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probing the issue of **PROBATE**

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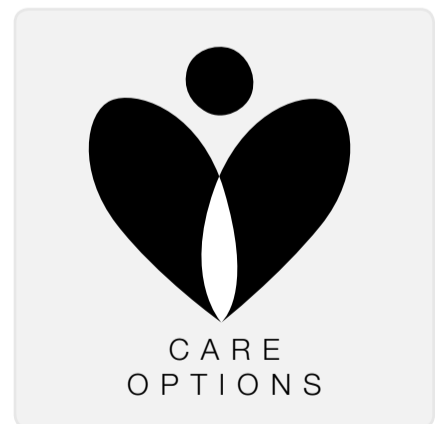


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Probing the issue of probate

Whether you are considering estate planning, helping your parents create their Wills, or organizing your own affairs, ‘probate’ is a term everyone is aware of – but what does it really mean?

You may have a basic understanding of probate – but recent legislation means significant changes to the probate process and how it may affect you, whether you’re acting as an executor or [doing estate planning](#).

As of January 1st 2013, Ontario’s Estate Administration Tax Act amended the probate rules. Probate fees, now known as estate administration taxes (‘EAT’) are now considered taxes and subject to audit by the Ontario Ministry of Revenue. There is a new formal tax audit, collection system and appeal process for collecting probate fees, especially with regard to the accurate valuation of estate assets and responsibilities of executors regarding record-keeping, filing of tax returns, and general compliance. If an audit reveals that the estates assets have been incorrectly valued, fines may be imposed and executors may be personally responsible for additional taxes, even if all estate funds have been dispersed, up to four years after the estate has been closed. This additional requirement for valuations of property and administration will likely result in further delays to the probate process.

What is probate?

Probate is the presentation to a court of law (in Ontario, the Superior Court of Justice, www.ontariocourts.ca) of the Will of someone who has died. This process includes ‘probing’ or ‘proving’ that the executor, also known as the ‘estate administrator’, is who they claim to be, and the estate’s assets will be administered according to law.

Probate ensures that the:

- ▶ Will is valid in its construction:
 - for example, the Will may not be signed or witnessed properly, or not be a valid document for some reason; in this case the executor, although perfectly willing and able, cannot act since the Will is not valid, so the person is deemed to have died without a Will

- ▶ The executor is confirmed as regarding their identity, ability and willingness to assume the task:
 - for example, a Will may be fine but the executor, who is often the same age as the deceased, may be unable to act due to physical or cognitive illness; in this case, the Will remains valid but the Court must appoint another executor

The probate process results in a document called a ‘certificate of appointment of an estate trustee’ (this may be with or without a Will). Notarized copies of the certificate will be needed by third parties such as banks, land registries and investment companies to transfer the deceased person’s assets to the beneficiaries they have named in the Will.

The probate process neither validates the terms of the Will, nor comments on the appointment of the executor; it merely confirms the validity of the Will and the appointment of the executor. The process entails completing numerous forms (forms are available, but cannot be filed, online from www.ontariocourtforms.on.ca); it may not require the full-time participation of a lawyer, and it does not require an actual appearance in Court.

Who applies for probate – when - and where?

The probate application is made to the Court where the deceased had their ‘fixed abode’ at the time of death, which may not be where they actually died. For example, if the person’s home was in North Bay, although the person had been transferred to a Toronto hospital and died there, the appropriate Court would be in North Bay. In Ontario, the applicable Court can be found via www.ontariocourts.ca.

Why seek probate?

There are definite advantages to seeking probate.

The most common purpose is to satisfy third parties such as banks, investment companies, land registries, that the executor is entitled to deal with the assets of the deceased person, including collecting debts, paying bills, transferring assets, arranging for and paying for funeral arrangements. If third parties cannot establish this fact, they can themselves be liable for any errors or omissions and be sued by the beneficiaries.

When real estate and property is being transferred to beneficiaries another important third party to consider are land registries.

The date which probate is granted can 'start the clock ticking' on the time limits on claims against the estate; if there is no probate, the claims can delay an estate's closing indefinitely. Probate also protects the executor against personal liability if later claims are made regarding the estate distribution, via the Trustees Act.

