

Avoiding Probate In Ontario: Strategies To Minimize Estate Administration Tax

Tax

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Obtaining probate for a will is the legal process through which the executor named in a will asks the court to confirm the validity of the will and the authority of the named executor. A probated will^[1] is proof of an executor's authority to act as the estate trustee. A probated will is necessary in many cases, for example to make transfers of real property and securities. However, probate can be a time-consuming and expensive process in Ontario, taking several months to complete.

What is a Probate Tax?

In Ontario, there is no "death tax", a concept found in the United States, giving the right to transfer assets on death. Instead, there is a tax that must be paid in order for the court to probate a will, known as estate administration tax ("EAT") and levied under the *Estate Administration Tax Act, 1998* (Ontario)^[2] on the estates of deceased persons.

The EAT is based on the "value of the estate"^[3] and is calculated based on the fair market value of assets owned by the deceased at the time of death.^[4] The amount of EAT due depends on the value of the estate. In general, the value of the estate in excess of \$50,000 is taxed at 1.5%.^[5] As of January 1, 2020, the EAT has been eliminated on the first \$50,000 if the value of an estate.

While the EAT must be paid when obtaining a probated will, it can significantly reduce the value of an estate and leave less for the beneficiaries. EAT is not a deductible income tax expense for the estate or the deceased, and it is not "recovered" by being added to the adjusted cost base of the assets in the hands of the estate/beneficiaries.

Fortunately, there are several methods used by estates practitioners to plan for minimizing EAT. Here are two commonly-used planning methods, often used in tandem.

Bare Trustee Corporation

A bare trustee corporation is a corporation set up in order to act as the legal owner of certain assets that generally require probate. When a person transfers legal title to a bare trustee corporation (coupled with a bare trust declaration by the corporation), they give up legal ownership of the assets but retain the right to control and manage the assets during their lifetime (i.e. beneficial ownership). The individual will be both the legal and beneficial owner of the shares in the bare trustee corporation. Upon the person's death, legal title does not change (as it is owned by the corporation not the deceased individual), and the estate may transfer beneficial ownership without the need for probate.

A bare trustee corporation can be used for investment accounts, bank accounts, art work, vehicles and real estate – essentially any asset that generally requires probate. Using a bare trustee corporation has several benefits, including:

1. **Avoidance of Probate:** As the bare trustee corporation is the legal owner of the assets, the assets will not be subject to probate upon your death. Shares of private corporations do not require probate in Ontario provided a secondary will is prepared disposing of those assets, the intention being that the secondary will is not probated

2. Privacy: Probate proceedings are public, which means that anyone can see the details of your estate. By using a bare trustee corporation, you can maintain privacy as the details of your estate remain confidential.
3. Cost Savings: Using a bare trustee corporation can help to reduce the costs associated with probate, including legal costs and the EAT.

However, probate planning using a bare trustee corporation will not work if the deceased only has one will, and probate is required for any other asset(s) owned by the deceased individual at the time of death. In that case, the value of assets held in the bare trustee corporation must be included in the value of the estate for probate tax. This issue can be addressed by preparing multiple wills, as discussed below.

Other potential drawbacks include the expense of incorporating the bare trustee corporation, cost and inconvenience of annual corporate filings and potential application of new trust reporting rules to bare trust corporations. As well, it may be undesirable for personal reasons to hold assets in a bare nominee company name.

Notably, the [Federal Underused Housing Tax](#) and [Toronto Vacant Home Tax](#) appear to apply to corporate-owned residential properties. These taxes, and the filing/reporting requirements thereunder, will likely apply to properties owned by bare trustee corporations.

Multiple Wills

Using "multiple wills" is a strategy involving the creation of a Primary Will and a Secondary Will.^[6] Typically, a Primary Will deals with assets that require probate, thus incurring EAT, and a Secondary Will deals with assets that do not require probate in order to transfer title (i.e. shares in a private corporation acting as a bare trustee).

Personal articles, most private company shares, and loans to private companies and loans to family members normally do not require probate, and are generally included in a Secondary Will and excluded from a Primary Will. A multiple wills strategy would involve creating a Secondary Will for these assets.

Multiple wills are often paired with the use of a bare trustee corporation in order to minimize the assets that pass under the Primary Will, which requires probate.

Using a multiple wills strategy has several benefits, including:

1. Avoidance of Probate: You can ensure that only those assets requiring probate are processed through the probate process. The Secondary Will does not require probate.
2. Cost Savings: You can help to reduce the legal costs associated with probate and the payment of EAT by exempting certain assets from the process.
3. Estate Planning Flexibility: You can tailor your estate plan to meet your specific needs and ensure that your assets are distributed according to your wishes.

Disadvantages to Multiple Wills

The strategy of using multiple wills is not without potential for problems..

Care is required in drafting multiple wills to ensure that there are no administration issues following death. For example, it is recommended that the executors under both wills are the same. Also, if the residual beneficiaries under the primary and secondary will are different, for example, issues may arise regarding the payment of debts and taxes, whether it be under the primary or secondary assets. Careful drafting by an expert estate planning solicitor should avoid these problems, but there will be added cost given the time and care required to properly draft primary and secondary wills.

Conclusion

Using a bare trustee corporation combined with multiple wills can be an effective estate planning tool for minimizing the costs associated with probate and EAT. While this strategy introduces several complexities and potential pitfalls, there is a clear advantage of ensuring that the assets are distributed without the payment of EAT, maximizing the assets of the estate.

It is important to seek the advice of an estate planning lawyer to determine the best estate planning strategy for you. Every estate plan is unique and the tax implications of each estate planning strategy should be carefully considered and addressed.

[1] In Ontario, a probated will is a will for which Certificate of Appointment of Estate Trustee has been issued.



[2] S.O. 1998, c. 34, Sched

[3] Defined with reference to the *Estates Act*, R.S.O. 1990, c. E.21.

[4] <https://www.ontario.ca/page/estate-administration-tax#:~:text=%245%20for%20each%20%241%2C000%2C%20or,of%20the%20estate%20exceeding%20%2450%2C000>

[5] As of January 1, 2020, the Estate Administration Tax has been eliminated for the first \$50,000 of the value of the estate. See: <https://www.ontario.ca/page/estate-administration-tax>.

[6] The use of multiple wills and grants of limited probate were approved by the Ontario Court of Appeal in *Granovsky Estate v. Ontario*, 1998 CanLII 14913 (ON SC) and confirmed by the Ontario Superior Court in *Milne Estate (Re)*, 2019 ONSC 57.

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