MILTONS ESTATES LAW

Probate in Ontario

A Practical Guide

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This is a short, practical guide to probate in Ontario. Probate is the process of securing approval from a Court for the person entitled to administer an estate of a deceased individual. Information on other issues is found in our other eBooks – see Estate Planning and Wills, our Executor's Checklist (administration of estates after probate), Powers of Attorney, and Estate Disputes in Ontario

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About this book

This eBook is exclusively about probate in Ontario. It is not about estate planning, or 'who inherits what', or the duties of executors, or estate disputes.

Estate law is very parochial – it varies from state to state, province to province, and country to country. In effect there are over 60 different estate law jurisdictions in North America alone and each is different, sometimes profoundly so.

Ontario is a common law jurisdiction, and estate law in civil law jurisdictions such as most countries in Europe and Latin America tends to be quite different.

This eBook is intended to be short informal guide for non-lawyers about probate in Ontario. It is not precise legal analysis, legal advice about your particular situation, or a how-to-guide.

Additional information about wills and estates planning can be found on our site www.ontario-wills.ca and in our eBook Estate Planning and Wills.

Additional information about estate issues unrelated to probate, including estate disputes, 'seeing the will', 'transferring vehicles without probate' and 'who inherits what' can be found in the eBooks on Powers of Attorney and Estate Disputes and on our website, www.ontario-probate.ca.

Other eBooks in this series

This eBook is one of a series. The others are:

- Estate Planning and Wills: A Practical Guide. See www.ontario-wills.ca
- Powers of Attorney: A Practical Guide
- The Executor's Checklist.
- Estate Disputes in Ontario: A Practical Guide

While there is some overlap in the material, these eBooks cover different material. For the most thorough understanding of the subject matter, we recommend that you consult all of them together.

Terminology

A person who makes a will is a 'testator'. A person who dies without a will dies 'intestate'.

An executor is a person named by the testator in their will to administer the estate.

Often, a Court order is necessary to administer an estate (see below for when probate is required). The person appointed by the Court to administer the estate of the deceased is the '**estate trustee**'. Depending on whether there is a will or not the estate trustee is the 'estate trustee with a will' or the 'estate trustee without a will'.

Probate is the process by which the Court appoints an estate trustee. Where there is a will, the person with the first right to apply for a Certificate of Appointment of Estate Trustee is the executor, and if the person applying is not the executor, the reason that the executor is not applying must be provided.

What is Probate?

Probate is the Court procedure for:

- formal approval of a will by the Court as the valid last will of the deceased; and
- formal confirmation by the Court of the appointment of the person who will act as the estate trustee (with or without a will).

In effect, probate is what gives the estate trustee the legal right to act on behalf of the deceased.

During probate, the key questions that the Court must address are:

- Is this the last will of the deceased?
- Is there any good reason to doubt the validity of this will?
- Is the executor named in the will the right person to administer this estate, and if not, who is?
- If there is no will, who is the right person to appoint as estate trustee?

When is probate required?

Not all estates require probate. However, the number of estates that can be resolved quickly and informally without probate or any formal proceedings is falling rapidly.

Whether or not probate is required depends largely on:

- Is there actually an estate? Often all 'assets' pass 'outside the estate'. This is especially common for the first of two spouses to die;
- the nature of the assets in the estate, and
- whether the choice of executor, or actions of the executor, may be contested by one or more beneficiaries (inheritors) or other people.

Generally, financial institutions and land registry offices will require probate to confirm that the estate trustee is authorized to receive the assets and funds that belonged to the deceased person.

Probate will likely be required

Probate will likely be required when the estate includes any of:

- real estate (houses, condos, apartments, cottages) owned by the deceased in his or her name alone or as a tenant in common (i.e. Owned any way but 'in joint tenancy');
- shares of a publicly-traded company (stocks listed on a stock market); or,
- funds or investments held at a financial institution (bank, trust company, brokerage) held solely in the name of the deceased and not 'in joint tenancy' with another person (note that sometime these institutions will not require probate if the amounts are nominal).

The estate should likely be probated if

The estate should definitely be probated if:

- there is (or is likely to be) any dispute about the choice of estate trustee, or
- the actions of the estate trustee are likely to give rise to any dispute, or,
- any beneficiary is unable to consent (because they are a minor child, or, an adult lacking capacity).

There is no exemption from probate because the estate is 'simple' or 'everyone agrees' or 'the will is clear'.

Information on transferring ownership of vehicles without probate is found on our website.

When probate is not required

There are only three types of 'estate" that normally do not require probate.

All assets pass outside the estate

a. If all of the assets owned by the deceased pass directly to a beneficiary or joint owner, then technically there is no 'estate'. This is fairly common for modest estates of the 'first spouse to die' of long-married spouses – the house, bank accounts and RRSP/RRIF pass to the surviving spouse and there is nothing to probate.

The only asset is long-held real property

b. There is a potential to use 'the first dealing exemption' to transfer real property in Ontario (a house, usually) that has been owned by the testator for more than 30 years without probate. The exact time depends on the land titles registry applicable to the land. This exemption is informal, poorly documented, requires surrender of the original will (so the house must be the only asset that requires probate) and requires certainty that no 'dealings' with title to the house have occurred in the past such as registering or discharging a mortgage. You will require the advice of a real estate expert (not us) to pursue this.

Waiver of probate by banks for modest estates

c. Sometimes banks will waive probate if the estate is modest and consists solely of uncontested funds in a bank account. Before waiving probate, most banks require the amount on deposit to be less than $40,000, require there to be absolutely no dispute about the estate and who is entitled to the funds, and require all recipients of the funds to sign an Indemnity. The Indemnity (or 'bond of indemnity') is a bank form (each has its own – use their form). In the Indemnity, the signor(s) agree to indemnify the bank from any liability for releasing the funds. **This waiver of probate by the bank is not a right – it is entirely at the discretion of the bank holding the funds and can be denied at any time without reason.** Banks do not follow their own policies consistently. Their decisions can be arbitrary and erratic. If the bank refuses to waive probate you can try appealing to a higher authority at the bank – a bank manager for instance. However, if that does not succeed, then the solution is to probate as quickly as possible and remove the issue from the bank's control.

