TD Mutual Funds

Looking at Probate: Protecting What is Yours

Probate is the process of applying to the courts to have a Will confirmed as the last valid Will and Testament. Basically the court certifies through Letters Probate that the executor(s) of the estate is legally able to honour the "wishes of the Will."

Without probate, the executor of a Will may not be able to collect and distribute the estate's assets to the beneficiaries. Probate is often required by third-party institutions, such as banks, mutual fund companies and investment dealers in order to release assets for distribution to the beneficiaries of the estate. For financial institutions, probate is critical, as it gives them comfort that the named executor controls legal ownership of the assets and that the person (or people) seeking access to the accounts is entitled to do so (although sometimes exceptions are made for small amounts).

In Ontario, the grant of probate is known as a "certificate of appointment of estate trustee with a Will." The terminology may be different in your province. In Quebec, probate is not required for notarial Wills.

Examples of Costs

Ontario and British Columbia charge the highest fees (with Nova Scotia not far behind), at around $7,000 on a $500,000 estate. Other provinces charge from $400 to around $4,000 on similar-sized estates, with Quebec charging a nominal flat fee, or no fee at all, depending on the circumstances.

In Ontario, the rate for probate is set at .50 percent of estate assets up to $50,000 and 1.5 percent in excess of $50,000. It generally includes all assets owned by the deceased person, with the exception of secured mortgages against real estate properties (plus a few other exceptions noted below).

For example, a $500,000 estate consisting of real estate with a $400,000 mortgage is a $100,000 estate for probate purposes, and the total probate tax is $1,000 ($250 on the first $50,000 and $750 on the next $50,000).

Is There a Way to Avoid Probate?

Yes, there are a number of legal strategies that can be used:

- **Homes, bank account, and other substantial assets held jointly with another person as "joint tenants with right of survivorship,"** will pass directly to the survivor at death (not available in Quebec). However, unless you owned these assets together from the beginning, there may be a deemed disposition of capital gains if you adda joint owner on instruments such as common shares.
- **Property that is given as a gift during your lifetime** does not fall into your estate because you did not own it upon your death. The gift is the legal property of the person to whom you gave it. However, you should keep in mind that in the case of assets that have grown in value, the tax payable on the deemed disposition when you gift the assets may greatly outweigh the cost of probate. For example, if you had common shares currently worth $20,000 that had grown in value from $10,000, and then you gifted the shares to someone in your lifetime, it would considered a deemed disposition, leaving you liable for the capital gains tax on the $10,000 growth.
- Under a **life insurance policy** you can name a beneficiary who is to receive the death benefit proceeds directly, without payment passing through the estate.
- Assets placed in an **Alter Ego Trust, Joint Partner Trust or an "irrevocable trust"** for a beneficiary.

As well, the value of outstanding mortgages or debt secured by real property is generally deducted from the estate's value. Replacing unsecured debt with secured debt may be an option to consider. Securing debt will also generally offer a lower rate of interest.

RSP and RIF Beneficiaries May Avoid Probate

As with insurance designations, probate may be avoided for named beneficiaries under a **Retirement Savings Plan**

(RSP) or a Retirement Income Fund (RIF) and the assets pass to them with no immediate tax to be paid, including a spouse or common-law spouse. If you name a minor child or grandchild as beneficiary and the child was financially dependent on you, the money can be used to purchase an annuity until the child turns 18. If assets accumulated in your RSP or RIF are not transferred to your spouse (or a financially dependent child or grandchild), the full value of the plans will be included in taxable income in the year of your death.

Probate can be a useful process, especially in cases where there is the potential for disputes over a Will or a Trustee or Executor. However, probate fees can be significant. By taking the time now to properly establish your estate plan, you can minimize the impact of these fees on your estate and ensure that more of your assets are distributed as you want them to be.