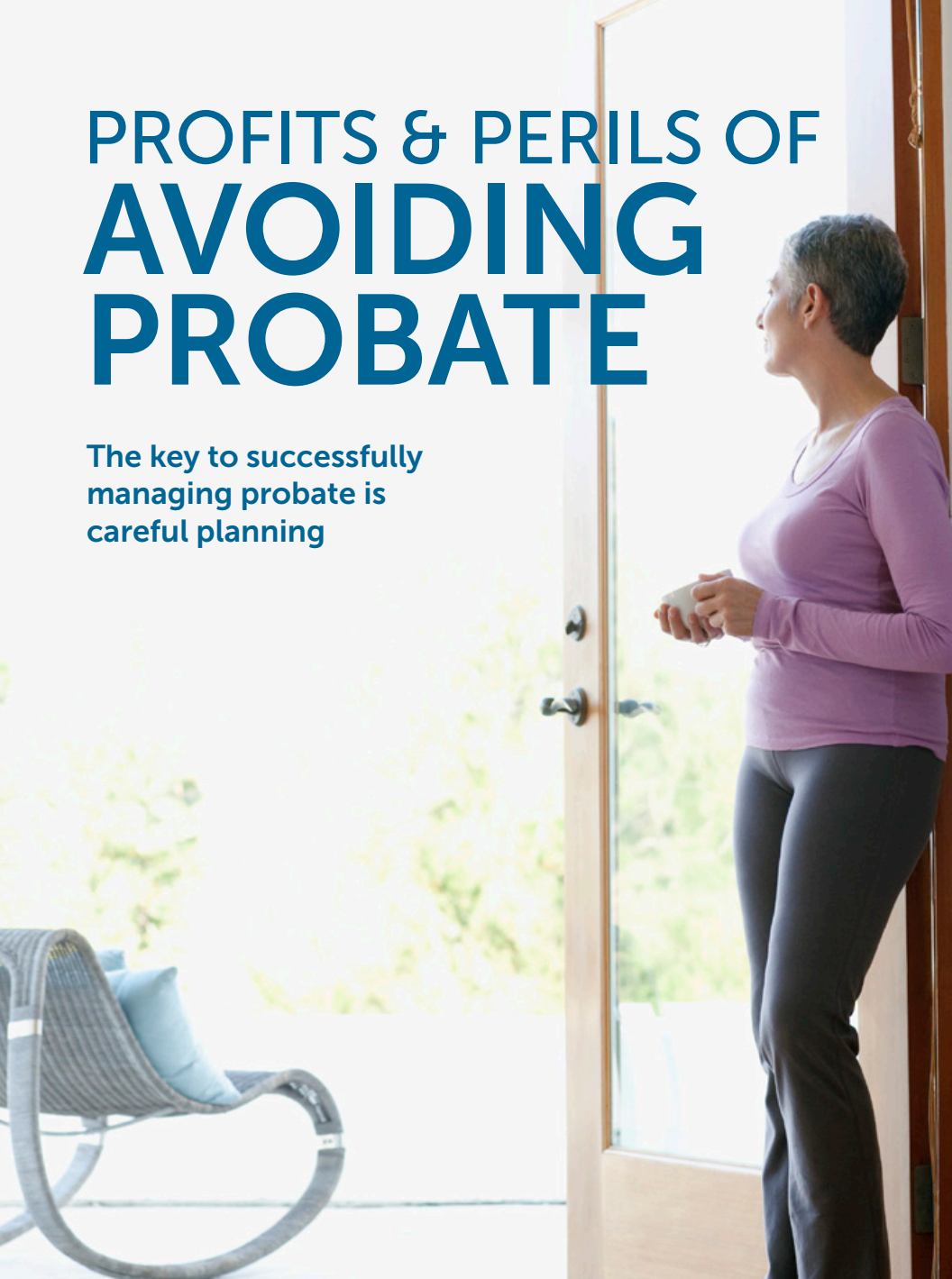


PROFITS & PERILS OF AVOIDING PROBATE

The key to successfully
managing probate is
careful planning



What is probate?