Insolvent Estates

One of the most common reasons for a named executor to refuse to probate is when the estate has debts greater than its assets.

This is known as an insolvent or bankrupt estate. Insolvent estates should be handled, if at all, by a registered insolvency practitioner (a 'bankruptcy trustee').

When the estate has debts

The estate trustee is not automatically liable for the debts of the deceased. Just because the deceased had debts does not automatically create a problem or liability for the executor or estate trustee.

The estate trustee is personally liable for:

- Debts that the estate trustee incurs (such as funeral and legal fees). The estate trustee is not liable for costs incurred before death or by other people.

- Ensuring that the assets of the estate are properly distributed, and this means that all creditors are paid 100% in full before any distribution is made to any beneficiary.

A potential estate trustee who believes that the estate is insolvent should investigate, but should not meddle in the estate before deciding whether to act or renounce (see above).

There is no harm in probating an estate with debts or liabilities, where the assets exceed the debts. Debts such as mortgages and income taxes are very common, and are commonly paid off from estate assets **before any distribution to the beneficiaries**.

If the debts of the estate are complex or contentious (for instance, with litigation underway), it is very helpful if the estate trustee has experience dealing with commercial disputes and civil litigation. Accordingly, if the estate has complex or uncertain debts, it is common for relatives to renounce in favour of a professional who then applies to be appointed the estate trustee.

Bankruptcy

If the liabilities exceed the assets the estate is bankrupt ('insolvent'). In this case, it is usually best NOT to probate and instead to either walk away or assign the estate into bankruptcy with a licensed insolvency practitioner ('bankruptcy trustee') who can then

administer the estate. It is crucial not to pay some creditors while failing to pay others. A bankruptcy trustee has the power to compel individual creditors to accept less than full payment of their debts which is the essence of proper administration of an estate when it is unable to pay every creditor in full; an estate trustee does not have this power.

Reasonable funeral expenses rank ahead of other creditors and should be paid from the estate.

It is possible to transfer some assets from a bankrupt estate to beneficiaries without paying creditors of the estate. These assets include:

- A vehicle valued at less than $6,000
- Equity in a home value at less than $10,000
- Tools and equipment valued at less tha
- Clothes and personal effects.

Bankrupt estates do not need to be painful

It is not uncommon for folks to have more debt than assets, especially if they are early in their career or have experienced a set-back like illness, divorce or business bankruptcy. Creditors assume the risk that they will be paid back from on-going income, and failing that they should take security (mortgage, vehicle lien) or life insurance to protect themselves.

Creditors make money assuming risk. If the risk materializes, that is their problem and not the estate trustee's fault. An estate trustee or spouse of the deceased should never allow themselves to be bullied into paying creditors for debts that were the deceased's and not theirs. Unless you were a joint debtor or guarantor, the debts of the deceased are not your debts and the creditors cannot simply come after a spouse or trustee for payment.

There is no stigma for the potential estate trustee recognizing reality and refusing to act. If the estate is insolvent, walk away or assign it in to bankruptcy, and let the creditors take their losses.

Is there a will? Finding wills.

Whether or not the deceased made a will makes a profound difference for two quite different issues:

- Who will inherit what? This is not discussed in this eBook, but is discussed on our website, www.ontario-probate.ca

- Do the rules for intestacy or with a will apply to the probate process. As discussed below, the rules for probate without a will are much more onerous to comply with.

Unfortunately, may folks do not leave clear instructions about whether they made a will and if they did, where it is. Family members are often left wondering 'if there is a will' and 'if so, where so'?

There is no simple way to locate a will in Ontario. For instance, unlike in Quebec, there is no centralized registry of wills.

The common ways to locate wills are:

- A careful review of the deceased's papers;
- Review of safety deposit boxes;
- Direct contact to lawyers that the deceased might have engaged;
- Advertising to local lawyers, usually via the local bar association;
- Consulting new online will registry services such as ?

Have copy or draft but not the original will

Sometimes, a copy or draft of the testators will can be found but not the original. If so, it may be possible to probate this copy but the probate will not be routine and will require additional care and cost.

When a copy is available and the original is not, the onus be on the applicant to prove that the testator signed the original, and the original has been lost and not destroyed. If the original was lost 'at the lawyer's office' a strong argument can be made that the testator did not revoke it by destruction; conversely, if the testator had the original and was making changes to it, then the presumption of revocation must be rebutted.

Probate – who, when, how

Probate of Small Estates (under $150,000)

New rules in Ontario effective April 1, 2021 have streamlined the process for probate of estates under $150,000 (both with and without a will)

- The forms required for probate are simpler to complete and file, and the requirement to 'swear the form under oath' or 'provide an affidavit of service on beneficiaries' have been removed;

- The requirements for notice on beneficiaries have been modified; and,

- There is no requirement to post a bond for a small estate.

However, the new rules do **not** eliminate the need to probate small estates nor do they change the Estate Administration Tax payable.

It is likely that these new rules will streamline the process for estate trustees.

However, because of the new notice requirements, beneficiaries of small estates will receive notice of the **gross** value of the estate. Estate trustees will need to be vigilant to communicate that the **net** value distributable to beneficiaries will be less, as taxes, fees and expenses will be deducted from the gross value prior to any distribution.

Probate of Intestate estates

One of the key advantages of having a will is that it makes probate easier. Probate of an intestate estate is harder because there is no named executor with a clear presumptive right to apply to act as estate trustee. As a result various renunciations and consents from third parties may be required.

The principal distinctions between probating an estate with and without a will are:

- There is no named 'executor'. A presumptive order of rights to apply as estate trustee is set out in the *Succession Law Reform Act* and generally is 'spouse (i**ncluding common law spouse)**, then next of kin'. However, this does not bind the Court, which can choose the most suitable estate trustee.

- Generally, if the applicant is not the 'first person in line' as set out by the SLRA then a renunciation must be obtained from everyone with a prior right to apply and filed with the application.

