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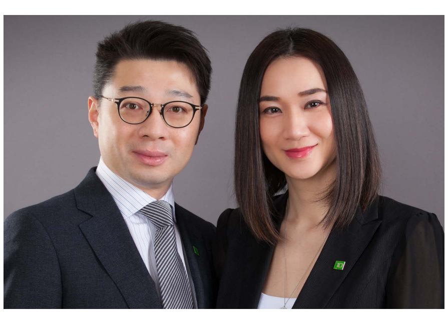

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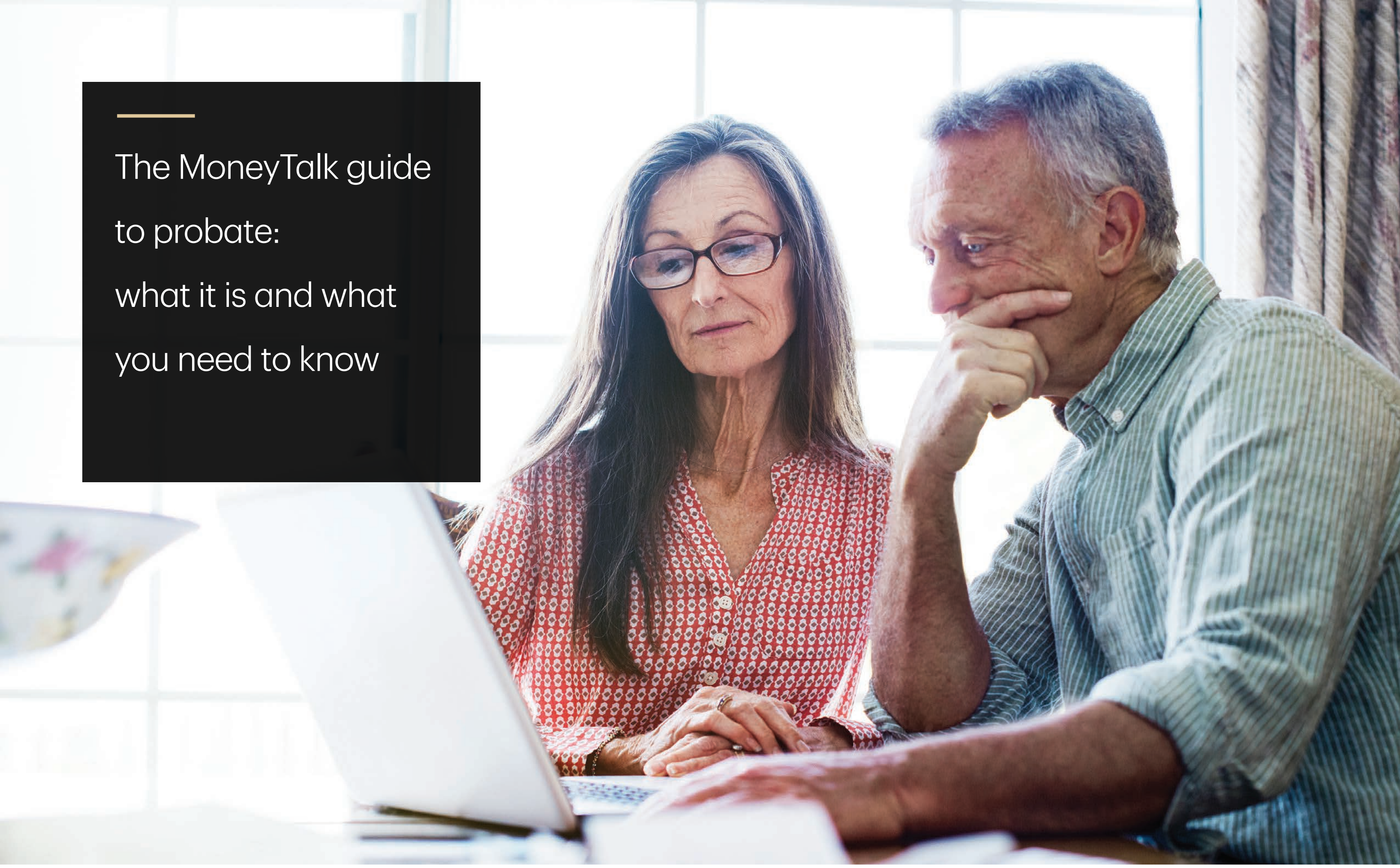

The MoneyTalk guide to probate: what it is and what you need to know

It's a key part of managing a person's estate but Canadians may be confused about how it works and how to mitigate the fees involved. Here's what you need to know about probate.

