

PROBATE

Probate is the process that transfers legal title of property from the estate of the person who has died (the "decedent") to their proper beneficiaries.

The term "probate" refers to a "proving" of the existence of a valid Will, or determining and "proving" who one's legal heirs are if there is no Will. Since the deceased can't take it with them, probate is the process used to determine who gets their property

Property left through a will usually must spend several months or a year tied up in probate court before it can be distributed to the people who inherit it.

Probate is not cheap or quick. Because probate requires a hearing in over-burdened courts, the process can tie up property for a year or more. In addition, probate may be expensive. Estate attorneys, who sometimes charge a flat percentage or a high hourly rate, usually handle probate. Their fees and court costs may cost 5% of the estate's value. A will is a very personal document, and may reveal private family and financial issues and concerns. But once it is entered into the court record, it becomes public, and can be inspected by anyone.

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Question #1 **What is probate?**

Answer: Probate is a legal process where your named executor goes before a court and does several things:

- Identifies and catalogs all property owned by the deceased.
- Appraises the property, and pays all debts and taxes.
- Proves that the will is valid and legal, and
- Distributes the property to the heirs as the will instructs.

Typically, probate involves paperwork and court appearances by lawyers. The lawyers and court fees are paid from estate property, which would otherwise go to the people who inherit the deceased person's property.

Probate usually works like this: After your death, the person you named in your will as executor -- or, if you die without a will, the person appointed by a judge -- files papers in the local probate court. The executor proves the validity of your will and presents the court with lists of your property, your debts, and who is to inherit what you've left. Then, relatives and creditors are officially notified of your death.

Question #2 **Why is Probate necessary?**

Answer: The primary function of probate is transferring title of the decedent's property to their heirs and/or beneficiaries. If there is no property to transfer, there is usually no need for

probate.

Another function of probate is to provide for the collection of any taxes due by reason of the deceased's death or on the transfer of their property.

The probate process also provides a mechanism for payment of outstanding debts and taxes of the estate, for setting a deadline for creditors to file claims (thus foreclosing any old or unpaid creditors from haunting heirs or beneficiaries) and for the distribution of the remainder of the estate's property to ones' rightful heirs.

Question #3 How long does Probate take?

Answer: The duration varies with the size and complexity of the estate, the difficulty in locating the beneficiaries who would take under the Will, if there is one, and under state law.

If there is a Will contest, or anyone objects to any actions of the Personal Representative, the process can take a long time. Some matters have taken decades to resolve.

Question #4 What is the probate process of an uncontested will?

Answer: Typically the person named as the deceased's Personal Representative (a more formal term is "Executor" or "Executrix") goes to an attorney experienced in probate matters who then prepares a "Petition" for the court and takes it, along with the Will, and files it with the probate court.

The lawyer for the person seeking to have the Will admitted to probate typically must notify all those who would have legally been entitled to receive property from the deceased if the deceased died without a Will, plus all those named in the Will, and give them an opportunity to file a formal objection to admitting the Will to probate.

A hearing on the probate petition is typically scheduled several weeks to months after the matter is filed. Depending on the state, and sometimes who the named beneficiaries are, how long before the death the Will was signed, whether the Will was prepared by an attorney, who supervised the "execution" of the Will, and/or whether the Will was executed with certain affidavits, it may be necessary to bring in the persons who witnessed the deceased's signature on the Will.

If no objections are received, and everything seems in order, the court approves the petition, appoints the Personal Representative, orders that taxes and creditors be paid, and requires the Personal Representative to file reports with the court to assure all the deceased's property is accounted for and distributed in accordance with the terms and conditions of the Will.

Question #5 Who is responsible for handling probate?

Answer: In most circumstances, the executor named in the will takes this job. If there isn't any will, or the will fails to name an executor, the probate court names someone (called an administrator) to handle the process -- most often the closest capable relative, or the person who inherits the bulk of the deceased person's assets.

If no formal probate proceeding is necessary, the court does not appoint an estate administrator. Instead, a close relative or friend serves as an informal estate representative. Normally, families and friends choose this person, and it is not uncommon for several people to share the responsibilities of paying debts, filing a final income tax return and distributing property to the people who are supposed to get it.

