

WHERE THERE'S A WILL – WHAT IS “PROBATE”?

What is “probate”?

Probate is the process where the Court confirms that a Will is valid. Most financial institutions, insurers, the Land Title Office and the Manufactured Home Registry require the executor to probate a will before they will allow an executor to deal with any estate assets in their holding.

How do I know if I need to probate?

The size of the estate is not the trigger for whether probate will be required. Rather, it is the nature of the assets in the estate that determine whether probate is needed. If the assets include larger bank or investment accounts, interests in land or real estate, or a mobile home for example, probate will generally be required.

How long does probate take?

An Administration Grant (i.e. the grant of probate) can be obtained in as little as six weeks or it can take many months depending on the complexity of the assets in the estate, how quickly information can be obtained, and whether the beneficiaries can be easily located and notified. It is the executor's job to disclose all the assets of the deceased as of the date of death and obtaining this information can often take a long time.

Additionally, probate fees must be paid before the court will issue the grant of probate.

What are probate fees?

Probate fees are essentially a tax on the assets of the estate. Probate fees are set by the government. They are based on the size of the estate. The fees are calculated as follows:

- The first \$25,000.00 (\$0.00 to \$25,000.00) = \$208.00
- The next \$25,000.00 to \$50,000.00 = \$150.00
- Over \$50,000.00 = 1.4% of the estate, or \$14.00 per \$1,000.00 or part thereof.

For example, on a \$500,000.00 estate, the probate fees would be \$6,658.00 (\$208 + \$150 + \$6,300).

How can I avoid probate fees?

Not all assets require probate to transmit the asset to the beneficiary. Anything held in “joint tenancy” (the family home, for example) will pass to the surviving joint owner through the “right of survivorship”. Additionally, certain types of investments with named beneficiaries (RRSPs, RRIFs, TFSAs, for example) pass immediately upon death to the beneficiary without going through probate and therefore avoiding the fees and delay.

A carefully thought out estate plan can minimize probate fees. If you are asking this question after the death of the Will Maker, it is too late to minimize probate fees.

What are the steps of the probate process?

In order to obtain probate, the executor must obtain a Wills Notice search and file numerous affidavits (sworn statements) with the Probate Registry of the B.C. Supreme Court.

One of the affidavits requires the executor to confirm he or she has notified the appropriate people, as required by law. If the executor is unable to locate any of the people who are entitled to notice, a Court application may be necessary to proceed with probate. This may result in a delay in obtaining probate.

Another affidavit includes a sworn statement providing a detailed listing of the assets and liabilities of the deceased person as of the date of death. The executor must make diligent inquiries to ascertain the debts and liabilities of the estate.

What happens after probate is granted?

Once the executor has received the Grant of Probate, the executor begins the business of settling the estate. The following are some of the steps the executor must take:

1. Determining who the beneficiaries are, and what they are entitled to receive under the Will;
2. Calling in/selling/cashing in assets;
3. Paying the debts and outstanding income taxes of the deceased and the estate;
4. Providing an in-depth accounting to all beneficiaries of the estate;
5. Obtaining of a Clearance Certificate from the Canada Revenue Agency; and
6. Distributing the estate.

There are a number of procedural requirements that the executor must be aware of and follow. These include: waiting a minimum number of days before applying for probate after all persons entitled to notice have been properly given such notice; waiting at least 6 months from the date of probate before distributing the estate (unless other requirements are met to permit and earlier distribution); and notifying the Public Guardian and Trustee where required.

To avoid personal liability for unpaid taxes, the executor must obtain a Clearance Certificate from Revenue Canada before wholly distributing the estate.

Why should you use a lawyer for settling an estate?

One of the most significant reasons that executors hire lawyers to assist in settling an estate is because executors are personally liable to the beneficiaries for their dealings with the estate. Regardless of how diligent or competent the executor might be, the law relating to the settling of estates is complex and full of traps that many an unwary executor fall into.

The probate application materials themselves are complex and full of intricacies. The estate may be complicated by blended families, estranged children or disinherited beneficiaries, minor children or incompetent beneficiaries, warring family members, unusual or multiple assets, complex taxation issues, or a combination of these. The executor's dealings with the estate are scrutinized by not only the beneficiaries but in many cases also the courts.

For these reasons, executors recognize the value of having a lawyer with experience in estate administration guiding them through the process. The executor's legal fees are paid for by the estate, rather than the executor's own pocket, and a lawyer's assistance can streamline the process and provide assurances to the executor and the beneficiaries that the estate is being handled in a proper and efficient manner.

For assistance with estate planning or administering an estate, contact a member of our experienced estate team at Fulton & Company LLP.



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