In common usage, probate refers both to the process of applying to a court to have a Will confirmed as valid, and the charge levied by the court for having done so.

Technically, the process is an “application for certificate of appointment of estate trustee with a will” and the charge is the “estate administration tax”, but both are still generally called “probate”.

What if there is no Will?

The absence of a Will will result in an intestacy. Planning opportunities in the absence of a Will are severely limited. The loss of tax saving opportunities is compounded by a loss of control over the manner and timing of asset distribution, not to mention the additional grief for the family. Executor powers are also restricted in an intestacy — but probate is still levied!

What does probate cost?

The charge is based on the value of the estate assets that the Will covers. Currently in Ontario, the rate is set at \$5 per thousand dollars of estate assets up to \$50,000 and \$15 per thousand thereafter, effectively a 1.5% tax at the top rate.

It generally includes all assets owned in the name of the deceased person, with the only allowable deduction normally being mortgages against real estate holdings.

Example

A \$500,000 estate consisting only of real estate with a \$400,000 mortgage is a \$100,000 estate for probate purposes. Total probate is \$1,000 (\$250 on the first \$50,000 and \$750 on the next \$50,000). Note that if the debt had been unsecured, probate would have been based on the full \$500,000, resulting in a charge of \$7,000.

When is probate required?

The grant of probate confirms that your executor (technically your “estate trustee”) is entitled to deal with the estate assets. For strangers this is critical as they will have the comfort that a court has confirmed that the executor controls legal ownership of the assets.

Commonly probate will be required when dealing with financial institutions and in transferring real estate. Exceptions may arise where the value of the property in question is small.

Can you legally avoid probate?

YES! There are a number of strategies that can be used to escape probate.

Gift

Property that is given away during your life does not fall into your estate because you do not own it upon your death.

Transfer while retaining life interest

This structure allows you to continue to use your property (likely real estate) as you always have and when you die your intended beneficiary will receive it without it having to go through your Will.

Joint ownership

Spouses often hold their home in joint ownership, meaning that the home passes to the living spouse upon the other's death. Similar arrangements can be made with individuals other than a spouse, and the type of property need not be restricted to real estate. For example, spouses often hold one or more bank accounts jointly.

Insurance beneficiary designation

Under a life insurance policy you can name a beneficiary who is to receive the death benefit proceeds directly, without the payment passing through the estate.

RRSP/RRIF beneficiary designation

Similarly, RRSPs and RRIFs allow for the designation of a named beneficiary.

Trust

In some situations it may make sense to transfer property into a trust for the benefit of those who would have otherwise been the Will beneficiaries.

Corporation

Holding corporations may be useful devices to carry debt. Shares in the corporations would be valued net of the debt, resulting in a lower figure on which probate is calculated.

Estate freeze

An advanced planning technique such as an estate freeze may be used for those with appreciating capital assets, particularly those with significant real estate holdings, long-held securities portfolios or small business interests.

Should you avoid probate?

The answer to this question will depend on the characteristics of the specific situation. What may appear to be a savings at first blush may in the end be counterproductive.

Example 1 – Insurance designation

An insurance policy naming a beneficiary will bypass probate. However, by doing so the testator loses the opportunity to use one or more testamentary trusts to reduce the beneficiary's future income taxes.

Example 2 – RRSP designation

A widowed father names his daughter as his RRSP beneficiary and son as his estate beneficiary. Though the estate and the daughter have joint liability for the income tax associated with the RRSP money at death, the estate could potentially bear the entire tax burden, directly reducing the son's inheritance.

Example 3 – Joint ownership

An investor transfers a portfolio into joint ownership with her son, resulting in a prepayment of capital gains tax which would otherwise not be due until her death.

Example 4 – Estate freeze

To reduce probate on his estate on death, a father gives up control of his business to an adult daughter as part of an estate freeze. The breakdown of the daughters marriage forces the sale of the business, disrupting the father's succession plan.

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