

# To Probate or Not to Probate... That is the Question.

Often times planning to avoid the probate process and the payment of probate fees<sup>1</sup> on death is one of the principal objectives of an estate plan. Clients often regard probate fees as more taxes going to the Government and planning occurs from a tax savings perspective with little or no thought given to the consequences of not obtaining the grant of probate. We have set out below information to help you make a more informed decision when contemplating planning to avoid probate.

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## What is Probate?

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"Probate" or applying for Letters Probate<sup>2</sup> is the process whereby the Court confirms that a Will is the valid last Will of a person. When the executor files for a grant of probate, he swears that the Will filed with the court is the last Will of the deceased person and that he knows of no later Will. Generally, only once a grant of probate has been issued, can the assets of the deceased be transmitted into the name of the executor. Once assets are in the name of the executor, the executor can begin to administer the estate and eventually transfer those assets to the beneficiaries.

Certain assets can be administered without the grant of probate. Usually, a "grant of probate" or where the deceased died without a Will, a "grant of administration"<sup>3</sup> is generally required in the following situations:

- › **Intestacy** – If the deceased died without a Will, the administrator must apply for a grant of administration and the entire estate would be subject to probate fees.
- › **Litigation** – In situations where litigation is pending, such as when there is a claim for dependant's relief or spousal support, or where the Will is being challenged.
- › **Real Estate** – Where property registered in the land titles system (with few exceptions).

- › **Canada Savings Bonds** – Unless the bonds registered in the name of the deceased:
  - A. do not exceed \$20,000 and are being transferred to a family member;
  - B. are being transferred to a married spouse and do not exceed \$75,000; or
  - C. are being transferred to children and do not exceed \$50,000.
- › **Assets held with financial institutions** – If the deceased held assets with a financial institution over the amount that the financial institution determines it will release the funds without requiring a grant or probate (the dollar amount will vary from one financial institution to another).

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## What are the Probate fees?

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Probate fees vary from province to province and are usually calculated on the value of assets owned by the deceased that are transferred under a Will or on intestacy. As these fees vary greatly from province to province, planning is particularly important in provinces where the probate fees are high. In Canada, fees range between provinces from 0%, in Manitoba and Quebec (for a notarial will), to 1.65% of the value of the estate in Nova Scotia. See the chart on the next page for the rates in each province.

## Advice sheet

### Probate Fees\*

Province/Territory	Estate Value	Probate Fee
Alberta	Less than or equal to \$10,000	\$35
	Over \$10,000 to \$25,000	\$135
	Over \$25,000 to \$125,000	\$275
	Over \$125,000 to \$250,000	\$400
	Over \$250,000	\$525
British Columbia	Less than \$25,000	No fee
	Over \$25,000 to \$50,000	\$200 basic fee plus \$6 per \$1,000 or portion thereof over \$25,000
	Over \$50,000	\$200 basic fee plus \$150 plus \$14 per \$1,000 or portion thereof over \$50,000
Manitoba	All Estates	No fee
New Brunswick	Under \$5,000	\$25
	Over \$5,000 to \$10,000	\$50
	Over \$10,000 to \$15,000	\$75
	Over \$15,000 to \$20,000	\$100
	Over \$20,000	\$5 per \$1,000 or portion thereof
Newfoundland and Labrador	Less than \$1,000	\$60
	Over \$1,000	\$60, plus \$0.60 per \$100 over \$1,000
Northwest Territories	Less than \$10,000	\$25
	Over \$10,000 to \$25,000	\$100
	Over \$25,000 to \$125,000	\$200
	Over \$125,000 to \$250,000	\$300
	Over \$250,000	\$400
Nova Scotia	Less than \$10,000	\$85.60
	Over \$10,000 to \$25,000	\$215.20
	Over \$25,000 to \$50,000	\$358.15
	Over \$50,000 to \$100,000	\$1,002.65
	Over \$100,000	\$1,002.65, plus \$16.95 per \$1,000 or portion thereof over \$100,000
Nunavut	Less than \$10,000	\$25
	Over \$10,000 to \$25,000	\$100
	Over \$25,000 to \$125,000	\$200
	Over \$125,000 to \$250,000	\$300
	Over \$250,000	\$400
Ontario	Less than \$50,000	No fee
	Over \$50,000	\$15 per \$1,000 or portion thereof
Prince Edward Island	Less than \$10,000	\$50
	Over \$10,000 to \$25,000	\$100
	Over \$25,000 to \$50,000	\$200
	Over \$50,000 to \$100,000	\$400
	Over \$100,000	\$400, plus \$4 per \$1,000 or portion thereof over \$100,000
Saskatchewan	All estates	\$7 per \$1,000
Yukon	Less than \$25,000	No fee
	Over \$25,000	\$140

Quebec charges a flat fee where a person files a request for a will verification with the Superior Court. A notarial will does not need to be probated. The cost is between \$106 and \$119 for non-notarial wills.