Why avoid probate?

The prevailing belief about probate is that it's something to be avoided at all costs. So what are the actual and intangible costs of probate?

The most common concern is **costs**. Probate fees are among the most costly in Canada:

Gross estate asset size	Ontario Probate Fees / EAT
\$0 to \$50,000	\$5 per \$1,000
\$50,001 & over	\$250 + \$15 per \$1,000 over \$50,000

A useful rule of thumb for probate fees in Ontario is \$14,500 per \$1 million in gross assets.

Estate lawyers may charge 2-5% of the gross average estate, including court costs.

Another common concern is **complexity**, which invokes worries about the need for specialized and expensive assistance. The 2013 legislation requirements will increase the complexity by requiring more stringent valuations, record-keeping and audit trails.

Probate is also synonymous with **time delay**. The granting of a certificate of appointment can often take up to one year, due to the burden on courts and the need for supporting documentation for the amended legislation.

Once probate is granted, the Will becomes a public document, available to be viewed by anyone. Thus **lack of privacy** into their financial affairs encourages some people to seek every option for avoiding it.

How do I know if I should seek probate?

The need for probate is based on the nature of the assets and the size of the estate. The first step for an executor is to estimate both of these, estimate the potential probate fee, and collect expert advice from the deceased person's advisors:

- ▶ Visit the Ontario government website, <http://www.ontario.ca/government/what-do-when-someone-dies>, for step-by-step instructions in what to do.
- ▶ Consult the personal papers to find the Will; contact the lawyer who did the Will to obtain a supply of notarized copies of the Will and generally discuss the estate.
- ▶ Check the personal papers to collect financial information, such as banking and investment statements, insurance policies, real estate deeds and other valuables.
- ▶ Visit the bank to advise them of the death and your role via a notarized copy of the Will. The bank will freeze the bank account, open an estate account, and advise about the need for probate:
 - For example, if assets are joint and the estate value less than \$20,000, the bank may advise probate is not required
 - The bank may only require that the executor indemnify it against any errors or omissions made in settling the estate
- ▶ From the information received so far, make a rough calculation of the gross asset value of the estate, including both real estate and personal property:
 - Use a [probate fee calculator](#) for an idea of what the probate fees might be
 - This figure is a valuable rule of thumb to guide future decisions about closing the estate

How can probate fees be avoided?

Not surprisingly, legal and financial-management strategies have been developed to avoid probate fees by minimizing the number of assets in an estate; the fewer the assets, the lower the probate fees. The type and ownership of assets are also important. Here are the most common strategies used in Ontario:

- ▶ Make assets 'joint with right of survivorship'
 - This way the asset passes directly to the joint holder, is not part of the estate and therefore not subject to the terms of the Will
 - For example, a chequing account held jointly with a spouse, if it has the right of survivorship, automatically becomes the spouse's property
- ▶ Designate a beneficiary (a person, not your estate) for assets such as registered accounts or insurance policies
 - Ownership, as well as any death benefits that an insurance policy may pay out, will pass directly to the beneficiary and not be dictated by the terms of the Will
 - Note that this is not applicable to non-registered or non-insurance investments, vehicles or real estate, which can only be transferred via a Will.
- ▶ Make a gift of assets during your lifetime
 - Since probate fees are based on asset value at the time of death, giving assets away before death reduces the asset value, and potential probate fees, of your estate, which will reduce probate fees.
 - If the asset has appreciated in value since being purchased, it will trigger [capital gains tax](#).
 - It also means the former owner relinquishes all control over the property; for example, it may be sold or used as security

► Establish trusts

- The distribution of assets held in a trust are dictated by the terms of the trust, not by probate rule or by a Will
- Create more than one Will
- Since shares of privately-held companies are exempt from probate, they can be dealt with in a separate Will
- Be sure to seek legal advice so that one Will does not invalidate the other.

Probate considerations for estate executors

Many adult children are named as executors for family members; indeed, it is often considered a compliment to be chosen. The task of an executor is time-consuming and meticulous, made even more daunting by the rigour imposed by the Estate Administration Tax Act. However a clear-headed assessment of the facts may reveal that things are less complicated than they seem.

Let's have a look at an example.

