Probate Primer

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Many times a year I meet with clients struggling through grief after the loss of a spouse or parent, yet bravely accepting the new title of "executor". Sometimes they have already been an executor, but in most cases it's all new to them, and they are bewildered, wondering what they need to do next.

A new executor has many duties, ranging from planning the funeral, to preparing the deceased's final income tax returns, to paying the deceased's bills and distributing his or her assets in accordance with the Will. Sometimes, the executor is told he or she needs to probate the Will, and comes to the lawyer to ask what this means and what they should expect. By far the most common questions I encounter are:

- What is probate?
- Why it is required?
- How much it will cost?
- How long will it take?
- How can I help my family avoid all this when I am gone?

WHAT IS PROBATE?

The word "probate" is derived from the Latin "probare", which literally means "to prove". It is the process by which we submit a Will to the scrutiny of a judge, to prove the Will was validly executed in accordance with applicable legislation. In Manitoba this submission takes the form of a Request for Probate. A judge who approves the Request for Probate will sign a Grant of Probate, lending the court's endorsement to the provisions set out in the Will. The executor can then provide copies of the Grant of Probate to whomever may require it, such as financial institutions, life insurance companies, the Land Titles Office, or the Canada Revenue Agency – and upon doing so the executor can deal with the assets and debts of the deceased person.

WHY IS PROBATE REQUIRED? ISN'T THE WILL ENOUGH?

Financial institutions and life insurance companies may require probate if the deceased had a financial asset (account, investment or policy) in his or her sole name. The reason a company may require probate is related to risk assessment: if the bank releases $50,000 to an executor solely on the strength of an unprobated Will, it is potentially putting itself on the hook to the tune of $50,000 to other beneficiaries or creditors, whereas if the Will has been probated, the bank has some comfort (and legal protection) that the executor has the approval of the Court behind him.

Each financial institution has its own internal policies on how much money can be at stake before they will require probate, and these policies range dramatically from one company to the next. Chartered banks, for example, have a greater ability to absorb loss and their amount might be higher than a Credit Union's.

HOW MUCH DOES IT COST TO PROBATE A WILL?

Costs associated with probating a Will fall into two categories, namely ***probate fees*** and ***legal fees***.

Both categories of cost are based on the value of the estate, in other words, how much money the estate was worth as of the date of death, when you add up all the assets (bank accounts, house, vehicle, etc.). The Court Rules require that you include the fair market value of the assets, deducting only the amount of any encumbrances (eg. mortgages). The list of assets is called the Inventory of the estate.

Assets that the deceased owned jointly with another person, or financial assets with designated beneficiaries (for example, RRSPs with named individual beneficiaries) do not need to be included in the Inventory.

Probate fees

Probate fees are the fees paid to the provincial government upon submitting the Request for Probate. They are calculated as follows:

a. where the value of the estate is $10,000 or less, $70

b. where the value of the estate is more than $10,000, $70 plus $7 for every additional $1,000 or fraction thereof.

As a general rule of thumb, probate fees are 0.7% of the Inventory with a minimum of $70.

Legal fees

Legal fees are the fees paid to the lawyers for their services in connection with the estate. There is no minimum legal fee in Manitoba but lawyers are governed by Queen's Bench Rule 74.14 which sets out the following formula for calculating legal fees:

c.3% on the first $100,000, or portion of that amount, of the total value of the estate, subject to a minimum fee of $1,500;

d.1.25% on the next $400,000, or portion of that amount, of the total value of the estate;

e.1% on the next $500,000, or portion of that amount, of the total value of the estate;

f.0.5% on the total value of the estate over $1,000,000.

Legal fees are reduced to 40% of the above if the executor is a trust company, the Public Trustee, or a lawyer who is acting as both the executor and lawyer.

In addition to legal fees, lawyers will charge for out-of-pocket expenses known as disbursements, and applicable taxes.

HOW LONG DOES PROBATE TAKE?

The process of requesting and obtaining probate can be broken down into several stages. Below we have provided an average timeline for each stage based on our experience, but the actual timeline in any given estate will vary depending on factors outside the lawyer's control, such as the nature and variety of estate assets and the speed at which inquiries are answered.

Information gathering stage

The lawyer preparing the Request for Probate will have to collect information from the executors, and from the financial institutions where the deceased had accounts. The information-gathering stage can take around **4-6 weeks** to complete, but that might be shorter or longer depending on how quickly the information comes in.