- Generally, consents to the application signed by beneficiaries with a right to inherit >50% of the estate must be filed with the application.

- A nearly universal rule is that the estate trustee for an intestacy must be resident in Ontario. If no beneficiary is resident in Ontario, then normally a third party (such as a lawyer) must be appointed to act. A Certificate of Appointment of Estate Trustee Without a Will will only be granted to a non-resident of Ontario in very rare circumstances - usually if the applicant is resident elsewhere in Canada, the applicant is the sole beneficiary, and the estate is simple and small (often, just some savings in a bank account, and there are no liabilities). We have considerable success recently with these specialized applications but they are neither routine nor easy..

- The applicant must post a bond or secure a Court order dispensing with one (see bonding requirements below). In either case, the applicant must provide detailed information about the estate assets and liabilities.

For intestate estates, if the deceased died prior to March 1, 2021 the married spouse will inherit the first $200,000; for deaths after March 1, 2021, this 'preferential share' is now $350,000.

This book is about Probate, not 'who inherits what'. The rules for inheritance for intestate estates are complex and discussed on our website www.ontario-probate.ca.

When

It is the obligation of the estate trustee to administer the estate in a reasonable period of time. If probate is required, they should apply in a reasonable period of time after death. This does not mean 'immediately', but equally, it is unlikely to be reasonable to wait a year.

Further discussion of the slow estate trustee problem, including passing over and removal of appointed trustees is discussed on our website and in our eBook on ***Estate Disputes.***

Should I act or renounce?

Just because you are named the executor in a will or have a right to apply as estate trustee for an intestacy does not mean that you are obliged to take on the role.

If for any reason you are unable or unwilling to take on the onerous duties of being the estate trustee you may **renounce** the role without explanation or cost, provided you do so before taking any steps to administer the estate.

Renunciation is completed by signing a simple form.

If you start administering the estate you cannot simply change your mind and renounce. Once you begin or interfere with the estate you must 'resign', and to do so you must pass your accounts (see below).

In general terms, you are permitted to make reasonable inquiries to see if you want to take on the role without 'meddling' in the estate. However, If you take any action which changes the estate (deal with any assets or liabilities) for instance, then you have 'meddled' and can only be released from liability by resigning and passing your accounts.

Simple versus complex probate

Routine probate applications are dealt with 'over the counter' by the estate registry staff (not on the day of filing – often weeks or months later). Applications approved in this manner receive treatment more quickly and at lower cost than applications which must be reviewed and ultimately approved by a judge.

However, in order for an application to be approved by registry staff is must strictly comply with absolutely every requirement (for instance, all original signed renunciations and consents required for an Application Without a Will).

If absolute all of the requirements are not met the application must be reviewed by a judge. These applications typically require considerably more legal expertise to assemble (usually requiring affidavit evidence and perhaps an appearance in Court by

the lawyer), cost considerably more than routine applications, and take longer to be approved.

The cost of probate

Legal fees for applications for 'probate' are usually borne by the estate.

The cost to probate is comprised of:

- Legal fees, if any;
- Disbursements, if any; and,
- Estate Administration Tax. (see below).

Generally, the legal fees for a standard probate an estate are in the range of $1,000 - $4,000. Except in highly unusual cases there is no reason for probate fees to be more.

In our firm, the legal fees for the vast majority of probate applications are in the range of $2,000 - $3,000. Our fees are detailed on our website, and we will gladly provide a fixed price quote in advance.

The costs of estate administration

Once an estate has been probated there are a number of possible expenses and costs. These vary from estate to estate but often include:

- Legal advice received by the estate trustee, including related to passing of accounts
- Accounting and tax filing services
- Investment advice
- Home cleaning and staging services
- Real estate brokerage services
- Services related to valuing and selling personal property
- The services of the estate trustee

In all cases, the costs incurred and fees charged must be reasonable. The costs of some of these services will be borne by the estate; the costs of services which are 'normally' provided by estate trustees will usually reduce the compensation otherwise available for the estate trustee.

Getting advice

A lawyer to assist with probate

You do not always need a lawyer to probate an estate – it is certainly possible to 'do it yourself'. However, dealing with the courts and the required paperwork can be a complex and confusing process, and most people do seek legal assistance with probate. In particular, if there is no will, and it is necessary to deal with multiple consents and renunciations, or apply to the court for an Order to dispense with a bond (see below), or the actions of the estate trustee are likely to be challenged or closely scrutinized (for instance by a sibling who is a beneficiary but not a co-executor), then we strongly recommend that you seek professional assistance with probate and all other aspects of the administration of the estate. Also, if delay is likely to cost money (for instance if the estate has substantial value) then hiring a lawyer to move it along faster is usually very cost-effective. Remember, each month of delay costs the beneficiaries income – so trying but slowing down probate is rarely a good idea.

The lawyer acts for the estate trustee and not for the estate

An estate is not a person. An estate is a trust, and the trustee is the estate trustee.

Accordingly, the estate does not hire a lawyer, and there is no such thing as a lawyer 'for the estate' with some magical duty to the estate or the beneficiaries.

When an estate trustee hires a lawyer, that lawyer **advises the trustee who hired them.** This lawyer will be acting for, and owe duties to, the estate trustee who hired them and not to the estate, any other estate trustees (unless the all agreed to retain the same counsel), the beneficiaries, or any other person.

If co-executors have a disagreement, they should hire separate legal counsel.

If a beneficiary disagrees with the conduct of the executor(s), that beneficiary should hire their own legal counsel. A beneficiary should never expect the lawyer for the estate trustee to look out for the beneficiary's interests. In fact, many lawyers acting for an estate trustee will refuse to speak to any beneficiary directly.

There is no obligation to retain any particular lawyer to assist with probate. There is absolutely no obligation to use the lawyer who drafted the will.

When you engage a lawyer, you should be comfortable with the lawyer and their engagement terms, including price, expertise, manner and service. As long as you pay all outstanding accounts, you can switch lawyers at any time. You can get a second opinion.

Some lawyers charge a fee that is a percentage of the estate for all aspects of advising the estate trustee, from probate through distribution. Depending on the value of the estate and the actual work required, this may result in an extremely high fee. This is generally an old-fashioned way of charging. You are **not** obliged to accept these terms.

