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Probate and Assets Passing Outside of an Estate

Some assets can be transferred after death without the need for a Certificate of Appointment of Estate Trustee With a Will (also known as “probate”). However, assets properly considered part of an estate should nevertheless be declared on a probate application and within an Estate Information Return if other circumstances require that probate is obtained.

In many circumstances, joint assets that pass by right of survivorship directly to the joint owner are impressed with a resulting trust in favour of an estate and are administered as any other assets of the estate. While there is no obligation to obtain a Certificate of Appointment (and pay estate administration taxes) in respect of jointly-held estate assets in circumstances where probate is not otherwise required, if other estate assets do exist and a Certificate of Appointment is required, assets that have automatically passed to the survivor (but nevertheless represent assets of the estate that will be administered in accordance with the terms of the Will being admitted to probate), should be included within the statement of estate assets in respect of which probate fees will be paid.

The “first dealings” principle provides an interesting exception to the general rule that an estate trustee will require a Certificate of Appointment before transferring title to real property. While real estate that is subject to the first dealings exemption does not, in itself, necessitate obtaining a Certificate of Appointment, estate administration taxes must normally be paid on the value of such real property when a probate application is being submitted.

Notwithstanding the above comments, there still are other valid mechanisms for limiting the assets subject to probate fees. One such option is the use of multiple wills to eliminate certain classes of assets from being subject to fees upon the filing of a probate application. For example, when a separate Last Will and Testament is used to bequeath property subject to the first dealings exception and the Will being admitted to probate addresses only the distribution of other assets of the estate, probate fees need not be paid on the value of the real property.