Probate can be an enigma for Canadians writing their Wills. Yes, rules differ by province and what gets probated can depend on your individual circumstances. Further, probate doesn't happen with every estate or Will. But what many of us naturally want to know is, "How can I avoid probate?"

Probate doesn't need to be complicated. If you divide the process into what the law requires, how it affects you and the fees involved, it becomes easier to understand.

Treva Newton, a Tax and Estate Planner with TD Wealth in Victoria, B.C., says Canadians stand to gain from a greater understanding of how probate works, especially if their assets or family situations are complicated. But everyone — those writing Wills, future executors and an estate's eventual beneficiaries — should be familiar with what probate entails.

"It's a challenging process. Each type of asset is governed by different rules. You need to be careful how you plan," she says.

But while all situations are different, Newton says there are some general rules and information about probate that everyone should know before they draw up a Will or embark on an estate strategy. We've broken the concepts down to what probate is, what the fees are and how you may be able to reduce these costs. If you have questions about probate, you may find some of the answers here.

What is probate?

The basic definition of probate is the court's determination of whether a Will is truly the final testament of an individual, whether that Will is indeed valid, and whether the executor named in the Will has the right to manage the estate.

All executor duties and transfers of assets must follow this determination. Few things in the Will can be processed without it. But to make this clearer, let's revisit the process in chronological order:

Someone passes away, a Will emerges and an executor is named in that will. However, before the executor can take control of assets in the estate, like a bank account, a financial institution must ensure that the Will is valid and the executor has a legal right to do so. The legal process of verifying the Will and the executor is what's known as probate. A financial institution will request probate and the executor will apply to provincial court to set the probate process in motion. Once the Will is deemed valid — probated — by a provincial court, the executor can gain access and begin their duties.

Usually, banks or insurance companies are the organizations that request probate but it depends on what assets the deceased possessed.

What happens when my Will is probated?

When a Will is probated, a court will certify the executor can legally manage the estate and whatever bank accounts, property and other assets are in the deceased's name. Before this can happen, the executor must prove to the court that the Will is the latest valid Will. Depending on the jurisdiction, this may be done through a Wills search of provincial registries. The executor must also submit a valuation of the estate. Once the Will is probated — literally stamped with a certification of probate — an executor can access bank accounts and other assets.

What are the costs for probate?

Probate could be viewed as an inconvenience if not for the charges attached. Probate taxes or fees vary greatly from province to province and each jurisdiction may use slightly different terminology. For instance, Ontario's "estate administration tax" has the highest cost among the provinces ($14,500 on an estate of $1 million). Manitoba and Quebec, by comparison, have no fees attached to their probate process. Note, court costs for applying for probate are a separate, lesser expense.

What assets do and do not go through probate?

Which assets will go through probate can vary. Generally speaking, registered accounts such as Registered Retirement Savings Plans (RRSPs), Registered Retirement Income Funds (RRIFs) and Tax-free Savings Accounts (TFSAs) that have a named beneficiary are not considered part of the estate and won't be probated. These accounts will go directly to beneficiaries. In some provinces, shares of private companies may also escape probate as long as they are the only asset of an estate.

Real estate always goes through probate, with the exception of when it is transferred to a surviving

spouse through the right of survivorship. After these generalities, what goes through probate depends on your individual situation.

Does my estate have to go through probate?

Not necessarily says Newton. "You must have assets in your own individual name in order for the assets to go through your Will. If all of your accounts are jointly held with your partner or spouse, then you usually don't have to go through probate because there are no individual assets actually going through your Will," she says.

Newton says these jointly-held assets typically include bank accounts or property like the family home: When the first spouse dies, the assets "roll-over" to the surviving spouse. When the second spouse passes away and their assets are inherited by their children, for example, probate is likely required.

How long does the probate process take?

Probating a Will may take as little as a few weeks or as long as six months. The probate process is tied to separate but related estate management procedures. Essentially, if an estate must be probated, a value must be placed on the estate: This is an additional task for the executor who must employ professional assessors to estimate the value of the deceased's assets. This may be straightforward or more complicated depending on how extensive and diverse the deceased assets may be. Once the estate has been valued, the probate fees or taxes can be paid and the executor can proceed with other estate duties.

How can I avoid probate?

