Probate

Profits and perils of planning around a formal estate

For some people, even the thought of creating a Will casts a pall over their mood. Yes, a Will deals with a person's death, but the broader process of estate planning is about caring for the most important people in your life. Having an up-to-date Will is central to that process.

There's no word that seems to strike greater fear when people approach their estate planning than the spectre of "probate". It's not an everyday word, so its nature and implications are a mystery to many. Without a clear understanding, you open yourself up to added anxiety and potentially misguided actions that may be more harmful than helpful.

Your first priority is a sound estate plan for yourself and your beneficiaries. Once that's satisfied then yes, why pay more probate than is necessary?

The many faces of probate

Probate has historically referred to estate matters in a variety of ways, from the name of the courts to the description of the application and process – and of course, the tax.

We'll use the term "probate" in this article, understanding that many provinces now use different terminology. Readers are encouraged to consult an estate planning lawyer to learn the appropriate language in their province, and to discuss how the principles in this article apply to their situation.

When is a probate application needed?

A person's Will is the legal authority for an executor to take control of that person's property at death, in order to 'execute' the instructions in the Will. Like probate, "executor" is not the official term in all provinces.

Despite the Will being the source of the executor's legal power, a probate application is often necessary to prove that authority to others who are in possession of the deceased's property. For example, a financial institution has to be careful before releasing funds from an account as the Will may not have been executed properly. Or, there may be a subsequent Will that supersedes the one the executor offers or it may even be a forgery.

Even without such a demand, a formal application may still be necessary for other reasons:

- Where there are minor age beneficiaries, the provincial Public Guardian's office usually requires that official procedures be followed as part of its obligation to protect those beneficiaries' interests
- Most real estate cannot be transferred out of an estate without a probated Will
- An executor requires a formal appointment to give instructions in any lawsuit involving the deceased or estate

Probate for an executor's peace of mind

A probate application is often desired by the executor to guard against personal liability. While not completely protected from the cost and inconvenience of litigation, an executor who acts in a bona fide manner is generally protected against liability to the estate when acting under a formal probate appointment.

Undertaking the probate process

It is the executor's responsibility to see to it that the probate application is properly completed. Often the executor will hire a law office or trust company to assist with the application. This may be for the sole task of filing the probate application, or it may be part of a continuing retainer for the duration of the estate administration. Either way, the executor remains legally responsible to oversee all hired professionals.

The executor must first gather sufficient information about the deceased and the beneficiaries to begin the application. Once submitted, the court processing time depends on the volume of applications in the queue, which may mean weeks or months. The law office or trust company can provide guidance, based on their experience.

Property subject to probate

A summary of the deceased's assets will have to be prepared. In a simple estate this may be part of the initial court application, but often the executor will need time to identify and gather assets. In that case, an initial outline and estimate may be provided, with a legal promise to complete the information over time. In some provinces the court handles the initial legal appointment, and another government department oversees property details.

Most provinces assert jurisdiction over real estate within the province and personal property wherever it may be located, including bank/deposit accounts, individual investment securities and mutual funds, vehicles and vessels, clothing, furniture and personal belongings, as well as intangibles and business interests. Property beneficially owned by the deceased but held in another person's name must also be accounted for.

The cost of probate

While every province has a probate process of some sort, not all provinces levy a probate fee or tax.

In Alberta, Manitoba and Quebec, there are only court filing fees, amounting to a few hundred dollars at most.

In the other provinces, the property value (usually less mortgages on real estate) is multiplied by either a flat or graduated percentage rate. The maximum rates are: British Columbia 1.4%, Saskatchewan 0.7%, Ontario 1.5%, New Brunswick 0.5%, Nova Scotia 1.695%, Prince Edward Island 0.4% and Newfoundland and Labrador 0.6%.

Acceptable probate avoidance strategies

Despite the wide range of property open to probate, there are a number of ways to legally escape its application.

Common planning practices

- **Lifetime gifts** – The tax applies to property owned at death, so legitimate gifts made to others during a person's lifetime will not be brought into the calculation.
- **Beneficiary designations** – Where there is a named beneficiary on an insurance policy or registered investment plan (eg., RRSP, RRIF, TFSA), the proceeds will pay to the beneficiary outside the estate.
- **Joint ownership** – When someone holds property in joint ownership with others, that person's interest does not fall into his or her estate, but instead passes by right of survivorship to the other registered joint owners.

Situation-specific strategies

- **Secondary Wills** – A multi-Will strategy uses a secondary Will to isolate property that is not expected to require court authority for the executor to take control, often shares in a closely-held private corporation.
- **Alter ego trusts & joint partner trusts** – A person over 65 may transfer select property to this type of trust whereby he/she/spouse is life beneficiary, and then contingent beneficiaries receive what remains at death.
- **Corporations** – Non-registered portfolio investments and associated investment loans might be held in a corporation so only the net value of the investments is subject to the probate calculation.
- **Real estate outside of province** – Not really a strategy, but a reminder that extra-provincial real estate will not be subject to probate in the deceased's province, though it may be exposed in that other jurisdiction.

And the perils?