The accounts of lawyers are subject to supervision by the Courts under a process known as 'assessment'. Invoices must be fair having regard to all of the relevant circumstances which include time, effort, skill, quality of work and outcome, the important of the matter in issue, and the risk (if any) taken by the lawyer. If you are unhappy with the fees charged by a lawyer, you should use this process to ensure that the fees charged were fair.

Getting advice and assistance after probate

In all cases, the trustee must meet their obligations to the beneficiaries. They cannot avoid these liabilities by delegating to third parties. Equally, however, while it is possible for trustees to handle the entire estate alone, often it is best practice to hire a professional with specialized expertise as this produces both better results and a paper trail to support the results achieved. For instance, the benefits of hiring a real estate professional should include proper pricing and marketing of the property to ensure that the estate receives fair value for a property as quickly as possible.

In addition to hiring professional advisors, estate trustees can hire third parties to assist with routine tasks of administering the estate, and often this is by far the best course of action. For instance, it is often the duty of an estate trustee to sell a house owned by the deceased within a reasonable time. It is not the duty of the estate trustee to personally clean and prepare the house for sale without hiring anyone or incurring any costs. Often it is in the beneficiaries' best interest for the estate trustee to incur

reasonable fees to hire junk removal, auction, cleaning, and staging services to get the necessary work done quickly and effectively.

Accountants: Doing your own taxes is simple compared to filing taxes for an estate. If you don't do your own taxes without an accountant, then you definitely should not be trying to do the taxes of the deceased without qualified advice.

Estate tax is different from routine tax for individuals. Estate trustees should engage advisors with expertise in estates.

Lawyers: Lawyers advise their clients on rights and duties, and, they can assist to enforce rights (by prosecuting legal proceedings) and assist trustees to perform duties (by doing such things as drafting probate applications).

An estate trustee can entrust a lawyer to handle almost the entire administration of the estate. However, the estate trustee remains responsible for the outcome, and the estate trustee should not be compensated for work performed by legal counsel (and legal counsel should be compensated at trustee rates not lawyers' rates for performing trustee work).

The estate trustee's lawyer is not the 'lawyer for the estate' and does not work for or owe a duty to the beneficiaries.

Estate trustees have a duty to control the estate and their lawyers – and should not unduly delegate or permit a lawyer to impose decisions on the estate trustee as to how the estate is to be administered.

Other experts: Executors often hire other experts to assist with particular matters, including:

- investment advisors to assist with investments;
- accountants to assist with accounting and tax returns;
- real estate agents to assist with selling real estate;
- appraisers and auctioneers to assist with selling other assets.

Who pays?

Professional advice to perform the role

As a general rule reasonable professional fees incurred by the estate trustee securing professional advice that assists her to carry out her duties will be borne by the estate, and not by the executor herself. Examples include real estate agents, investment advisors, and lawyers assisting to interpret the will and with probate applications.

Assistance to fulfill trustee duties

Fees incurred by the estate trustee to hire others to help fulfill duties of the estate trustee should generally be paid for by the estate trustee, by way of a corresponding reduction in compensation to the trustee. Examples include fees for paying bills and cleaning a home. If estate expenses are paid by a law firm that is holding estate funds in trust, the fees for these services should reduce trustee compensation.

Assistance defending the trustee

Legal fees incurred by the estate trustee to protect their inheritance as beneficiary are usually not a legitimate estate expense.

Fees incurred by an estate trustee defending their role or performance as estate trustee may be a legitimate estate expense, especially if the trustee is vindicated or if the problem was caused by the testator.

The estate trustee is responsible for ensuring that the fees charged by their legal counsel (and all other professional advisors) are fair and reasonable, and should take steps to object to any unreasonable fee charged by any professional.

The value of the estate

The estate of a deceased person is composed of the assets and liabilities of the deceased, valued as at the date of death.

The assets of the deceased

All property including real property and personal property (tangible and intangible) owned by the deceased on their death falls into their estate and must be dealt with by their estate trustee. The value for probate purposes is the value on the date of death. This raises the key issue: what assets are in the estate? Some of the most contentious issues are digital subscriptions, jointly owned assets, and financial assets with designated beneficiaries. These are discussed briefly below.

The liabilities of the deceased and the estate

The estate trustee must identify and pay all liabilities of the deceased, and all debts incurred by the estate. It can be a challenge to identify liabilities of the deceased. Estate trustees are protected from personal liability from undisclosed liabilities if they advertise prior to distributing the estate. Traditionally these advertisements were placed in local newspapers, but now some online notices are acceptable.

Estate assets – common challenges

Currently, pets are considered tangible personal property and thus can be estate 'assets'.

Assets

Intellectual property rights, such as ownership of copyright to songs, literary works, images and videos are intangible personal property and can form part of an estate.

Jointly-owned Assets – Be careful!

Houses and bank accounts jointly held by the deceased and one or more of their adult children are a frequent cause of expensive estate disputes. See our eBook on *Disputes* for more.

Beneficiary designations for RRIFs, RRSPs, TFSAs, and life insurance can also cause serious tax problems, and unfair distribution of the estate. However, they are often signed quickly at a bank without much thought. **Make sure you understand the impact of these very important designations.**

Online services

Users of many digital 'services' such as Facebook, Instragram and LinkedIn often have no ownership rights to their accounts – they are not 'owned' by the user and the user does not 'own' the content. Many of these accounts are services owned and controlled by foreign companies, who do not recognize domestic Canadian law.

Unless and until there is legislative change in Canada, access to these accounts by estate trustees may be limited or prohibited by the owners of the services.

Joint ownership

Many assets are owned by more than one person. Some, but not all, forms of joint ownership result in the deceased losing all ownership of the asset on their death. When this occurs, the assets does **not** form part of the estate of the deceased, and is not governed by their will.