There are several ways an individual may prepare their estate in order to minimize the requirements of probate. Newton emphasizes that you can work with a financial professional to help create a personalized plan, but here are some things that plan may include:

- **Put assets in a trust**: Putting funds and property into an Alter Ego trust (in the case of an individual) or a joint partner trust (in the case of a couple) is a popular method of reducing probate costs for wealthy Canadians. "If you put assets into a trust before you die, the assets won't go through your Will and won't be subject to probate fees," says Newton, but she notes there are also costs and fees involved in setting up and managing a trust.
- **Identify beneficiaries for registered accounts:** While the funds inside RRSPs and RRIFs can circumvent the probate process, that can only happen when there are beneficiaries named in the account. If there are none, the funds will revert back to the estate and will be subject to probate. Everyone should check annually that the beneficiaries named in their registered accounts are up to date.
- **Consider jointly held ownership:** If one spouse passes away and all their assets (accounts and property) are held jointly, then everything passes to the surviving spouse and there may be no reason for a bank to ask for probate. However, if each half of the couple has separate bank accounts and holds property in their own names, or there are other beneficiaries from the Will, a financial institution may ask for probate. Newton says that every couple is different and that there may be good reasons to hold assets individually: People can benefit from talking with their lawyer or a financial advisor about this.
- **Gift away assets:** "Canada has no gift tax. If you don't own the asset at your death, it's not going to go through your Will. A lot of people will give away money and other assets during their lifetime if they feel they won't require them," says Newton. She says that people should move carefully around gifting: If we give away too much money to family, we may find ourselves short of funds if we have unexpected healthcare costs.

How can you prepare for the probate process?

Newton says people should work with estate lawyers and accountants in order to ensure that their probate process goes smoothly: "People can also work with a trust company. The estate and probate process is what they do. With even a simple estate taking two years to complete, working with a trust company can save you a significant amount of time and stress."

— Don Sutton, *MoneyTalk Life*

Advanced probate strategies for wealthy Canadians

You may already know what probate is and how it works. But do you know some ways you can mitigate its impact when you pass wealth to your heirs?

Canadians with large and complicated assets should be mindful of the role probate has on their wealth. With fees or taxes potentially taking a considerable chunk out of an estate — for instance, a $1 million estate in Ontario would pay $14,500 — it may be a good idea to learn more on how probate works and how to mitigate its potential impact when your wealth transfers to the next generation. Fortunately, there are several strategies worth considering.

Treva Newton, a Tax and Estate Planner with TD Wealth in Victoria, B.C., says wealthier Canadians in particular stand to gain from a greater understanding of the probate process. Being an entrepreneur or an individual with extensive holdings or intricate family wealth means that assets may be more exposed to these fees and taxes.

"It's a challenging process. Each type of asset is governed by different rules. You need to be careful how you plan," she says.

Here's a reminder of the role probate plays when you pass away and how to manage the costs for your heirs.

What is probate?

Probate is the court's determination that a Will is the last Will and testament of the individual who has passed away. It certifies that the document is valid and that the executor has the right to manage the estate. This process begins shortly after an individual passes away: Before an executor can proceed with the management of the deceased's assets and the transference of those assets to beneficiaries, financial institutions will request the Will be probated.

This entails a Will search to prove there are no other Wills and a valuation of the estate. Once the Will is probated, an executor can access bank accounts and other assets.

What assets do and do not go through probate?

Real estate, unless it is transferred through the right of survivorship, always goes through probate. But it is important to understand the role spouses can play in probate. If a couple own all their assets jointly (real estate or unregistered accounts) and if there are no other beneficiaries other than the surviving spouse, the assets will "roll-over" to that spouse, and the estate will be transferred without probate. When the second spouse passes away, (assuming the assets are in their individual name) then the estate will pass through the probate process.

Registered accounts such as Registered Retirement Savings Plans (RRSPs), Registered Retirement Income Funds (RRIFs) and Tax-free Savings Accounts (TFSAs) that have a named beneficiary are not considered part of the estate and will go directly to beneficiaries. Shares of a private company may also escape probate so long as they are the only asset of an estate being passed down and depending on what province you are in.

Costs and strategies around probate

While Manitoba and Quebec have no probate tax and some provinces have a flat fee, in Ontario and B.C. and other provinces, the costs are significant. Newton says you may have options available to you, particularly if you are a business owner, have diverse or complex financial assets, or an atypical family situation. For example, a Trust is often a solution that, despite legal expenses, may help to offset probate fees.

