

What Is Probate?

Probate is the process whereby the court certifies that an individual (a legal personal representative) has the right to administer the estate of a deceased person. Making a probate application in Ontario results in a liability to pay certain provincial fees. Probate fees are now officially known as the “estate administration tax” in Ontario, but because the term “probate fees” is widely recognized, it is used throughout this article.

Whether a person dies with or without a will, his or her property must be administered by a legal personal representative, either in accordance with the will or consistent with the distribution scheme prescribed by the Ontario *Succession Law Reform Act*.

A Certificate of Appointment of Estate Trustee with a Will and a Certificate of Appointment of Estate Trustee Without a Will (formerly Letter Probate and Letter of Administration) confirm the authority of a personal representative. When there is a will, the estate trustee’s authority to act derives from the will itself; the certificate simply verifies the appointment and provides evidence to third parties of the estate trustee’s authority.

If an individual dies without a will or with a will that does not name an estate trustee who is able and willing to act, a personal representative must be appointed by the court. In these circumstances, the personal representative derives his or her authority to act from the certificate issued by the court.

There is no general requirement that a will be submitted to probate. A certificate of appointment is required under some statutes, however, for the management of particular assets (e.g., real estate in the Land Titles System as opposed to the Registry System). The certificate is sometimes required by third parties (e.g., banks or trust companies) as confirmation of the estate trustee’s authority to manage an asset that belonged to the deceased (e.g., monies in an account). Often, a certificate is required for only one or two assets of many in the estate. Unfortunately, probate fees are levied on *the total value of all property that belonged to the deceased at the time of his or her death*.

The calculation of the total value of the deceased’s assets for probate fee purposes is made on a “gross” basis: deductions for personal debts of the deceased (with the exception of mortgages on any real property owned by the deceased) are not permitted. If an individual dies without a will or with a will that does not name an estate trustee who is able and willing to act, a certificate will be required and fees will be payable.

What Are Probate Fees?

Probate fees are levied by the provincial government when it grants a certificate to appoint an estate trustee. In 1992, Ontario tripled the rate of probate fees to 1 1/2% of the value of the estate in excess of \$50,000. Today, each million dollars worth of estate value is subject to probate fees of about \$15,000. An estate of \$10 million would be subject to fees of approximately \$150,000. Ontario’s probate fee rates are currently the highest in Canada.

How Can You Reduce or Avoid Probate Fees?

For Ontario residents and persons owning assets in Ontario, planning to reduce or avoid probate fees has become an important element of estate planning. To do this, one or more of several strategies of varying

complexity can be used. Whether or not a particular strategy is appropriate will depend on the nature of the assets that the individual owns, the size of the estate, the individual's other estate-planning objectives and the need to avoid undesirable income tax results. Several basic planning techniques are summarized below.

Holding assets jointly. If an asset (real or personal property) is held jointly by two individuals, with right of survivorship, title to the asset will pass to the surviving joint owner immediately on the death of the first joint owner. The asset does not form part of the deceased joint owner's estate. In this situation, probate fees are not levied on the value of the jointly held asset.

Note, however, that not all assets that are owned by more than one person are held "jointly" in this manner. It must be clear that the asset is held jointly *with right of survivorship* in order to achieve the savings described above. For example, real estate that is described on the deed as being held by two (or more) persons as "joint tenants and not as tenants in common" will pass to the surviving joint owner automatically on the death of the first joint owner. As well, bank accounts and brokerage accounts that are held jointly usually provide for rights of survivorship in the account agreements. The particular account agreement should be reviewed carefully to confirm whether adequate provisions have been made.

Transferring property into joint names has some potentially undesirable consequences. If the title to property is transferred into joint names, the former sole owner generally relinquishes the right to dispose of the property during his or her lifetime or under a will. In addition, depending on the nature of the property, transferring the property into joint names may result in an immediate income tax liability. For example, the person who transfers real estate or a corporate security that has an accrued gain (i.e., it has appreciated in value since the date it was acquired) may incur a capital gains tax liability, based on the amount of the accrued gain. You should obtain income tax advice as part of any probate fee strategy that involves the transfer of property into joint names,

Naming beneficiaries. If an insurance policy designates a beneficiary other than the estate of the individual whose life is insured, the proceeds pass directly to the designated beneficiary on the death of the insured individual and do not form part of the deceased's estate. The amount of the insurance proceeds are not included in the calculation of probate fees. The same concept also applies to various types of "plans," including RRSPs, RHOSPs and RRIFs, as well as to profit-sharing, retirement and pension plans.

Transferring assets to a trust. Property that is transferred to a trust during an individual's lifetime ceases to belong to the individual and does not form part of his or her estate on death. The value of the assets transferred are therefore not subject to probate fees. However, transferring assets to a trust may trigger adverse income tax consequences. For example, an individual who transfers corporate shares that have accrued gain (e.g., shares that have increased in value since the date the transferor acquired them) may incur a capital gains tax liability, based on the amount of the accrued gain. It is important to obtain appropriate tax advice if you wish to use a trust as part of a strategy to avoid probate fees.

Converting personal debt into corporate debt. As noted above, the calculation of the total value of the deceased's assets for probate fee purposes does not permit any deduction for personal debts (with certain exceptions). Debt-encumbered assets can, however, be transferred to a corporation that is controlled by the transferor. Then when the shares of the corporation held by the deceased individual are valued, the corporate debt will reduce the probate value of the shares.

Lifetime gifts. Lifetime gifts can also reduce the value of an individual's estate and the probate fees payable. By gifting, however, the individual relinquishes all control over the gifted property. Gifting may, depending on the nature of the gift, also result in immediate income tax liability.

Jurisdiction shopping. Moving the legal location of assets to a jurisdiction with lower probate fees can also reduce the total amount of probate fees payable. An individual could create a corporation in Alberta, for example, and transfer certain assets to the corporation (Alberta's probate fees are capped at \$400). One could then prepare an "asset-specific" will to manage and dispose of the shares of the corporation.

Because the costs of both incorporation and an additional will can be high, this strategy is most appropriate for larger estates.

Multiple wills. If the assets of an estate can be distributed without probating the will, no probate fees will be payable. Generally, probate is not required to transfer personal and household articles or shares in a private corporation. An estate may benefit from the preparation of two wills: the first would include any personal and household articles and any shares in a private corporation; the second would include the remainder of the estate. Probate fees would be payable only on the value of the assets included in the second will. 