## What are the benefits of Probate?

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Probate serves several purposes, including the following:

### 1. Protects the executor or administrator

Probate protects the executor under a Will or an administrator, when there is no Will, from liability when transferring assets of the estate to a beneficiary. Take the case of Justine Cerro's estate. She was a widow who made a Will naming Charity X as her sole beneficiary. Her estate was valued at over \$8M mostly composed of investment assets held in a private company. The charity was very eager to obtain its gift. Justine's executor was Brian, her brother. Brian knew of Justine's intention to benefit Charity X so the Will that he found naming Charity X as the sole beneficiary appeared to be in keeping with the intention she expressed to him. With the charity's encouragement Brian made the decision to transfer the shares of the private company to Charity X without obtaining the grant of probate. However, Justine had written a holograph Will days before she was admitted to the nursing home, changing her beneficiary and stating the reasons why. Brian found himself in the embarrassing position of having to recover the shares of the private company from the charity.

In this situation Brian was fortunate. Charity X was co-operative in returning the shares. If the beneficiary under the first Will had not been Charity X but someone who refused to return the shares, Brian may have been personally liable for the legal costs that would have been incurred to recover the shares. If Brian had obtained a grant of probate of the first Will, he would likely have not been personally liable for those legal costs.

### 2. Limits potential court claims

The date of the grant of probate also starts the clock running for certain claims that may be made against the estate. In some provinces persons who were the deceased's dependants may commence legal proceedings to claim more of the deceased's estate than what the Will provides for them. However, in most provinces the legal proceedings must be commenced within a certain period of time (referred to as the "limitation period"), typically 6 months, following the date of the grant of probate. If a grant of probate is not obtained, the limitation period does not start to run and the deceased's dependants may at any time commence proceedings, even after the estate has been distributed to the beneficiaries under the Will.

### 3. Facilitates administration

Without the grant of probate the actual administration of the estate may take longer. Financial institutions may require indemnities and letters of direction before they release the deceased's monies held with them when there is no grant of probate. Both the executor and the beneficiaries, assuming that they are all of the age of majority, may be required to sign an indemnity and this can be time consuming and inconvenient depending on the number and location of the beneficiaries.

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## Probate Saving Strategies – Consequences and Cost

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There are many planning options available that will avoid the probate process and result in a savings of probate fees. However, these options must be implemented carefully in order to avoid unintended results. Before implementing any planning options, you should discuss your estate plan with a lawyer. Discussed below are several common techniques and their possible pitfalls.

1. Transferring assets into joint tenancy with another person is a common technique to avoid probate. If some of your assets are owned jointly with another person, upon your death, the other person may become the sole owner of those assets by right of survivorship, if that is what you intended, and those assets will not be subject to probate fees. However, without further planning, the other person will, immediately upon the transfer of the assets, own an interest in the assets which may be subject to the claims of that person's creditors or spouse upon a marriage breakdown. The transfer into joint tenancy may also result in capital gains taxes being realized for tax purposes if the other person is someone other than your spouse. If the transferred asset is your principal residence, joint tenancy may compromise your ability to claim the exemption from capital gains tax upon a subsequent sale of the property or upon your death. If your intention was only to avoid probate and not to make an actual gift of the assets to the other person, that intention must be carefully documented in order to avoid a possible legal dispute between the other person and your estate beneficiaries.

2. Designating beneficiaries for your registered plans is another common method of avoiding probate. This strategy could have income tax consequences to your estate if the designated beneficiary is not your spouse. While the non-spouse beneficiary of the registered plan will receive the plan proceeds on your death, your estate will likely be responsible for paying the income tax liability that arises with respect to the registered plan on your death. This result could be unfair if the beneficiaries of your estate are different from the designated beneficiary under your registered plan.
3. Gifting assets to persons, commonly your children or grandchildren or charities, during your lifetime is also frequently used as a technique to avoid probate. Assets gifted during your lifetime will not form part of your estate and, accordingly, will not be subject to probate fees. A gift to a person other than your spouse, however, may result in capital gains being realized for tax purposes if the gift is of capital property that has appreciated in value while you have owned it.

The above techniques must be evaluated carefully in light of your particular estate and circumstances to determine whether the future probate fee savings justifies the present costs and risks of implementing and maintaining the technique or strategy.

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## So what's the answer? To Probate or Not to Probate?

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The answer depends upon your particular estate and circumstances. Expert tax and estate planning can help you weigh the pros and cons of the various techniques and planning strategies. Clearly maximizing the value of your estate is important. However, ensuring that your estate is well planned so that your testamentary intentions will be achieved is more important than simply avoiding probate fees.



1 Referred to as Estate Administration Tax in Ontario.

2 Referred to as a Certificate of Appointment of Estate Trustee with a Will in Ontario.

3 Referred to as a Certificate of Appointment of Estate Trustee without a Will in Ontario.

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