Recall that even the highest probate tax is less than 2% of the value of estate property. Consider that in proportion to what is expected to be gained by any probate avoidance steps, as they may alter ownership rights, open creditor exposure and incur income tax. Legal and tax advice should be obtained before taking any action.

APPENDIX – Provincial reference material

Below are provincial government websites or resources referenced from those sites. Underlined text in the PDF version of this article are hyperlinks. Full text of the links are on the next page. This is intended as a starting point for resources in each province. Consult an estate planning lawyer in the province for further information.

British Columbia

- Guidance – Probate Fee Act s.2 – Court forms
- Summary – The probate fee does not apply to the first $25,000. It is 0.6% from $25,000 to $50,000, and 1.4% on the amount over $50,000.

Alberta

- Guidance – Court Fees: Surrogate Matters – Court forms
- Summary – Surrogate Court fee is based on net value of Alberta property: $35 up to $10,000; $135 over that to $25,000; $275 over that to $125,000; $400 over that to $250,000; and $525 if over $250,000.

Saskatchewan

- Guidance – Administering an estate – Court forms
- Summary – The probate fee is 0.7%. Real estate is valued net of mortgage/encumbrances.

Manitoba

- Guidance – Probate division FAQ – Notice re: Elimination of probate charges – Court forms
- Summary – Probate fees no longer apply as of November 5, 2020. Previously the charge was $70 on the first $10,000 value of the estate and then 0.7% on the amount over.

Ontario

- Guidance – Estate administration tax – Court forms
- Summary – Estate Administration Tax is 1.5%, with the first $50,000 of estate assets exempt. Prior to January 1, 2020, the charge on the first $50,000 was 0.5%. Real estate is valued net of mortgage/encumbrances.

Québec

- Guidance – Tarif juidiciaire en matière civile s.15 – Court forms
- Summary – There are no probate fees for a notarial will, and a $211 fee for non-notarial wills.

New Brunswick

- Guidance – Probate of the Will – Court fees – Court forms
- Summary – The probate fee is $25 for an estate valued up to $5,000; $50 if up to $10,000; $75 if up to $15,000; $100 if up to $20,000; and 0.5% of the value over $20,000.

Nova Scotia

- Guidance – Probate court practice – Court forms
- Summary – The probate fee is $85.60 for an estate valued up to $10,000; $215.20 if up to $25,000; $358.15 if up to $50,000; $1,002.65 if up to $100,000, plus 1.695% of the value over $100,000.

Prince Edward Island

- Guidance – Information for executors – Court forms
- Summary – The probate fee is $50 for an estate valued up to $10,000; $100 if up to $25,000; $200 if up to $50,000; $400 if up to $100,000. For larger estates, the fee is $400 plus 0.4% of the value over $100,000.

Newfoundland and Labrador

- Guidance – Wills & estates: Where do I start? – Schedule of fees – Court forms
- Summary – The probate fee is $60 on the first $1,000 value of the estate and then 0.6% on the amount over.

APPENDIX – Full text links

British Columbia – https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_99004_01#section2 • https://www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/court-forms/probate-forms

Alberta – https://www.alberta.ca/court-fees.aspx#jumplinks-2 • https://www.alberta.ca/surrogate-forms-non-contentious-matters.aspx

Saskatchewan – https://www.saskatchewan.ca/residents/births-deaths-marriages-and-divorces/dealing-with-death/administering-the-estate-of-someone-whos-died/when-the-deceased-has-last-will-and-testament • https://publications.saskatchewan.ca/#/categories/335

Manitoba – http://www.manitobacourts.mb.ca/court-of-queens-bench/frequently-asked-questions/probate-division/ • http://www.manitobacourts.mb.ca/site/assets/files/1152/2020-11-06_notice_-_elimination_of_probate_charges.pdf • https://web2.gov.mb.ca/laws/rules/forms_e.php

Ontario – https://www.ontario.ca/page/estate-administration-tax?_ga=2.246301507.696219018.1609694995-380465671.1607742803 • http://ontariocourtforms.on.ca/en/rules-of-civil-procedure-forms/pre-formatted-fillable-estates-forms/

Québec – https://www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/Fr__francais_/centredoc/publications/systeme-judiciaire/tarifs/TA_Frais_jud_Civil_2021_MJQ.pdf • https://www.quebec.ca/en/family-and-support-for-individuals/death

New Brunswick – http://www.legal-info-legale.nb.ca/en/probate_of_the_will • http://laws.gnb.ca/en/ShowPdf/cr/Rule-78.pdf • http://laws.gnb.ca/en/showfulldoc/cr/84-9/20210909

Nova Scotia – https://novascotia.ca/just/regulations/regs/probregs.htm • https://www.courts.ns.ca/probate_court/NSPBC_forms.htm

Prince Edward Island – https://legalinfopei.ca/wp-content/uploads/2020/08/Wills-Information-for-Executors_PLA3.pdf • https://www.courts.pe.ca/forms

Newfoundland and Labrador – https://court.nl.ca/supreme/general/forms/probate_booklet_2011.pdf • https://court.nl.ca/supreme/fees.html • https://court.nl.ca/supreme/general/wills.html#probate

For more information, please consult your advisor and tax professional.

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