In Ontario, when real estate is owned 'in joint tenancy with a right of survivorship' (joint tenancy"), then upon the first death of a co-owner, the deceased ceases to have any ownership of the property and the surviving co-owner is now the sole owner. Note that there is no 'transfer' of the asset to the survivor, the deceased simply drops off title to the property. **A property owned by the deceased and a surviving co-owner as joint tenants does not form part of the estate of the deceased.**

A different form of ownership is 'tenants-in-common'. Often tenants-in-common own a fixed share of the property. The ownership interest of tenant-in-common **does** fall in to their estate and is distributed to accordingly.

Beneficiary designations

Some financial 'assets' can pass directly to a designated or named beneficiary and as a result do not fall into the estate of the deceased. Except where a will is clearly drafted to over-rule a previous designation, these designations often prevail regardless of whether the deceased had a will or not.

Life insurance

Life insurance, which often has limited or no value to the deceased before or after death, results in a contractually agreed payment by the insurer to the beneficiaries of the policy. If the life insurance passes directly to a named beneficiary it is **not** part of the estate and is not governed by the will.

If there is no surviving designated beneficiary, then the policy will be paid to the estate of the deceased.

The proceeds of a life insurance policy are not taxable income for the recipient (whether a beneficiary or the estate).

Pensions

Some but not all pensions have 'successor' beneficiary rights that apply after the death of the plan member. These rights vary from plan to plan. They are most common if he plan member dies before retirement.

Pensioners have some, but limited, rights to designate beneficiaries of their pension. Generally, the beneficiary of any pension rights that survive the death of the pensioner must pass to the person who was the spouse of the deceased at the time of death (whether common law or by marriage). In this context, 'spouse' means in a conjugal relationship of at least three years at the time of death.

If, but only if, the deceased did not have a spouse at their death can the pension benefits pass to a named beneficiary, and failing that, to the estate.

TFSAs

There is no tax related to a TFSA on death.

There are two different types of designations for TFSAs:

a) A successor annuitant. If the spouse of the TFSA holder is named as a successor annuitant, then the entire TFSA rolls over to the spouse. The TFSA

remains a TFSA and thus can continue to grow tax free for the life of the surviving spouse.

b) A named beneficiary, who receives the proceeds of the TFSA tax free but the funds in it cease to be inside a TFSA and cease to grow tax free (although if the recipient has “TFSA contribution room” they may contribute the funds to their own TFSA).

In both cases of beneficiary designations, the TFSA passes outside the estate and does not form part of the estate of the deceased.

If there is no designated beneficiary, or no beneficiary survives the testator, then the TFSA falls into the estate.

If a minor child is a designated beneficiary of a TFSA, the rules about gifts to minors and notice to the Office of the Children’s Lawyer apply.

RRSPs and RRIFs

RRSPs and RRIFs can pass by designation directly outside the estate. When there is a valid designation, not over-ruled by a will, the full value of the plan will pass to the named beneficiary outside the estate without involvement of the estate trustee and without any Estate Administration Tax being payable.

If the RRSP/RRIF is ‘rolled over’ to a surviving spouse, it retains its character as tax-deferred savings, and does not create taxable income on the death of the holder (taxable income is generated as funds are withdrawn from the plan).

If the designated beneficiary of the RRSP/RRIF is anyone other than the spouse of the deceased, then the full value of the Plan must be included in taxable income of the deceased in the year of death. The tax payable can be very significant. This tax is payable by the estate, not by the beneficiary.

Where there is no designation, or the named beneficiary pre-deceases the plan holder, the value does fall into the estate of the deceased.

Divorce and Separation

If married spouses divorce, a will made before the divorce remains valid but is read as if the ex-spouse pre-deceased.

Divorce does not automatically revoke beneficiary designations on life insurance, TFSAs, RRSPs or RRIFs. These designations should be dealt with in any separation agreement, and with each plan separately (or in a will made after the divorce).

Where legally married spouses separate but do not divorce, the separation does not automatically terminate the ex-spouses rights under the will or any beneficiary designation.

Spouses who are legally married may elect to receive their entitlements under the *Family Law Act*, as if they had divorced the day before the death, rather than under the will of the deceased. Therefore, a will that attempts to disinherit a separated but not divorced ex-spouse may be ineffective.

Common law spouses have no inheritance rights in Ontario unless they are written expressly in a will (i.e. common law spouses do not inherit when there is no will). They may have rights to support, under the *Family Law Act* or the *Succession Law Reform Act*.

Passing accounts: be prepared from the start!

An estate trustee has a duty to account to the beneficiaries of the estate. This includes accounting for the assets recovered, the income generated, the fees incurred, and the distribution of the estate.

The process by which the Courts 'supervise' the conduct of estate trustees is known as the 'passing of accounts'. By no means are accounts passed for all estates. Often, 'informal' accounts are all that is required. If all beneficiaries approve the accounts of the estate trustee, then a formal passing of accounts can be dispensed with.

If one or more of the beneficiaries is a) a minor, or b) under disability, then it is extremely likely a formal passing of accounts will be required.

Where all beneficiaries cannot or will not consent to the estate trustee's accounts, then a formal passing of accounts is likely required. If a beneficiary simply refuses to agree to provide a release of the estate trustee, the estate trustee's recourse is likely to proactively pass their accounts.

Note that the passing of accounts extends well beyond the fees charged by the estate trustee or paid by him or her, and extends to the entire administration of the estate.

Accounts are usually only passed once, at the end of the administration of the estate. It is crucial for the estate trustee to maintain excellent records throughout the entire administration process.

Preparing accounts is a duty of the estate trustee, and therefore if they retain advisors (such as a law firm) to assist them to prepare accounts these fees are often deducted from trustee compensation.

The legal fees incurred filing an Application to Pass Accounts is usually borne by the estate.

The legal fees for any opposition to the trustee's accounts may or may not be borne by the parties or by the estate. Much depends on who prevails and whether any position taken was correct, or if not, reasonable.

Probate fees in Ontario: Estate Administration Tax

When a probate application is filed in Ontario with the court, "probate fees" (properly known as 'estate administration tax') must be paid to the government of Ontario.

Estate administration tax ("EAT") is paid by the estate, and is not borne by the trustee/executor.

