# Planning for probate and estate administration taxes (excluding Quebec)

Probate fees (also known as estate administration tax) are calculated on the value of the estate. Probate planning strategies focus on either ensuring that assets pass outside of the estate or reducing the value of assets in an estate which require probate. Effective probate planning strategies include using life insurance, segregated funds and registered plans.

## Probate and estate administration tax

An executor's authority to act on behalf of the estate comes from the will. Probate is a court process that certifies a will so that third parties have the confidence and protection that the will is the last will of the deceased and that the executor has the authority to act on the estate's behalf. This is why banks and insurance companies typically require a probated will before paying amounts to an estate or taking instructions from an executor. Once probate is granted, the will becomes a public document and, except in very rare cases, may be looked at by anyone at the deceased's local courthouse.

Each province has its own sets of rules and fee structure around probate, but the basic fee computation and judicial process is similar. The amount of probate is generally based on the fair market value of the assets in the estate at death. Provincial rates for probate fees and estate administration taxes are listed at the end of this article.

Probate involves legal costs, fees (or taxes) and loss of privacy. Planning for probate is worth considering. That said, probate planning is only a part of the broader estate planning discussion. In some cases, it's preferable to go through the probate process to achieve other estate planning objectives, including having certainty that assets will go to the right person or organization or to start a limitation period for dependants' relief claims. Also, probate planning strategies may conflict with tax planning strategies (before or after death) and should be considered with a tax professional.

## Probate planning strategies

### Beneficiary designations – non-registered insurance products

Naming a beneficiary (other than the estate) of an insurance product ensures, except in limited cases, that the death benefit passes outside of the estate and not be subject to probate. Canada Life offers products which allow the owner to name one or more beneficiaries to receive a death benefit upon the death of the life insured / annuitant:

- Life insurance
- Segregated funds
- Annuities (within a guarantee period or the return of premium feature)
- Insurance GIOs
- Critical illness insurance with return of premium on death (in some provinces)

If no beneficiary is designated or the beneficiary predeceases the life insured or annuitant, the death benefit is paid to the estate. Contingent beneficiaries may be named to address a situation where the primary beneficiary predeceases the life insured or annuitant.

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Death benefits paid through insurance products are paid tax-free to the beneficiary. In the case of life insurance, segregated funds, annuities and insurance GIOs, naming a beneficiary almost always achieves estate bypass for probate planning purposes and provides:

- Potential creditor protection – Insurance products may be protected from the policyowner's creditors where the policy's designated beneficiary is either:
  - irrevocable, or
  - the spouse, parent, child or grandchild of the life insured or annuitant[1]
- Rapid liquidity – Death benefits are typically paid within two weeks of a claim
- Privacy – A death benefit payment to a named beneficiary isn't a public record[2]
- Lower estate costs – Reduced costs to the estate from legal, accounting and executor fees

The following example uses Ontario rates to compare the probate fee liabilities of two estates where the deceased of Estate A used insurance products with a named beneficiary and the deceased of Estate B used traditional investments which pass through the estate.

| **Ontario estate administration tax (probate)** | **Estate values** | |
|---|---|---|
| **$1,500,000 estate at death** | **Estate A** | **Estate B** |
| House | $600,000 | $600,000 |
| GIC held with bank | 0 | $400,000 |
| Mutual funds | 0 | $500,000 |
| Insurance GIO | $400,000 | |
| Segregated funds | $500,000 | |
| Total estate | $1,500,000 | $1,500,000 |
| **Estate subject to probate** | **$600,000** | **$1,500,000** |
| **Probate fees (estate administration tax):** | | |
| First $50,000<br>(no tax) | 0 | 0 |
| Remainder<br>($15 per $1,000) | $8,250 | $21,750 |
| Total probate fees | $8,250 | $21,750 |
| **Savings** | **$13,500** | |

## Beneficiary designations – registered plans

Registered pensions, registered retirement savings plans (RRSPs), registered retirement income funds (RRIFs) and tax-free savings accounts (TFSAs) facilitate a named beneficiary as well. Naming a beneficiary (other than the estate), on a registered plan also ensures, except in limited cases, that the death benefit passes outside of the estate and is not subject to probate[3]. Our segregated funds, and other investments like mutual funds, may be owned through RRSPs, RRIFs and TFSAs.