Question #6 Should I plan to avoid probate?

Answer: Probate rarely benefits your beneficiaries, and it always costs them money and time.

Probate makes sense only if your estate will have complicated problems, such as many debts that can't easily be paid from the property you leave.

Whether to spend your time and effort planning to avoid probate depends on a number of factors, most notably your age, your health and your wealth. If you're young and in good health, a simple will may be all you need -- adopting a complex probate avoidance plan now may mean you'll have to re-do it as your life situation changes. And if you have very little property, you might not want to spend your time planning to avoid probate. Your property may even fall under your state's probate exemption; most states allow a certain amount of property to pass free of probate, or through a simplified probate procedure.

But if you're older (say, over 50), in ill health or own a significant amount of property, you'll probably want to do some planning to avoid probate.

Probate is the process whereby the court recognizes the authority of an estate trustee. One of the reasons for probate is to provide needed assurance to certain third parties that your Will is valid and that your executor is authorized to act in your name with regard to your assets after your death in order to better facilitate an efficient distribution of estate assets in accordance with the wishes of the Will.

When application for 'letters probate' is made, the expense - the taxes or probate fees - are calculated as a percent of the value of your assets and paid for out of your estate. Among Canadian jurisdictions, only Quebec does not impose a probate tax. In Quebec, Notarial wills are not required to be probated and only a flat nominal charge applies to holograph wills and wills made in the presence of witnesses. Because there is no maximum for the tax chargeable (except in Alberta), probate tax for large estates can be substantial.

When a deceased dies without a valid Will - i.e. intestate- or the trustee named in his or her Will cannot act, someone is appointed by the courts through the issuance of a 'testamentary grant' to perform the duties estate trustee.

Not all Wills require probate; only those whose disbursement involves financial institutions, transfer agents etc. because of the nature of the assets of the estate.

When Probate is Necessary

Given that the authority of the trustee stems from the Will and not the recognition of the courts, the question with respect to any particular Will might be - 'is probate necessary?' Considering the time, trouble, and not least of all, expense that it can entail, that question is often the first that an estate trustee will ask of his or her legal advisor. The answer is that probate is only strictly necessary depending upon the nature and extent of the deceased's assets. If the estate is relatively small and uncomplicated, probate is often unnecessary.

Specifically, probate is not usually required to deal with the following estate assets:

- Life insurance, RRSP, and RRIF proceeds with a named beneficiary;
- C.P.P. Survivor Benefits;
- Jointly held property with right of survivorship;

- Personal articles;
- Automobiles;
- Certain kinds of securities and bank deposits;
- Concerns of Third Parties.

Probate becomes necessary because certain third parties called upon to transfer estate property to the trustee require assurance that the trustee is the valid representative of the estate. Financial institutions, the land registry office and other advisors need to know that the Will was validly executed, that it is the only or latest Will of the deceased and that the deceased had the mental capacity to make the final decisions regarding the distribution of his or her estate.

In the absence of probate i.e. in those cases where it might seem as though probate may be avoidable, it would be necessary to contact each of these third parties individually to confirm their willingness to proceed without probate and to determine what assurances, documentation, guarantees etc. they would require to satisfy their concerns about the validity of the Will. Where there are a number of third parties to contact and the total value of the assets involved is not great, it may make more sense to simply apply for probate.

Trustee's Liability

Having a Will probated also protects the person who is acting as estate trustee or executor. The courts generally apply the "reasonable and prudent person" criterion, meaning that if a trustee acts with the same care and diligence expected of a reasonable and prudent person in the conduct of their own affairs, then he or she will not be held liable for any losses suffered by the estate. However, that may not be the case if the trustee did not have authority to act in the first place. If the legality of the Will is successfully challenged after the trustee has proceeded without benefit of probate, the trustee may be personally liable for any losses suffered by the estate.

In Ontario, the *Succession Law Reform Act* provides for a six-month period within which claimants can lodge an application for support against the estate. This period commences from the date probate is granted. Thus, a trustee acting in absence of probate does so at some risk. If an application for support is successful, and there does not remain sufficient assets in the estate to satisfy the claim, the executor will be personally liable make up the difference.