EAT is calculated on the value of the estate probated:

- Nil on the first $50,000, and
- $15 per $1,000 of estate assets over $50,000.

Calculating the value of the estate to calculate EAT

The value of the estate for the purposes of calculating and paying EAT is a bit odd.

The value of the estate for EAT purposes:

- Includes all real estate in Ontario;
- Does not include any real estate outside Ontario;
- Is reduced by the value of any debt **secured against real estate in Ontario** (which means registered against title, and hence includes mortgages and HELOCs and tax liens); and,
- Is not reduced by any debt not secured against real estate in Ontario, including mortgages outside Ontario, credit card debt, unpaid taxes (not secured by a tax lien) or child or spousal support.

Debts & EAT

Debts secured against real estate in Ontario do reduce the value of the estate for the calculation of EAT.

All other debts not secured against real estate in Ontario do not reduced the value of the estate for the calculation of EAT due

Note: it is possible that tax debts that are secured by a lien registered against real estate. This is especially so with longstanding unpaid income and property tax debts. If there is a lien, the value of the lien (not the value of the total unpaid tax bill with interest and costs) will reduce the value of the estate for EAT calculation.

Accessing funds to pay EAT

A common concern for estate trustees is ‘where do I get the money to pay the EAT?’

If the estate has liquid assets like savings or investments, then with good legal advice it is usually possible to get the financial institution to release the EAT payment that must accompany the probate application in the form of a bank draft payable to the Ministry of Finance.

If there are no liquid assets, it may be possible to get a Court order deferring payment of the EAT for up to 90 days after the Certificate of Appointment. These orders are not routine and will increase the cost and complexity of the probate application and the processing time by the Court

The trustee’s obligations to report and pay EAT

EAT is payable by the estate, but the estate trustee has personal liability for proper payment and reporting.

The estate trustee must file an EAT return within 180 days of receipt of the Certificate of Appointment. This return is in effect an ‘asset’ return, quite different from the ‘income’ returns most Canadians are accustomed to. It is filed with Ontario. It can be filed readily online.

It is common for estate trustees to retain the services of a lawyer to prepare and file the EAT return.

Minimizing Probate Taxes

Many techniques exist to minimize probate fees, but most require proper planning by the testator prior to death. The most common is the use of 'dual wills', whereby assets that require probate pass under one will, and other assets that often do not require probate (such as the shares of a family or private business) pass under a separate will that is not subject to probate. Of course, this requires advance planning and preparation by the testator (the person making the will), and, a lack of dispute among the potential executors and beneficiaries.

For more information, consult our eBook on Estate Planning and Wills, and get proper professional advice.

Don't be penny-wise, pound-foolish

Many 'plans' designed to minimize probate fees are in fact very bad planning, which create far more trouble and cost than they avoid. This is particularly true when using 'joint ownership' with adult children of the testator. For more information, see our eBook on Disputes.

How to apply for Probate

In order to apply for probate in Ontario, the executor (or a lawyer acting on his or her behalf) must prepare the application, serve it on all the required people, and file it in the right Court registry.

Prepare the right forms

You must prepare your application for probate using the correct court forms, as set out under the Rules of Civil Procedure in Ontario.

Rule 74 of the Rules of Civil Procedure sets out the forms used in Ontario for estate matters.

The precise forms to use depend on the circumstances, including whether the estate trustee is being appointed 'with a will' or 'without a will', and other factors, including whether the proposed executor is an individual, or corporation and **whether the estate is a small estate (valued less than $150,000).**

Depending on the circumstances:

- You may need to file consents from other people to your appointment as estate trustee;
- You may need to file renunciation(s) for anyone who is entitled to serve as an executor and who does not wish to serve;
- You may need to post a bond, or, apply for an order dispensing with one (particularly if you live outside Ontario, or, have not been appointed executor pursuant to a will).

In addition to the application itself, you must prepare and file all of the required supporting documentation. This includes, at a minimum the Application, a Notice of Application, and a Certificate of Appointment.

If the appointment is 'with a will', you must file the original will and originals of any codicils, together with a copy of an 'affidavit of execution' (ideally, one was prepared and signed by a witness at the time the will was signed by the deceased).

You must complete the forms:

i) accurately,
ii) completely, and
iii) consistently (all information the same in all places).

Ontario court forms can be found at: www.ontariocourtforms.on.ca

Serve the application on everyone entitled to service

Once you have the documentation prepared, you must serve your application as required by the circumstances. This means, at a minimum, serving every person entitled to share in the distribution of the estate (including minors and charities).

You must serve the parent or guardian of a minor beneficiary, and for adult beneficiaries for whom an attorney has been appointed, the attorney.

If there are beneficiaries under 18 (minors) or unborn or unascertained, you must serve the Children's Lawyer.

If there are incapable adult beneficiaries without an appointed guardian or attorney for property, notice of the probate application must be served on the Public Guardian and Trustee.

Beneficiaries of a will must receive proper notice of their entitlement. At a minimum, for recipients of a specific bequest, this means enough of the will to confirm the bequest. Residual beneficiaries of an estate are entitled to receive a copy of the entire will. Sometimes there are good reasons to provide a specific bequest beneficiary with a redacted version of the will that does not show gifts to third parties; often redacting causes suspicion and conflict and is not a good idea.

There is no obligation in Ontario for a 'reading of the will' and individuals who are not beneficiaries have no right to be told what the will says by the executor. Obviously this can cause significant problems for individuals who believe that they should be in the will. If an individual has not received a copy of the will then either a) the executor has not applied for probate, or b) that individual is not a beneficiary.

Once a probate application has been filed, the will is a public document and can be viewed at the courthouse where the probate application was filed.

MINOR CHILDREN

An inheritance by anyone under 18 years of age can be complex!

Parents are NOT automatically the guardian of property of their children. A gift cannot just be 'paid to the parent'. Before any adult, including a parent, can receive a gift for a child over the modest limit the adult must secure a court guardianship order. These are complex, difficult orders to secure.

The modest limit for payments to parents is now $35,000 (amended in 2021 from $10,000).