RRSPs and RRIFs pay the beneficiary tax-free while that amount is treated as income in the deceased's terminal return and the associated taxes are payable by the estate (unless a rollover to a spouse or dependent qualified beneficiary is available). The resulting tax liability could affect the amount of assets available to the estate's beneficiaries. Also, a beneficiary of the RRSP or RRIF is jointly and severally liable for the deceased's tax liability that's associated with the income inclusion from the registered plan up to the amount they received from the registered plan[4]. The Canada Revenue Agency (CRA) may collect directly from the beneficiary of the registered plan without first attempting to collect from the estate[5].

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## Multiple wills

Multiple will planning to reduce probate costs is available in Ontario and British Columbia. This involves one estate using multiple wills to plan for probate. One will addresses assets that generally require probate, like real estate, bank and brokerage accounts (the primary will) and a separate will addresses assets that are not expected to require probate, like shares of a private company (the secondary will). The primary will is probated and secondary will isn't, thereby sheltering the assets of the secondary will from probate. The wills should be prepared by an estate lawyer familiar with this strategy. Shares of a private corporation don't require probate so using multiple wills is an effective strategy for sheltering the value of shares from probate fees.

The CRA has confirmed that a taxpayer has one estate despite having implemented multiple will planning. As a result, trusts created as a consequence of death under both a primary will and secondary will may be treated as a graduated rate estate (GRE) for tax purposes. Generally, GREs have tax advantages that aren't available to regular estates: graduated tax rates, more flexible charitable donation rules and more post-mortem planning options for business owners.

## Inter-vivos gifts

Giving away your estate before you die is a probate planning strategy. Obviously, you lose control of the asset and it's no longer available to you going forward. A simple solution is to gift the property to an *inter vivos* discretionary trust instead where you're the trustee and a beneficiary. Income from that property will be attributed to you, but at least you would still control and benefit from the property. Property transferred to a trust is done so on a taxable basis and may result in the transferor realizing a capital gain. This may be avoided when the transferor is aged 65 or older by using an alter ego trust or joint partner trust, discussed below.

When gratuitous gifts are made directly to family members, a presumption of a resulting trust may arise. If so, upon the death of the transferor, the recipient is viewed as holding the property in trust for the benefit of the estate. These assets would be included in the estate for probate purposes. The presumption of resulting trust can be rebutted by evidence of the transferor's intention to provide a gift. To avoid uncertainty and potential litigation, the intention of a gratuitous transfer should be clearly documented in writing.

## Joint property with a right of survivorship

Property held by owners jointly, with a right of survivorship, becomes the sole property of the surviving owner on the death of the other joint owner. The deceased's will would not apply to such property, and therefore the interest the deceased had possessed in it would not be subject to probate. There may be income tax consequences to consider when creating the joint ownership arrangement. There's a deemed disposition of capital property, like marketable securities and real estate, conveyed to the new joint owner(s) on a proportional basis. Also, there are many practical problems and issues that may arise with joint ownership, including control over the asset and the risk of a third party's claim that a resulting trust was made rather than an outright gift (discussed above).

## Alter ego and joint partner trusts

Once an individual attains the age of 65, they may create an alter ego trust, or a joint partner trust (JPT). Property may be transferred to these trusts on a tax-deferred rollover basis, excluding life insurance policies. This results in no immediate tax consequences although the trust is deemed to dispose of the property for tax purposes on the settlor's death (or the last death of the settlor, or spouse in the case of a JPT). The settlor (and the settlor's spouse in the case of a JPT) is entitled to all the net income of the trust during their lifetime and no one else can be entitled to the capital during that time.

