

Estate Essentials: What is Probate and Why Should You Know About It?

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Understanding probate and what it entails is important whether you are in the process of considering your own estate planning, you are appointed as the estate trustee of an estate, you wish to apply to administer the estate of a person who has died without a Will or you are a beneficiary of an estate. This article aims to provide a basic understanding of probate and how and when it is applicable. It's important to note that estates law is provincial and this article focuses on probate in Ontario.

What is an estate?

During a person's lifetime, they may own assets (such as a home, bank accounts, investment accounts, personal items, etc.) and upon such person's death, their assets form part of their estate.

For the purposes of this article, let's talk about an imaginary person named Sam who owned a mortgage-free home in Ontario, had one bank account and owned some personal items. Upon Sam's death, his estate would comprise the assets he owned as of the date of his death and, assuming the home was valued at \$800,000, the bank account was valued at \$175,000 and the personal items were valued at \$25,000, the value of Sam's estate would be \$1,000,000.

What is an estate trustee?

When a person dies, someone else (known as the estate trustee) is responsible for administering the estate. The estate trustee's role includes managing the estate (typically dealing with funeral arrangements, gathering the deceased's assets, determining the deceased's liabilities, arranging to file the deceased's taxes, etc.) as well as distributing the assets of the estate to the beneficiaries.

The estate trustee(s) (there can be more than one) can be appointed in the deceased's Will or by the court. In fact, as mentioned in one of our other articles [Estate Essentials: Who Should Administer Your Estate?](#) one of the many benefits of making a Will is that it gives you the ability to appoint one or more person(s) (being an individual or a trust company) as the estate trustee(s) of your estate.

What is probate?

In Ontario, a Certificate of Appointment of Estate Trustee (also known as probate) is the process by which a court authorizes or confirms the authority of the estate trustee to act on behalf of the estate. An estate trustee submits an application to the Superior Court of Justice to apply for probate. The exact forms required to be completed and submitted will vary depending on each person's situation and a lawyer can assist with preparing and submitting the application.

When is probate needed?

Probate is typically required by third parties who require proof that the estate trustee named in the deceased's Will has the authority to act on behalf of the deceased's estate. It is also required where there is no one with the authority to act, such as when a person dies without a valid Will.

Let's go back to our example of Sam and talk about the bank account. In order for the estate trustee of Sam's estate to access his bank account, the bank is likely to require the estate trustee to obtain probate to confirm their authority to act as the estate trustee of the estate. The reason for this is that if the bank releases the funds in a bank account to a person claiming to be the estate trustee without probate and it turns out that the Will they relied upon was not in fact the deceased's Last Will and Testament and the person they distributed the funds to was not in fact the appointed estate trustee, the bank can be held liable for the funds.

What are the costs associated with probate?

In Ontario, when an estate trustee applies for probate, they are required to pay Estate Administration Tax (also known as probate fees). The probate fees payable depend on the value of the estate, as follows:

- For an estate valued at \$50,000 or less as of the date of the deceased's death, there are no probate fees payable.
- For an estate valued at over \$50,000 as of the date of the deceased's death, the probate fees payable are equal to 1.5% of the total value of the estate, subject to the following:
 - no probate fees are payable on the first \$50,000 of the value of the estate as of the date of the deceased's death; and
 - in order to calculate the probate fees payable, the value of the estate as of the date of death is rounded to the nearest thousand dollars (for example: an estate worth \$1,000,900 would be rounded up to \$1,001,000 for the purposes of calculating the probate fees).

While 1.5% may not seem like a high percentage at first, in our example the probate fees payable on the value of Sam's estate (which was valued at \$1,000,000 as of the date of death), would be \$14,250 calculated as follows:

Estate Administration Tax = [Value of the Estate (rounded to the nearest thousandth) – \$50,000 (to account for the elimination of probate fees on the first \$50,000)] x 1.5%

Estate Administration Tax = (\$1,000,000 – \$50,000) x 1.5%

Estate Administration Tax = \$950,000 x 1.5%

Estate Administration Tax = \$14,250

It's important to note that for the purposes of probate, an encumbrance can be used to reduce the value of real property (such as a mortgage registered on title to a home). For example, if Sam owed a \$100,000 on a mortgage registered on his home and Sam owed \$30,000 in credit card debt, the value of his estate for probate purposes would reduce to \$900,000 (as the value of the mortgage will be used to reduce the value of his real property but the value of his credit card debt cannot be used in the same manner).

Other than probate fees, the estate trustee also has to consider payment of other costs including legal fees, accounting fees, estate trustee compensation, etc.

Can you minimize probate fees?

In Ontario, there are ways to minimize the amount of probate fees payable on death depending on the type of assets a person owns, including multiple Will planning, bare trust planning, alter ego trusts, etc. An in-depth analysis and discussion on potential ways to minimize probate fees is beyond the scope of this article though we encourage you to reach out to one of our [estate planning lawyers](#) to discuss your personal circumstances.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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