Hector, aged 87, and his wife had lived in their east-end semi-detached house for 65 years, selling it for a great price when his wife's dementia required her to enter a nursing home. Hector moved into an adjacent retirement home and spent his days with her until her death four years ago. Without children or close family, Hector was alone, but content.

Hector was a careful man. After his wife's death he contacted a local estate lawyer to arrange his affairs. He appointed his niece as his Power of Attorney for Care, and a trust company his [Power of Attorney for Property](#). He prepared a Will and made his niece his executor, telling her where his Will was located but not its contents.

When Hector died, his assets were as follows:

- Cash in bank account of \$15,000
- Death benefit payable to estate to help defray funeral expenses
- A Life Insurance policy payable to his estate to cover estate closing costs
- 1997 Neon sedan, left to his niece's son in the Will
- \$10,000 in GICs with the defined beneficiary of his niece
- Miscellaneous jewelry which belonged to his late wife, left to his niece in the Will

Is probate required? What do you think?

The niece followed an on-line executor checklist, this one from her bank, www.rbcwealthmanagement.com. She already knew where to find the Will, and gathered the financial information and estimated an asset value of about \$28,000. She checked an online [probate fee calculator](#) to find the probate fees on an estate of about \$30,000 was estimated at \$150.

Sure enough, at the niece's appointment with the bank, the manager advised that with an asset size of under \$30,000, assets with beneficiaries and a straightforward Will, probate was not required.

What had Hector done right?

- He appointed a significantly younger person, his niece, his executor, after already seeing her abilities as his Power of Attorney for Care
- He made a trust company his Power of Attorney for Property just to be careful, since he knows that this appointment is valid as soon as it is signed
- Rather than making accounts or investments joint, he defined beneficiaries for each of them
- On his lawyer's advice, he made one insurance policy payable to estate, ensuring enough funds for the niece to outsource the whole executor process to a lawyer if she felt overwhelmed by the task.

What else could Hector have done?

- Given that he had no other trusted family or appropriately-aged friends to act as executors, he could have appointed the trust company as executor in case his niece could not act for any reason.

Probate considerations for estate planning

Who needs an estate plan? Everyone –particularly if you are 55+.

An estate plan has two elements: the preparation of a Will and a strategy to reduce income taxes and probate fees. These two tasks must work in tandem, as the tax strategies must be incorporated into the text of the Will.

The ultimate purpose of an estate plan is more than just minimizing tax; it's to ensure that your hard-earned assets are distributed according to your wishes, not those of an anonymous court formula.

Estate planning is a joint effort, usually involving an estate lawyer, tax advisor and financial planner. It includes complementary strategies for:

- ▶ Tax planning
 - Tax savings can be achieved via registered products, spousal and joint ownership arrangements
- ▶ Wills
 - Considerations when making a Will include the choice of executor, distribution of assets and special instructions
- ▶ Powers of Attorney
 - Choice of substitute decision makers for Care and for Property
- ▶ Trusts
 - Trusts can protect assets and dictate terms of their management within the trust instead of in an estate

▶ Donations and bequests

- Registered charitable donations of cash, securities, property, [life insurance](#), investments, personal property can reduce the asset size of an estate

▶ Life insurance

- Considerations include death benefits, beneficiaries and sources of funds to cover probate fees and funeral expenses

Let's review an example of addressing probate during estate planning.

Andy and Jane were both widowed and re-married in their 70's. Soon after the wedding they created a spousal Will that laid out in detail their plans that each set of children inherit their own parent's assets.

Five years later they planned a 'bucket-list' heli-skiing vacation. Just before they departed, the husband's son, a financial planner, convinced them to put all their investments into joint ownership. They were unsure but felt time-pressured, so on the eve of their trip they made the alterations, although their Will was not changed, and the son assured them it won't affect anything.

Tragically the couple died in an avalanche on the vacation. According to law, the husband was presumed to have died first. Since the assets were now joint with right of survivorship, they all passed directly to the wife, bypassing the Will, and hence to her descendants. The husband's 'clever' son was left with none of his father's assets.

