



Saving Probate Fees

What Is Probate?

Probate is the process of having an individual appointed by the Court as an Estate Trustee (also called Executor or Executrix) for the estate of a deceased person. The Estate Trustee is the person who administers the estate of the deceased person. An Estate Trustee may be appointed with or without a Will. If there is a Will, the court issues a Certificate of Estate Trustee with a Will. If there is no Will, the court issues a Certificate of Estate Trustee Without a Will and the Estate Trustee administers the estate according to the intestacy laws of the province. When a person dies without a Will, they are said to have died “intestate”.

When Is Probate Needed?

Whether or not probate will be required is determined by the types of assets the deceased owned and their value. If the deceased owned real property in Ontario in his or her name, alone or as a tenant in common, probate will be required to transfer the real property to a beneficiary. If the deceased owned shares of a publicly-owned company, probate will be required. To transfer assets held at a financial institution to a beneficiary, the Estate Trustee must meet the requirements of that institution. The maximum value of assets that may be transferred without probate varies with each financial institution. If probate is not required, the financial institution will require that certain documents be provided before releasing such assets.

Calculating Probate Fees

If probate must be obtained, probate fees are paid by the estate to the court. The amount is based on the estate value. In Ontario, the fees are \$5 per \$1,000 on the first \$50,000, plus \$15 per \$1,000 of estate value over \$50,000. There is no maximum.

Reducing or Avoiding Probate Fees

For most estates, some advanced planning can reduce or even eliminate probate fees. It is usually possible to avoid probate fees altogether when an estate passes between spouses. It is generally difficult to avoid probate fees when an estate passes between generations.

To avoid probate fees upon death, the strategy is to keep as many assets as possible out of the estate by joint ownership, naming beneficiaries, or other means. On an asset-by-asset basis, here are some factors to consider:

Real Estate

If you own real estate with another person and both of you hold title as “joint tenants with right of survivorship”, when one of you dies, the other owns the real estate outright and it does not pass through the estate. Upon the death of a joint owner, the property is re-registered to remove the name of the deceased owner leaving the property in the name of the surviving owner.

Life Insurance

If you have named a beneficiary on your life insurance policy, at your death the beneficiary receives the proceeds directly without passing through the estate. Such proceeds are not included in the value of the estate. However, if the beneficiary has predeceased you and no other beneficiary has been named, the insurance proceeds will be payable to the estate and probate fees will apply.

Bank Accounts, GICs, Bonds

If you set up your bank accounts or purchase GICs or bonds with another person and you are both named as “joint tenants with right of survivorship”, when one of you dies, the other owns the asset outright. No probate fees are paid on such jointly-owned assets.

Cash

Any asset that is not owned by you at your death is not included in the value of your estate. If you can afford to and if you wish to do so, you can give cash to your intended beneficiaries during your lifetime to avoid probate fees.

Is Joint Ownership Always a Good Idea?

When reviewing your estate with the intention of avoiding probate fees, it is important to consider the possible problems that could result, particularly from joint ownership. For example, to save probate fees, you transfer your home from your name alone to joint ownership with your son so that you own your home as joint tenants with right of survivorship. If your home is worth \$150,000, the savings in probate fees could be as high as \$2,250. However, the cost could be significantly higher if other factors are not considered. Some possible areas of concern include:

- If your son does not live in the home with you, capital gains tax may be payable because the home is not your son’s principal residence.
- If you have a mortgage on your home and you change the way ownership is held and you do not obtain your lender’s approval, you may have violated your agreement with the lender.
- If you decide to sell or re-mortgage your home, you are no longer free to deal with your home

as you wish since your son is a co-owner and he and his spouse, if any, must sign any necessary documents.

- If your son operates a business which fails or if he declares bankruptcy, your home could be subject to claims by your son’s creditors.
- If your son and his wife live with you in the jointly-owned home, your daughter-in-law will have some say regarding what is now the couple’s “matrimonial home”.

Other Strategies to Avoid Probate Fees

Other strategies, such as including certain clauses in your Will, can reduce or avoid probate fees:

- A thirty-day survivorship clause can avoid double probate fees where a beneficiary dies at the same time or soon after you.
- Trust clauses can allow your Estate Trustee or other person to hold some of your assets in trust for the lifetime of a beneficiary and then pass to another beneficiary with probate fees being paid only once.

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