Put assets in a Trust. Putting funds and property into an Alter Ego Trust (in the case of an individual) or a Joint Partner Trust (in the case of a couple) is a popular method of reducing probate costs for wealthy Canadians.

"If you put assets into a Trust before you die, the assets won't go through your will and won't be subject to probate fees," says Newton.

No taxes are triggered when transferring assets into an Alter Ego or a Joint Partner Trust unlike some types of Trusts. Alter Ego or Joint Partner Trusts are available only after an individual reaches age 65, with the key being that through this process, probate is avoided. Once the Trust is created, the individual or couple are the only people who can benefit from the income and use the capital of the Trust for the remainder of their lifetimes. When the individual or couple passes away, taxes are paid on capital gains earned on the assets being passed down. However, the Trust acts like a Will: Named beneficiaries receive the assets but probate is avoided.

A so-called family or discretionary Trust would work in a similar fashion although assets transferred to the Trust would be subject to capital gains tax. When the person who creates the Trust passes away, assets would pass to the beneficiaries without probate.

For people with multifaceted assets these Trusts may offer other benefits. For example, unlike Wills or the probate process, the Trust is not a public document and so may offer some privacy. If an individual believes their Will could be challenged by other individuals, having assets in the Trust instead of in the estate, could mitigate that worry.

Newton says while Trusts are attractive, individuals must be comfortable with the fact that once the funds enter the Trust, it is legally no longer their money — there may be complexities around shifting funds to family members.

There are costs and complications in setting up and managing any Trust. But she says they are useful for tax strategy purposes, outside of probate process, and can help families deal with complicated estate issues.

Have beneficiaries for registered accounts. While the funds in an RRSP or a RRIF can circumvent the probate process, that can only happen when there are beneficiaries named in the account. If there are none, the funds revert back to the estate and will be subject to probate. Everyone should check annually that the beneficiaries named in their registered accounts are up to date.

Couples should consider jointly-held ownership. In regard to couples, there may be no reason for a bank to ask for probate if all their assets are held jointly and everything passes to the surviving spouse in a Will. However, if each half of the couple has separate bank accounts and holds property in their own names or if there are other beneficiaries, a financial institution may ask for probate. Newton says that every couple's situation is different, and there may be good reasons to hold assets individually: People can benefit from talking with their lawyer or a financial advisor.

Gift away assets. "Canada has no gift tax. If you don't own the asset at your death, it's not going to go through your Will. A lot of people will give away money and other assets during their lifetime if they feel they won't require them," says Newton.

These considerations could typically happen later in life when the amount of wealth someone accumulates is more than enough to see them through the rest of their days. A documented gift can also ensure funds given to a relative are not lost through a divorce or action by a creditor, and can also help to clarify intentions in a Will. Newton says that people should move carefully around gifting, for a variety of reasons: While we can make plans, we can't really be certain what the future entails. If we give away too much money to family, unexpected surprises could happen, especially around healthcare costs, she says.

How can you prepare for the probate process?

Newton emphasizes that, while the probate process may be inevitable, that doesn't mean people can't work to alleviate some costs. Wealthy families may already be familiar with tax strategies and estate planning but a check-in with your tax lawyer, estate planner or Trust officer can clarify what steps to take during a generational wealth transfer. This can include what fees and services are required, what the tax impact will be and, ultimately, what the estate will look like after it is finally dispersed.

— Don Sutton, *MoneyTalk Life*

The MoneyTalk guide to Trusts

If you think Trusts are only for wealthy children waiting to obtain family riches, think again. Here is a simple guide to how Trusts can be an important part of an estate planning toolkit.

Here's a common enough situation: A widow with adult children remarries. It's a match made in heaven, except for one little vice that their new spouse has: They like to spend. Overspend. Really max out those credit cards.

As a result, our widow comes to realize they need to think carefully about estate planning should they die and be survived by their new spouse. They really would prefer their assets, such as their home and investments, to be eventually received by their children. However, they also want to make sure their new partner is taken care of in the meantime, and doesn't fritter away the assets.

In a case like this a Trust can be an important part of an estate planning toolkit. "Executed correctly, a Trust can be a solution for a person who may want some control over how their assets are distributed upon their passing," says Susan Mabley, Associate Vice President, TD Wealth Private Trust.

"This is especially true where there may be uncertainty about a child or a spouse's ability to manage money, whether their children are minors or if someone in a second marriage wants to ensure their assets ultimately are received by their children." As Mabley says, Trusts can be a beneficial tool in a number of situations. If you have ever wondered if you need a Trust, or have questions about how Trusts work, this guide may help you.