Did this estate require probate? Yes:

- ▶ To confirm executor and the spousal Will
- ▶ To confirm the validity of the last-minute change to the asset designation
- ▶ To allow the transfer of assets to wife's beneficiaries
- ▶ To begin the countdown for the time within which the Will could be contested – which it was.

What did this couple do right to plan for probate?

- ▶ They created a proper estate plan, giving careful consideration to managing impact of probate fees and to passing their assets to their respective children

What could they have done better?

- ▶ They failed to recognize that an estate planning is a delicate balance created via the expertise of several advisors
- ▶ Changing one element of the plan can affect or negate careful intentions
- ▶ It's essential to keep all advisors apprised of any change, even if they think there's no potential impact

One of the most common and tragic estate-management mistakes is a poor choice of executor. The task is time-consuming and stressful, and choosing one adult child to implement the estate can pit siblings against each other, totally negating a parent's wishes for a harmonious legacy.

Here's an example of an executor dealing with probate and estate planning.

Muriel, aged 92, had three adult children. She still lived in the [family home](#) with her daughter and son-in-law. Her daughter Janis provided care home-making, took her to errands and appointments, and for the sake of convenience she was made joint on her mom's chequing account.

Muriel had taken a church friend's advice and made her daughter joint owner of the beloved family home, which she was very anxious to keep in the family and not be sold. She presumed that the daughter would understand that anything Muriel left would be shared among the three children; however, this was never formally documented.

Muriel also appointed her older son as her Will's executor since 'it was his turn to help'.

When Muriel died, Janis inherited the house without a need for probate. Her middle brother objected - 'Mom had dementia and didn't know what she was doing'. Janis replied - 'I deserve it for what I did'. The elder, being executor, was bound to administer the terms of the Will regardless of his personal feelings. No share in the house for each brother - and no more relationship with Janis.

Within two years Janis's husband divorced her. The house, as the matrimonial home, had to be sold as part of the divorce settlement. In that time its market value had increased so much that neither son was able to buy it. Most of Janis's share was eroded by the matrimonial debts she had to settle as part of the divorce.

Is this a case for probate?

In this case, probate was encouraged and fees were low, since aside from the house (which was no longer an estate's asset), the estate was small.

Probate was desirable; the elder brother wanted to limit his liability, the other brother to try and establish this Will had been made while the mother was mentally incompetent (proven to be false). It was also valuable to establish a timeline for the brother to contest the Will, which he did. Four years later, all three siblings are estranged.

What did Muriel do right to plan for probate?

- ▶ She attempted to involve her children in her personal affairs, Janis as Power of Attorney while she was alive, and her eldest son as her executor
- ▶ She trusted that her daughter's finer feelings would prevail

What could Muriel have done better?

- ▶ She should have pursued legal advice regarding estate planning, not just acting on a chat with a friend
- ▶ In this situation, naming her son as executor guaranteed a family fight

A recent Supreme Court ruling has limited the 'presumption of gift'; an adult child will be presumed to hold the asset in trust for the estate or bear the burden of proving the action was intended as a gift.

Still mystified by probate? Here are some things to remember:

- Beware of mistaken actions that can cost far more than probate fees. Be sure the strategy will not divide the family or negate a parent's legacy.
- Before worrying about probate, do some homework to see if it's really a problem – it may be cheap at the price. What may seem like a sensible savings idea to the person making a Will may outweigh any savings for years after their death.
- When choosing an executor, carefully assess the person's skills and willingness to act.
- If you are an executor, think carefully before accepting, and budget to delegate to professionals as needed. Be meticulous in documenting every valuation and activity.
- Take ownership of your estate plan. Respect and work closely with all advisors so you are partners in your successful estate plan, during your lifetime and to ensure your legacy.

Get more information on topics related to probate at www.comfortlife.ca

Related Resources:

- ▶ [Information on Estates and Wills](#)
- ▶ [Ontario Ministry of Finance](#)
- ▶ [Ontario Courts](#)
- ▶ [Ontario Court Forms](#)
- ▶ [What To Do When Someone Dies](#)
- ▶ [Prepare Your Will With Taxes In Mind](#)
- ▶ [Powers of Attorney for Property](#)
- ▶ [Probate Fee Estimator](#)
- ▶ [Selling Your Home ebook](#)
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