These trusts generally don't have income tax benefits. They're implemented for probate planning, as trust property passes to the trust beneficiary on the death of the settlor (or the last death of the settlor and spouse in the case of a JPT) and not through the estate. Alter-ego trusts and JPTs provide other benefits such as privacy, potential creditor protection and an alternative to managing property under a power of attorney.

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## Summary

Probate planning is an important component of a comprehensive estate plan and could save an estate thousands of dollars in fees. Canada Life's insurance products provide the ability for estate bypass though a beneficiary designation. There are many effective probate planning strategies and they should work in concert with the client's overall estate plan.

[1] This article does not apply to Quebec estates. Creditor protection can never be guaranteed. Clients and policyowners should consult their lawyer to find out more about potential creditor protection, current legislation and case law in their province or territory.
[2] In Saskatchewan, executors under a probated will must disclose, in a filing available to the public (with rare exception), all known life insurance policies owned by the deceased, including segregated fund policies. They must list the insurance company, policy number, designated beneficiaries and the value at the date of death.
[3] This is not the case for registered plans held under nominee arrangements.
[4] Section 160.2 of the *Income Tax Act* (Canada).
[5] See *O'Callaghan v. The Queen*, 2016 DTC 1141 (TCC).

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## Appendix

The following chart shows the taxes and fees levied in the different Canadian provinces using an example of an estate with $1,000,000 of total assets. Note: Estate values "to" a certain amount include that amount "(rounded to the nearest dollar).

| Province | Brackets for probate fee / estate administration tax | Fees/tax | Probate fee / Estate administration tax liability |
|---|---|---|---|
| **Alberta** | $10,000 or less<br>Over $10,000 to $25,000<br>Over $25,000 to $125,000<br>Over $125,000 to $250,000<br>Over $250,000 | $35<br>$135<br>$275<br>$400<br>$525 | **$525** |
| **British Columbia** | Up to $25,000<br>Over $25,000 to $50,000<br>Over $50,000 | No fee<br>$6 per $1,000<br>$150 + $14 per $1,000 or portion | **$13,450** |
| **Manitoba** | N/A | N/A | **N/A** |
| **New Brunswick** | Up to $5,000<br>Over $5,000 to $10,000<br>Over $10,000 to $15,000<br>Over $15,000 to $20,000<br>Over $20,000 | $25<br>$50<br>$75<br>$100<br>$5 per $1,000 or portion | **$5,000** |
| **Newfoundland** | Up to $1,000<br>Over $1,000 | $60<br>$60 + $0.60 per $100 or portion | **$6,054** |
| **Northwest Territories** | Up to $10,000<br>$10,000 to $25,000<br>$25,000 to $125,000<br>$125,000 to $250,000<br>Over $250,000 | $30<br>$110<br>$215<br>$325<br>$435 | **$435** |
| **Nova Scotia** | Up to $10,000<br>Over $10,000 to $25,000<br>Over $25,000 to $50,000<br>Over $50,000 to $100,000<br>Over $100,000 | $85.60<br>$215.20<br>$358.15<br>$1,002.65<br>$1,002.65 + $16.95 per $1,000 or portion | **$16,258** |
| **Nunavut** | Up to $10,000<br>$10,000 to $25,000<br>$25,000 to $125,000<br>$125,000 to $250,000<br>Over $250,000 | $25<br>$100<br>$200<br>$300<br>$400 | **$400** |
| **Ontario** | Up to $50,000<br>Over $50,000 | No tax<br>$15 per $1,000 or portion | **$14,250** |
| **Prince Edward Island** | Up to $10,000<br>Over $10,000 to $25,000<br>Over $25,000 to $50,000<br>Over $50,000 to $100,000<br>Over $100,000 | $50<br>$100<br>$200<br>$400<br>$400 + $4 per 1,000 or portion | **$4,000** |
| **Saskatchewan** | | $7 per $1,000 or portion | **$7,000** |
| **Yukon** | Up to $25,000<br>Over $25,000 | Fee may apply<br>$140 | **$140** |

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