The Office of the Children's Lawyer must be notified of every gift to a minor over $35,000.

File the application with the Court, in the right place

You apply for probate by filing your complete application, with proof of service, and the Order sought, with the Estate Registrar of the Ontario Superior Court of Justice.

You must apply for probate in the County or district in Ontario where the deceased resided at death, and if the deceased did not reside in Ontario at death, then where the deceased owned property. "Resided at the time of death" does not mean a 'temporary stay' or 'visit'. It means 'where their home was'.

In the Greater Toronto Area, it is important to file in the courthouse with jurisdiction over the appropriate regional district (eg. Milton for Halton Region, Brampton for Peel, Newmarket for York, etc.).

Calculate and Pay the Estate Tax

You must submit payment of the applicable estate tax when you file the application for probate.

Bonding

When required

One of the most difficult aspects of many applications for probate is dealing with the requirement to 'post a bond' or 'secure a Court order dispensing with the requirement to bond'. The table below summarizes when a bond or Order to dispense is required.

Location of first probate, basis of appointment & trustee's residence	Bonding requirement
Ontario is first jurisdiction for probate	
Testate (with a will)	
Executor named in the will	
Executor resident in Canada or Commonwealth	No bond required
Executor not resident in Canada or Commonwealth	Bond or dispense
Executor NOT named in the will	
Executor resident in Canada or Commonwealth	Bond or dispense
Executor not resident in Canada or Commonwealth	Bond or dispense
Intestate (no will)	
Trustee resident in Ontario	Bond or dispense
Trustee not resident in Ontario: impossible	Not applicable
Estate already probated outside Ontario	
Any other province in Canada or in the Commonwealth	
Re-sealing: original probate with a Will	No bonding
Re-sealing: original probate of intestacy	Bond or dispense
Outside the Commonwealth	
With a will: ancillary grant: regardless of residence of trustee	Bond or dispense
No will: nominee of foreign trustee must be resident in Ontario	Bond or dispense

How to apply for a bond

A 'bond' is a form of 'surety', posted by an insurance company, for the benefit of the beneficiaries, to protect their interests. A bond for an estate must be for twice the value of the estate.

It is actually quite rare to post a bond for an estate trustee in Ontario. These bonds are difficult and expensive to secure. Experience helps greatly – ideally with a law firm that deals regularly with an experienced insurance broker.

In order to apply for a bond detailed information about the estate (assets and liabilities), will or SLRA distribution, and the estate trustee are required to complete the insurance application through a broker.

Court Orders to Dispense with Bonds

In many cases it is possible to secure an Order from the Court that dispenses with the requirement for the estate trustee to dispense with a bond. When available, these orders are much quicker, cheaper, and easier to secure than actually positing a bond.

If a proposed estate trustee cannot secure an Order to dispense with a bond, often the most practical thing to do is for the proposed estate trustee to renounce and to have someone else who can obtain an Order to dispense with the bond (such as an experienced estates professional) apply to be appointed the estate trustee.

The Information Required to Dispense with a Bond

The information that must be submitted to the Court for an Order by way of Affidavit to dispense with a bond is:

1. The identity of all beneficiaries of the estate;
2. The identity of any beneficiary of the estate who is a minor or incapable person;
3. The value of the interest of any minor or incapable beneficiary in the estate;
4. Executed consents from all beneficiaries who are sui juris to the appointment of the applicant as estate trustee and to an order dispensing with an administration bond should be attached as exhibits to the affidavit. If consents cannot be obtained from all the beneficiaries, the applicant must explain how he or she

intends to protect the interests of those beneficiaries by way of posting security or otherwise;

5. The last occupation of the deceased;
6. Evidence as to whether all the debts of the deceased have been paid, including any obligations under support agreements or orders;
7. Evidence as to whether the deceased operated a business at the time of death and, if the deceased did, whether any debts of that business have been or may be claimed against the estate, and a description of each debt and its amount;
8. If all the debts of the estate have not been paid, evidence of the value of the assets of the estate, the particulars of each debt – amount and name of creditor – and an explanation of what arrangements have been made with those creditors to pay their debts and what security the applicant proposes to put in place in order to protect those `creditors.

Probate in Ontario of Foreign Estates

From within the Commonwealth

If probate has been granted to an estate trustee with or without a will **elsewhere in the Commonwealth** and the deceased had assets in Ontario, a grant of 're-sealing' can be applied for in Ontario. This is a relatively straightforward application, similar to an original probate application in Ontario. Two **court-certified** copies of the original grant dated within 6 months of the Ontario application are required (must be certified by the Court that granted probate originally). Estate administration tax on the assets in Ontario must be paid. 'Bond or dispense' requirements apply, subject to whether any bonding was posted in the original jurisdiction. The applicant does not need to be resident in Ontario.

From elsewhere, with a will

If the original grant was **not in the Commonwealth, and if it was 'with a will'** then the process in Ontario is known as 'an ancillary grant of probate'. The applicant does not need to be resident in Ontario. As with a re-sealing, EAT must be paid on the assets in Ontario.

From elsewhere, no will

If there was no will, and the original estate was outside the Commonwealth in a jurisdiction where the deceased resided and if there is an intestacy with respect to Ontario assets, then, an Application for a Certificate of Appointment of Foreign Estate Trustee's Nominee as Estate Trustee Without a Will must be filed in Ontario.

This is particularly common for deceased who die without a will, resided in the United States or Europe and had a bank account or owned real property in Ontario.

The nominee estate trustee must be a resident of Ontario. The usual 'bond or dispense' requirements will apply.

A certified copy of the original grant under the seal of the Court that issued it will be required.

