

Probate-related questions are among the most common questions heard during estate planning discussions. What is probate? Can it be avoided? Why avoid it? Should it be avoided?

What is probate? Probate is a court procedure for “proving a will”, essentially establishing that it is the deceased’s “last will” and confirming that the executor appointed in that will is entitled to take all steps necessary to administer the deceased’s estate. Note that where a deceased has no will or the deceased’s last will fails to appoint an executor, the court appoints a person to administer the estate (referred to in most jurisdictions as, respectively, an “administrator” and an “administrator with will annexed”). Also note that, in Quebec, a “notarial will” does not require probate.

Probate is almost always obtained in “common form” through an expedited procedure which relies on affidavit evidence and minimizes or eliminates the need for court appearances. However, a will proved in common form is subject to challenge on the basis that the will was not valid or was not the deceased’s last will.

For that reason, if an executor anticipates that someone will challenge the validity of the will (perhaps by alleging that the deceased lacked testamentary capacity or was under duress when the will was made) or that someone will apply for probate of a different will, the executor should likely take the unusual step of commencing a formal probate action to prove the will in “solemn form”. Proof in solemn form is more expensive than proof in common form because it generally requires a trial with oral evidence, but once obtained can only be set aside if it is later proven that the will was actually revoked or that the court order was obtained through fraud.

Can probate be avoided? In situations where an estate consists only of assets which are not registered with a third party (such as personal items, household furniture and furnishings including artwork, and private company shares), there is no need to obtain probate because change of ownership can occur with change of possession. Unfortunately, most estates do not consist solely of assets which are not registered with a third party.

If an estate contains even one asset (such as a vehicle, a financial account, or real estate) which is registered with a third party, probate will usually be required (and all of the estate assets, even those not registered with third parties, will have to be included in the probate application). That is because third parties will (with limited exceptions) refuse to transfer title to an estate asset until they receive proof that the will has been probated. The third party wants to ensure that the will and the executor have been authenticated by the court.

So the key to minimizing the value of assets which need to be probated is to minimize the number of assets which are registered with third parties and which will pass into a deceased’s estate. The simplest way to do that is to have assets bypass the estate and pass directly to the desired beneficiaries.

This can be accomplished by giving assets away during one's lifetime. But that is most often only a partial solution.

More often (except in Quebec, where beneficiary designations are not available), one or more beneficiaries are designated to receive an asset upon death of the owner. This strategy works for insurance products, most registered plans (such as RRSPs, RRIFs and TFSAs), and pensions. However, it does not work for all assets, including non-insurance non-registered investments, vehicles, and real estate. Therefore, use of beneficiary designations is usually only a partial solution, leaving some assets to pass into the estate where they are subject to probate.

Another option is to transfer assets into a trust (often an *alter ego* or a joint partner trust) so that the original owner receives full benefit from the assets while alive. Upon the death of the original owner, those assets either remain in the trust for the benefit of other trust beneficiaries or pass out of the trust to those beneficiaries. This strategy can be a complete solution if all assets which are registered with a third party are transferred into the trust. Assets which are not registered with a third party can still be owned personally, because they can pass into the estate and be distributed without probate.

Joint tenancy can be used for probate avoidance (except in Quebec, where joint tenancy is not available), but this strategy often goes awry because of its complexity. Many people are surprised to learn that joint tenancy does not always avoid probate, and that care must be taken when the joint tenancy is created if probate avoidance is an objective. Professional assistance is usually required if joint tenancy is to be successfully used to avoid probate.

A final, and more complex, strategy which can be used in some provinces (such as Ontario and British Columbia) to avoid probate is to create two wills, one which governs assets for which third parties will require probate, and one which governs the assets which are not registered with a third party and can be distributed without third party assistance. As with joint tenancy, care must be taken when the two wills are prepared and professional assistance is required.

Why avoid probate? Let's next consider why people may be tempted to avoid probate. It could be that it is desirable to avoid the public nature of the probate process, that the probate process is complex, that the process delays distribution of estate assets, or that, if a lawyer is hired to navigate the process, the resulting expense is not insignificant. Any of those reasons may be justifiable, even in jurisdictions where the provincial fee for probate applications is nominal such as Alberta, Quebec (where wills other than notarial wills require probate), and the three territories.

However, in the rest of the provinces, where probate fees are really taxes (because the value of the work required to process a probate application bears no resemblance to the amount of the fee), people may be tempted to avoid probate because of those high probate fees.

Should probate be avoided? As with most issues, there is no firm answer. Cost versus benefit is always an important consideration. It generally makes no sense to spend money trying to avoid probate when the probate fee savings are less than the money spent.

Competing planning objectives must also be considered. Sometimes they conflict with probate avoidance, but have a higher priority. For example, income tax minimization is very important in an estate plan, but often requires the use of testamentary trusts. With the exception of testamentary trusts created through beneficiary designations, assets must pass into an estate (where they are subject to probate) in order to be transferred to a testamentary trust.

Conversely, other planning objectives sometimes complement probate avoidance. For example, since materials used in a probate application are available to the public, if privacy is an estate planning objective then both objectives are satisfied when all assets bypass an estate and probate is not required. Meeting a privacy objective may be one situation in which the money spent to avoid probate exceeds the value of the probate fees avoided.

A final consideration is whether the closure which comes with probate outweighs the actual cost of probate and the associated probate fees. For example, some provinces allow family members to challenge a will (or sometimes the whole distribution plan including assets bypassing the estate) and the time in which to initiate that challenge is determined by when probate is obtained. (Often, the challenge must be commenced within six months of probate.) If there is concern that a challenge is in the offing, it may make sense to obtain probate in order to start the clock running, even though probate expenses will then arise.

In the end result, the question of whether probate should be avoided depends on many factors. As is always the case with estate planning, it is very important to work with legal, tax, insurance, and financial professionals to obtain advice based on the exact factual situation before decisions are made and the plan is implemented. Generally, the cost of the advice will be far outweighed by the effectiveness of the plan and by financial savings made possible by the plan.

*Floyd Gradley is a trust and estate lawyer with Mackenzie Financial Corp.
Originally published on Advisor.ca*