What is a Trust?

A Trust is a formal, documented transfer of assets — such as cash, investments or property — that is managed by a trustee for specific beneficiaries. A trustee can be one or more individuals, or even a Trust company. The Trust documentation would include specific instructions on how the assets are to be held, managed and distributed for the benefit of one or more beneficiaries.

There are two basic types of Trusts: An Inter Vivos or "Living" Trust, that is established during a person's lifetime, and a Testamentary Trust, which is established through a Will and comes into effect upon an individual's passing. When assets are transferred to a Trust, legal title to an asset is transferred to the care of the trustee, who is then responsible to follow the terms of the Trust, as per the agreement or Will, and to manage and distribute the assets for the benefit of the beneficiaries.

A Testamentary Trust is often used to manage money and costs for minor children after a parent dies. It may also protect an inheritance in case of a recipient's divorce. An example of how one might use an Inter Vivos Trust is to hold and manage a family cottage. A person can set up a Trust to hold the family cottage as well as investments meant to generate income to support the ongoing maintenance of the cottage. That same person can remain the trustee while they are alive, but appoint successor trustees to take over upon their passing. The Trust provides the opportunity for the original owner and future generations to enjoy the cottage for many years to come.

What is the purpose of a Trust?

Inter Vivos and Testamentary Trusts can be used for many purposes and are often referred to by terms to describe their use. Some examples may include: Family Trusts, Insurance Trusts, Cottage Trusts, Alter Ego Trusts, for individuals 65 and older, Henson Trusts for individuals entitled to government disability benefits, and many more. At their core, Trusts offer a means to manage financial affairs in the present or in the future. One purpose is the ability to ensure that assets are managed for people who may not be ready or able to manage the assets themselves, such as minor children. A Trust could also be used to ensure that assets are transferred to future generations and grandchildren yet to be born. They can even support charities on an ongoing basis.

Benefits of a Trust

Besides controlling the use and distribution of assets, a Trust can help protect assets from creditors. Take the case of a second marriage, as in the scenario at the beginning of this guide: If our protagonist were to pass away and leave all the assets in a Trust, creditors would not be able to access the assets in the Trust should their spouse encounter financial trouble down the road. Another potential benefit? Unlike a Will, Trust documents are not public, and so offer some privacy.

How much money do I need to set up a Trust?

There is no specific amount of money required to set up a Trust. However, there are costs associated with a Trust that need to be considered: There are legal fees for the creation of Trust documentation, ongoing compensation to trustees for the accounting and management of the Trust, and the cost of an annual tax filing since a Trust is considered a legal taxpayer by the Canada Revenue Agency. In the case of an Inter Vivos Trust, there may be a "deemed disposition" when an asset is transferred to a Trust, meaning that taxes on any appreciation or gains may need to be paid at the time. In the case of a home or cottage, where values have skyrocketed in recent years, that could be a substantial amount.

What is the difference between a Will and a Trust?

A Will is a legal document expressing a person's wishes after death. It may address the guardianship of minor children, and bequeathing objects and assets to loved ones and charities. It is only applicable after death. A Trust can also

address the transfer or use of an asset, but it can be implemented at any time during life or after death. "You can have both," says Mabley, "and they are both valuable ways of managing your assets and estate."

Revocable vs. Irrevocable Trusts

The settlor of a Revocable Trust, or an Inter Vivos Trust may change its terms at any time. They can change beneficiaries and modify how assets within the Trust are managed. It can be a flexible arrangement while the owner is still alive. An Irrevocable Trust is set in stone once the Trust document is signed. The main reason to create an Irrevocable Trust is taxes: An Irrevocable Trust may mean that the asset does not pass through the Will and is not a taxable estate asset upon death.

How do I start a Trust?

Trusts require the help of a qualified attorney or Trust and estate professional who can help you determine the best type of Trust for your situation. They can also help you to draft the Will or Trust documents, with clear language around beneficiaries, trustees, and use of the asset.

"It's important to use professionals to ensure a Trust is the right solution for you and that the Trust terms capture the intended wishes of the person setting up the Trust," says Mabley. "Equally important is the selection of one or more trustees, as the responsibilities for the management of a Trust can be onerous, and the use of a professional trustee may provide a good option."

— Denise O'Connell, *MoneyTalk Life*

TD Wealth