Document preparation stage

The documents themselves don't take long to prepare. Once all the information is available to the lawyer, the Request for Probate can be prepared within **2-3 weeks**. This time period might be longer if the lawyer is also preparing documents such as Letters of Direction and Transmissions for real property or financial assets. The lawyer will meet with the executors to sign the documents, will make arrangements to obtain the probate fees from the executors or from the deceased person's bank account, and will send the Request for Probate and probate fees in to the court for review by a judge.

Court review stage

Once the Request for Probate has been submitted to the court, generally it takes **4-6 weeks** for a Grant of Probate to issue. This time period might be longer if the court has questions or requires clarification from the lawyer or executor.

HOW CAN I PLAN MY AFFAIRS SO MY FAMILY WON'T HAVE TO PROBATE MY WILL?

There are many ways to structure your affairs in order to minimize the likelihood your estate will need to be probated, including corporations and family trusts. I will only touch upon the two most common probate-avoiding techniques: putting assets in joint ownership with survivorship rights, and naming beneficiaries of assets.

Joint ownership of assets

Putting an asset in joint ownership with survivorship rights removes the asset from the deceased person's estate upon his or her death. The asset becomes the legal property of the surviving owner(s) the moment after death. Since the asset does not form part of the deceased person's estate, it does not need to be included in the Inventory for probate purposes.

It is possible to put bank accounts in joint names with a spouse, child, or any other person. It is also possible to put real property (for example a house, commercial building, or farmland) in joint names. Married couples often own their house jointly, and on the death of one, the house goes to the survivor without the necessity of probate.

Naming beneficiaries

With some assets it is possible to name beneficiaries directly, which will remove the asset from the deceased person's estate. The most common types of assets for which you can name beneficiaries are life insurance policies, registered retirement savings plans or retirement income funds, and pension benefits.

DO I EVEN WANT TO AVOID PROBATE?

The idea behind avoiding probate is simple: by removing an asset from your estate you will avoid probate costs. However, you are also taking a leap of faith that the person who is receiving the asset through the "side door" will honour your wishes, for example by sharing it with his or her siblings, or using it to pay your estate's bills.

Careful consideration should be made before employing any probate-avoiding techniques, as unintended consequences may result, whether it's surprise income taxes owing or fighting between beneficiaries.

Please see Peter Sims' article, "Use and Abuse of Joint Accounts" for an excellent summary of the reasons to proceed with caution with respect to joint bank accounts.

Putting an asset into joint names, or naming beneficiaries, can:

•open the door to creditors of the new owner bringing a claim against the asset. An elderly parent with a spotless credit rating and free and clear title might hesitate to add his or her child's name to the title, knowing the child's creditors can sue the child and register a judgment against the title.

•create the opportunity for abuse of trust both before and after the death of the parent, if the co-owner child chooses to disregard the parent's wishes by taking the asset for him or herself, rather than sharing it with his or her siblings.

•cause major inconvenience in the event the parent decides to dispose of the asset during his or her lifetime. Each joint owner will need to sign the disposition documents. With real estate, sellers must sign sale papers with a lawyer.

•result in unintended tax burden. For example, if a jointly-owned house is not the principal residence of all co-owners, the death of one co-owner or the sale of the property might attract capital gains tax.

•render an estate unable to pay its bills. For example, if a mother dies owning $100,000 in an RRSP with one child as named beneficiary of the RRSP, and her other children named as beneficiaries under the Will, there might be a significant tax bill owing by the estate to the Canada Revenue Agency upon the mother's death. If the estate does not have access to other funds or assets to pay that tax bill, then the other children will suffer while the child who was named as beneficiary will have received a windfall. Knowing this, the mother might have preferred to name her estate as the beneficiary of her RRSP which would have resulted in all her children equally sharing the RRSP money, less the probate cost and taxes.

Certainly there are situations when probate-avoiding estate planning makes sense. However, avoiding the cost of probate may not be enough to justify the unintended cost of careless estate planning. Before transferring assets or naming beneficiaries, careful thought and discussion should take place with your estate planning team, consisting of your tax professionals, investment and banking professionals, and of course your lawyers.

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Lucy's law practice includes residential and agricultural real estate transactions, wills and estate planning, and estate administration.