, at the time of death, subject to any encumbrances (e.g., a mortgage). In terms of Will planning, the term "estate" is used to describe all the assets of the deceased that are subject to the instructions of the Will. As we know, however, not all the deceased's assets are subject to the Will as succession strategies, such as naming a beneficiary on a registered plan, enable assets to pass outside the Will (in this context, commonly referred to as "passing outside of the estate").

Probate

Probate is an estate administration tax and is relevant to assets that will be subject to the deceased's Will. Probate is the legal process whereby an executor applies to the provincial court where the deceased person resided upon death to receive certification as the deceased person's legal representative. Probate may be required in certain circumstances to transfer legal title to a property from the deceased person to the executor, to then be distributed to the beneficiaries named in the Will. However, probate is not always necessary, as the authority to act stems from the Will and not through a grant of probate.

The provincial courts levy different rates of probate tax in return for the legal recognition it grants depending on the size of the estate. Some provinces calculate probate tax based on a percentage of assets above a certain threshold with no cap on the maximum probate tax charged (e.g., Ontario and B.C.), while other provinces levy a capped tax rate above a certain threshold value of the estate (e.g., Alberta). A hypothetical estate with a probate value of \$1 million in Ontario would pay probate taxes of \$14,500. In British Columbia, it would be \$13,450. In Alberta, the maximum probate tax charged is \$525. In Quebec, it would be \$0. As you can see, depending on the province in which you reside, probate planning may be of significant concern or not something to materially worry about.

Strategies for probate minimization

Planning one's estate should take into account probate tax in some way as it is a cost and in some circumstances is inevitable. Strategies to minimize probate tax have ignited the imaginations of people in the "no cap" provinces as there is an element of control, and some strategies are relatively easy and cost-effective to implement.

Some of the simpler strategies include reducing the value of your estate (e.g., gifting property before death or settling assets into a trust), naming beneficiaries on registered plans and life insurance policies, and placing non-registered property into joint ownership arrangements with the rights of survivorship (except in Quebec). Any of these strategies, if effectively implemented, exclude the monetary value of that property from being included in the probate-tax calculation as the property will pass outside of the Will. Property that passes outside the Will generally does not need to be mentioned in the Will, and care is needed to ensure there are no conflicting designations and references in the Will to avoid confusion and the potential for litigation. As a rule of thumb, where property is subject to the Will, it will be included in the probate valuation, assuming probate applies.

Beneficiary designations can be made directly on a registered plan (e.g., a registered retirement savings plan, registered retirement income fund or tax-free savings account) or life insurance contract. Naming a beneficiary directly on the plan contract ensures that property passes outside the Will for probate purposes. A not-so-well-known fact is that if properly drafted, beneficiary designations can be made in a Will and pass directly to the named beneficiaries and also be excluded from the application of probate tax. The registered education savings plan (RESP) is a special case, but the above principle generally applies. If an RESP is made joint with a spouse or common-law partner or if a successor subscriber is named in the Will, the value of the RESP is also excluded from the estate for the purposes of calculating the probate tax.

A financial advisor, when identifying gaps in a client's estate plan, may recommend that he or she speak to a lawyer to draft a Will and further discuss the estate plan. When having discussions about strategies to minimize probate tax upon death, it's good to know that there is flexibility in coordinating a beneficiary designation on a registered plan or life insurance contract, either on the contract itself or through the Will. Both strategies are effective in terms of minimizing probate tax payable upon death and maximizing the distribution of one's estate to loved ones.

A broader discussion should also be had with respect to the appropriateness of beneficiary designations on these plans as there are many pitfalls and unintended consequences with designating beneficiaries on such plans. Another truism with respect to probate is, never let the (probate) tail wag the (estate-planning) dog. In other words, plan your estate first before reflexively thinking about ways to minimize probate tax at all costs. For more detailed information on probate, please refer to Invesco's *Tax & Estate InfoPage* titled *Probate planning to minimize estate costs*.



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