



What Is Probate?

INFORMATION AND INSTRUCTION KIT

June 5th, 2020

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What Is Probate?

Probate is the Court procedure for:

- formal approval of the Will by the Court as the valid last Will of the deceased; and
- appointment of the person who will act as the Estate Trustee of the Estate.

Probate is the Court process that gives the Executor the authority to act on behalf of the deceased.

HOW LONG DOES PROBATE TAKE?

To file the application: it takes some time to prepare the Probate application properly, but if you are diligent, the application can usually be prepared and filed within days not weeks. We work with our clients to prepare and file as quickly as possible. Normally, with your required information, we can file within 1-2 weeks of first hearing from you. That's the benefit of the Will kit we provide.

From application to grant: once the application has been prepared and filed, it takes time for the Court to process the application. The amount of time required varies widely depending on the Court where the application was filed. Applications in Toronto and the GTA usually take several months, with processing times ranging from 4-6 months currently. Processing times vary by the Court location. The application must be filed in the Court where the deceased resided, so unfortunately you cannot simply choose to file in a faster Court.

To administer the Estate: Administration of the Estate after Probate is in the hands of the Estate Trustee. The rough rule is that the Executor has a year to administer the Estate. However, it can take 4-6 months to receive a clearance certificate from Canada Revenue Agency, and that only after all tax returns are filed, which itself, takes months. Many Estates extend beyond one year even if the Estate Trustee is very diligent.

WHEN IS PROBATE REQUIRED?

Probate is not always required, but most Estates should be probated.

Probate is required when Court approval of the vesting of the assets of the deceased in the Estate Trustee is required

– either to validate the Will, or the choice of Executor, and with respect to the Executor, either because there may be a dispute about who it should be or because some Beneficiaries are unable to consent on their own (for instance, people under disability including minors).

Many Estates of “the first spouse to die”, or, which do not involve real estate or significant financial assets, do not need Probate.

If the Estate includes real estate that does not automatically vest in someone like the spouse of the deceased, then Probate will almost always be required.

ONE EXTENSION WORTH CONSIDERATION

Probate can sometimes be avoided for real property that has been held by the deceased for longer than 30 years. Known as the ‘first dealing exemption’ this is only available when the transfer is the first transfer into the land titles system, when there is a valid last Will, and the last Will has not been probated. When this route is available, the real estate can be transferred directly into the names of the Beneficiaries or Estate Trustee.

You cannot avoid Probate, usually, just because:

- The estate is small,
- All Beneficiaries agree,
- There is only one Beneficiary, or
- The only assets are bank accounts or investments.

If a financial institution (bank) where funds are held demands Probate, then Probate is required. Financial institutions are not obliged to waive Probate under any circumstances. Some banks occasionally waive Probate for small estates when there is no obvious conflict among Beneficiaries. This is entirely at the discretion of the financial institution, and if they refuse in your circumstances the solution is not to argue – it is to Probate immediately. If the financial institution agrees to waive Probate, the Beneficiaries will usually be obliged to sign ‘indemnities’, agreeing to indemnify the bank from any claims. Some banks exercise reasonable discretion for Estates with money in the bank less than \$20,000. But that is both rare and really dependent on each case.



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SHOULD YOU HIRE A LAWYER?

You are not required to hire a lawyer to Probate an Estate but it is often advisable.

It is certainly possible to 'do it yourself'. However, dealing with the courts and the required paperwork can be a complex and confusing process, and most people do seek legal assistance with Probate, and later, with administration of the Estate. In particular, if the actions of the Estate Trustee are likely to be challenged or closely scrutinized (for instance by a sibling who is a Beneficiary but not a co-executor), then we strongly recommend that you seek professional assistance with Probate and all other aspects of the administration of the Estate.

One of the reasons our clients seek our assistance is that we can provide advice to you on an 'as and when needed basis' without taking over responsibility for the whole matter. As a general rule reasonable professional fees incurred assisting the Estate Trustee (Executor) will be borne by the Estate, and not by the Executor himself.

Of course, if you are concerned about the conduct of an Estate Trustee or want to challenge a Will, a grant of Probate, or any other aspect of how an Estate has been administered we advise you very strongly to consult a lawyer as soon as possible (do not delay, as delay can seriously prejudice your position, both your legal rights and the practical reality of a challenge).

HOW MUCH DOES PROBATE COST?

The "costs to file" a Probate application are really several completely different sets of expenses:

- Estate administration tax ("Probate Fees"), which varies depending on the size of the Estate and, with very few exceptions must be paid up front. You can get the amount of tax by referring to the Ontario government calculator - we have provided below and in the resources section of our website.
 - <https://www.attorneygeneral.jus.gov.on.ca/english/estates/calculate.php>

- The costs of preparing and filing the application, including the fees of a lawyer or any other person that assists you.
- Depending on the circumstances, you should anticipate costs for searching for a Will and, possibly creditors (including advertising), serving potential Beneficiaries and people entitled to apply to be the Estate Trustee, costs of preparing consents, and costs of securing any bonds or sureties, if required. Also any necessary court attendance with judges.

Of course, as a general rule, all of these costs are ultimately borne by the Estate before any distribution to Beneficiaries and not by the Executor personally.

TERMINOLOGY

While the term 'Executor' is widely used in Wills and Estate planning, in Ontario the correct term for Court purposes is 'Estate Trustee'.

As a result, in Ontario, the formal legal term is actually 'Appointment of an Estate Trustee' rather than 'Probate' or 'Probate of a Will'.

Depending on whether or not the deceased had made a Will, the appointment will be either 'Estate Trustee with a Will' or 'Estate Trustee without a Will'.

Similarly, formally Ontario does not have 'Probate Fees' or 'Probate Tax'. These are now known as 'Estate Administration Tax'.



Want more information?

**ARE YOU INTERESTED IN A CONSULTATION WITH PETER R. WELSH?
CONTACT ME AT [PETER@SMARTWILLS.CA](mailto:peter@smartwills.ca) BY TELEPHONE 416-526-3121
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