The Information Required for a Probate Application

The following basic information and documents are required to apply for probate:

1. Original signed will if available, or confirmation that the deceased died without a will

2. Death Certificate

3. Information about the deceased person:

   - full name (including middles names) of the deceased
   - date of death
   - last address of the deceased
   - occupation or former occupation of the deceased

4. Information about the proposed executor(s):

   - full name (including middles names) of each proposed executor
   - relationship of each executor to the deceased
   - occupation or former occupation of each executor
   - address, phone number and email address of each executor

5. Information about deceased person's relatives: for each living child, sibling and parent:

   - full names (including middles names) of each living child, sibling and parent
   - relationship of each of the above relatives to the deceased
   - occupation or former occupation of each of the above relatives
   - address, phone number and email address of each of the above relatives
   - confirmation as to whether any of the above relatives are mentally incapacitated

6. Information about the estate:

   - full list of assets & value of each asset (bank accounts, investments, automobiles, property, etc.)
   - information regarding pensions (if applicable)
   - confirmation of CPP payments (amount and when last payment was received)

A Sample Probate Application Form (not small estate).

FORM 74.4

COURTS OF JUSTICE ACT

APPLICATION FOR CERTIFICATE OF APPOINTMENT OF ESTATE TRUSTEE WITH A WILL (INDIVIDUAL APPLICANT)

ONTARIO

SUPERIOR COURT OF JUSTICE

At

This application is filed by *(insert name and address)*

DETAILS ABOUT THE DECEASED PERSON

Complete in full as applicable

First given name	**Second given name**	**Third given name**	**Surname**

And if the deceased was known by any other name(s), state below the full name(s) used including surname.

First given name	**Second given name**	**Third given name**	**Surname**

Date of birth of the deceased person, if known: *(day, month, year)*

Address of fixed place of abode *(street or postal address) (city or town)*	*(county or district)*

If the deceased person had no fixed place of abode in Ontario, did he or she have property in Ontario?	**Last occupation of deceased person**
☐ No ☐ Yes	

Place of death *(city or town; county or district)*	**Date of death** *(day, month, year)*	**Date of last will** (marked as Exhibit "A") *(day, month, year)*

Was the deceased person 18 years of age or older at the date of the will (or 21 years of age or older if the will is dated earlier than September 1, 1971)? ☐ No ☐ Yes

If not, explain why certificate is being sought. Give details in an attached schedule.

Date of codicil (marked as Exhibit "B") *(day, month, year)*	**Date of codicil** (marked as Exhibit "C") *(day, month, year)*

Marital Status ☐ Unmarried ☐ Married ☐ Widowed ☐ Divorced

Did the deceased person marry after the date of the will? ☐ No ☐ Yes

If yes, explain why certificate is being sought. Give details in an attached schedule.

Was a marriage of the deceased person terminated by a judgment absolute of divorce, or declared a nullity, after the date of the will? ☐ No ☐ Yes

If yes, give details in an attached schedule.

Is any person who signed the will or a codicil as witness or for the testator, or the spouse of such person, a beneficiary under the will? ☐ No ☐ Yes

If yes, give details in an attached schedule.

VALUE OF ASSETS OF ESTATE

Do not include in the total amount: insurance payable to a named beneficiary or assigned for value, property held jointly and passing by survivorship, or real estate outside Ontario.

Personal Property	**Real estate, net of encumbrances**	**Total**
$	$	$

Is there any person entitled to an interest in the estate who is not an applicant? ☐ No ☐ Yes

If a person named in the will or a codicil as estate trustee is not an applicant, explain.

If a person not named in the will or a codicil as estate trustee is an applicant, explain why that person is entitled to apply.

If the spouse of the deceased is an applicant, has the spouse elected to receive the entitlement under section 5 of the *Family Law Act*? ☐ No ☐ Yes

If yes, explain why the spouse is entitled to apply.

AFFIDAVIT(S) OF APPLICANT(S)

(Attach a separate sheet for additional affidavits, if necessary)

I, an applicant named in this application, make oath and say/affirm:

1. I am 18 years of age or older.
2. The exhibit(s) referred to in this application are the last will and each codicil (where applicable) of the deceased person and I do not know of any later will or codicil.
3. I will faithfully administer the deceased person's property according to law and render a complete and true account of my administration when lawfully required.
4. If I am not named as estate trustee in the will or codicil, consents of persons who together have a majority interest in the value of the assets of the estate at the date of death are attached.
5. The information contained in this application and in any attached schedules is true, to the best of my knowledge and belief.

Name *(surname and forename(s))*	**Occupation**

Address *(street or postal address)* *(city or town)* *(province)* *(postal code)*

Sworn/Affirmed before me at the .....

of .....

in the .....

of .....

this _____ day of ..... , 20 _____

_____ Signature of applicant

_____

A Commissioner for taking Affidavits *(or as may be)*

Name *(surname and forename(s))*	**Occupation**

Address *(street or postal address)* *(city or town)* *(province)* *(postal code)*

Sworn/Affirmed before me at the .....

of .....

in the .....

of .....

this ..... day of ....., 20 .....

_____
Signature of applicant

_____
A Commissioner for taking Affidavits *(or as may be)*

Notice to applicant: Information provided on this form related to the payment of estate administration tax may be forwarded to the Ministry of Finance pursuant to clause 39(1)(b) and 42(1)(c) of the *Freedom of Information and Protection of Privacy Act*. This includes the name of the deceased, name and address of estate trustee(s), value of the estate and any undertakings and tax payments made or refunded. This information will be used by the Ministry of Finance to determine the value of estates and the amount of estate administration tax payable. Questions about the collection of this information should be directed to the Senior Manager – Audit, Advisory and Compliance Branch, 33 King Street West, PO Box 625, Oshawa ON L1H 8H9, 1-866-668-8297.

Further Information

What to do when someone dies

Information from the Province of Ontario: www.ontario.ca/government/what-do-when-someone-dies

Court Forms for "probate" (estates) in Ontario

http://www.ontariocourtforms.on.ca/english/civil/pre-formatted-fillable-estates-forms

The Office of the Children's Lawyer

http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/

The Office of the Public Guardian and Trustee

http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/

About Us

We are **Miltons Estates Law**. We provide advice about estate law: wills and estate planning, and full services to trustees and beneficiaries. We focus on providing advice that is practical, cost-effective, and results-oriented.

Our services include probate, passing accounts, and estate litigation. We also provide estate trustee services.

Contact us at 1-888-995-0075, or

info@ontario-probate.ca

www.ontario-probate.ca
www.ontario-wills.ca