

» probate

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What is probate, what does it cost, and how can you avoid it?

Probate is a word that is often discussed in estate planning. It is usually something that people want to avoid. But what is it? Probate is a court process whereby individuals' wills are proven and the approval is given for the executor to carry out the terms of the will.

Many people are surprised to know that an individual's will does not, on its own, always allow the executor to settle the estate. Even when the deceased had a valid will and the executor is ready and willing to act, most estates over \$25,000.00 require the executor to go to court to obtain a Grant of Letters Probate. Why do we need such a process? Public protection. The process of probate endeavors to ensure that: the will is valid, the executor is knowledgeable about the estate and will carry out the terms of the will, creditors will be paid, beneficiaries are notified of the will, and anyone who would have benefited if there was no will is notified of the will. Most families have honest executors who pay the bills and distribute the estate properly so the probate process often is seen as a nuisance. But for those individuals who suspect that there is something amiss when an estate is being settled, they are relieved to know that the probate process exists.

What is the cost to probate a will? The provincial government charges a fee based on the value of the estate as follows:

\$0 for estates up to \$25,000

\$208 and \$6 per thousand for estates over \$25,000 and up to \$50,000

\$358 and \$14 per thousand for estates over \$50,000

The gross value of the estate is used for probate fee calculations with mortgages being the only debt that may be deducted.

The other costs pertaining to probate are legal fees. If a lawyer is retained to obtain the Grant of Letters Probate and to assist with settling the will the usual fee is 2% of the gross value of the estate. At this time, notaries are not permitted to apply for Letters Probate unless the notary is named as an executor in the will.

Can estates avoid the process of probate altogether? Yes, but careful planning must occur to ensure that the deceased's true intent will still be met. Some assets such as life insurance, tax free savings accounts, RRSPs/RRIFs, annuities and pensions allow beneficiaries to be named directly on the policies. When an individual dies these assets transfer directly to the named beneficiaries and avoid probate. Caution must be exercised when naming beneficiaries of RRSP and RRIFs as the accounts are paid to the named beneficiaries, but the income tax associated with the withdrawal of funds from the plans must be paid by the estate. Also, assets that are held

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Insightful Wealth Group, DWM Securities Inc.,
309 - 5455 152nd Street, Surrey, B.C. V3S 5A5
T. 604-575-6911 claliberte@dundeewealth.com
www.insightfulwealthsolutions.com

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jointly transfer outside of the estate when there is a surviving joint owner. Many couples avoid probate when the first one of them passes if they had owned either all of their assets jointly or had named each other as beneficiaries of the assets. The last survivor's will, however, is usually probated as the home, investments and other assets are often not held jointly with the next beneficiaries which are usually their children.

I am often approached by clients seeking to avoid probate when assets are to be transferred to children. If after reviewing the risks, benefits, and tax implications we decide to proceed, we transfer assets into joint names with one or more children but we ensure that we have the children sign a trust agreement indicating that they are holding the assets in trust for the parent. This agreement is crucial to ensure that deemed dispositions do not occur as a result of the transfer into joint names. The children become the registered owners of the assets, but not the beneficial owners. Also, the children who are not made joint owners of the assets may rely on the agreement to protect their rights to the assets after the death of the parent. One critical element of this strategy is to ensure that all of the parent's assets will be transferred outside of the will and, therefore, there is no requirement for probate. I have seen situations where people intended to avoid probate, but they forgot about one or two assets which required the wills to be probated. During the probate process the executor must disclose all of the assets of the estate which include assets which were held in trust for the estate by a third party like the children.

Another way to avoid assets from going through the probate process is to give the assets away during your lifetime. If an individual has more assets than he needs and he is comfortable with making a gift then this may be suitable. One must always consider the tax implications of the gift, if any. I recommend providing a gift letter with the gift to clarify that the asset is for the receiver to keep. This is especially important if a parent is giving to one child and not another, or if the gifts to the children are of unequal amounts. The gift letter refutes the claim that the asset was to be held in trust for the parent, or that it was a loan that was intended to be repaid.

Should everyone try to avoid probate? No. Individuals must look at meeting their objectives in the best way possible. If retaining independence, splitting the estate among several beneficiaries and flexibility by the owner are goals then the above steps to avoid probate would be in conflict with the goals. Every situation should be looked at individually and the benefits and risks of different strategies should be reviewed. And situations change over time. A 65 year old in good health usually has very different objectives than an 85 year old in poor health.

Article by Trish Fedewich, Fedewich & Witt, Notaries Public

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