Ontario Probate Kit

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Foreword

1. Introduction

The process of probating an estate is primarily a matter of filling out forms and paying close attention to detail. It can be done by anyone with average intelligence who has a little free time. This does not mean to say that the process does not involve some complications — because it does.

Most of the problems are concerned with the information needed to properly complete the forms and the meaning of the actual forms themselves. Depending on where you live, you may also encounter difficulties with certain court or other government personnel. Most are very helpful, but some are not.

In these cases, knowledge of your responsibilities and of the process involved will usually solve the problem.

Why do it yourself? The main reason is, of course, to save money.

Lawyers typically charge between 1.5 and 2 percent of the gross average estate (including the family home) and for small estates this percentage can be as much as 3 percent and higher.

It is not hard to calculate what you save by doing it yourself. And with this book we hope to make the whole process as simple as possible.

You will undoubtedly want to take advantage of the package of forms available from the publisher as it will save a great deal of time in running around. After obtaining the forms, you may proceed immediately to "do it yourself." The whole procedure should be finished in two to three months, even if you are only working on it in your spare time.

A word of advice about using the package of forms and this guide. Do not, as some customers have done, take the forms and the book to the court office and dump them on the counter with a demand that the clerks sort through it all and show you the forms that you are supposed to complete. You will probably get a very rude reception, and deservedly so. Furthermore, such behaviour won't help if you later run into real snags and need a few pointers.

You are far better off to sit down with the book and read it through quickly. Then, refer to those chapters that specifically apply to you. As you read each chapter, note the sample forms you will require for your situation. Note the title of the samples. Remove the matching blank forms from the package and put them aside.

Go slowly through the package. Match up the titles as they appear on the forms and in the book. Use the list that appears in the Table of Contents for quick reference. If you approach the matter in this way, you should experience few problems in selecting the forms that are appropriate for your situation.

2. A Word of Caution: Change in Terminology

On January 1, 1995, the Ontario Court introduced rules that eliminated the use of the terms "Letters Probate" and "Letters of Administration," terms which had been in use for a very long time and with which most people are familiar. These documents are now called "Certificate of Appointment of Estate Trustee with a Will" and "Certificate of Appointment of Estate Trustee without a Will." The terms "probate" and "administration" are still widely used and accepted and will be referred to throughout this book. The new terms are used in Chapters 6 and 7 where the application process for these two different situations is explained.

1
All about Probate

1. What Is Probate Anyway?

The simple definition of probate is the presentation to a court of the will of someone who has died for approval of it as the valid "last will and testament" of the person who made it. Lawmakers are concerned that the true final wishes of a deceased person be acted upon after his or her death. Therefore, they require that a court preside over the distribution of a deceased's assets.

The court also confirms the appointment of the person or persons who have been named in the will to carry out its directions.

If this person is a woman, she is called an executrix in the will. If a man is named, he is called an executor. Their duties are the same. The terms "personal representative" or "estate trustee" include both executor and executrix, and are used interchangeably here.

The personal representative is responsible for what is called the "administration of the estate." Administering the estate means following the deceased person's instructions in distributing and/or managing the estate's assets.

The document issued by the proper court and bearing a legal seal that confirms the validity of the will and the appointment of the

personal representative is known as "Certificate of Appointment of Estate Trustee with a Will."

Sometimes problems arise regarding the validity of a will as, for example, where the person who made the will may not have been of a sound mind at the time the will was made. In addition, if it appears that the will was not properly witnessed (in cases where witnesses are required) or that the person who made the will was younger than the age of majority (18 in Ontario), the court will not confirm the will as a valid document. In that case, the estate of the deceased will be handled as though the will had never existed.

If the will is confirmed as being valid, but the named personal representative is younger than the age of majority or is mentally infirm, senile, or generally unable to perform the duties of an executor, the will remains valid and governs the disposition of the deceased's estate. But it is then necessary for the court to name someone to administer the estate according to the provisions of the will.

In most situations, however, these problems do not arise. The will is approved by the court as a valid will and the personal representative named in it is confirmed at the same time.

It should be noted that probate neither validates the will nor affects the appointment of the personal representative named. Probate merely *confirms* the validity of the will of the deceased and *confirms* the appointment(s) already made.

2. Which Court Deals with Probate?

The Superior Court of Justice deals with applications for probate and related estate matters. The Superior Court has court offices in each of the counties, districts, and regional municipalities in Ontario.

All references to the court in this book should be taken to mean the local branch of the Superior Court of Justice.

3. Who Applies and Where?

The application for probate is made to the court of the county, district, or regional municipality in which the deceased has his or her "fixed place of abode" at the time of death.

If the deceased had no permanent home anywhere in Ontario, it is still possible for an application to be made to the court of the

county or district in which the deceased had assets or owned property at the time of death.

However, the more common situation is where the deceased died with a permanent residence somewhere in the province of Ontario. In that case, it is only necessary that the location of that residence be found and an application be made to the court in that county, district, or regional municipality.

The application for probate is made by the personal representative named in the will of the deceased. It is not necessary that the forms be completed by a lawyer. In simpler estates there is no reason why the personal representative named cannot successfully fill out the necessary application forms and submit them to the court. The benefit of doing so is, of course, to save the estate the expense of retaining a lawyer.

Applying for probate in Ontario involves filing various documents with the court and paying court fees. Unless questions arise as to the validity of the will or the capacity of the executors to act, *no personal appearance is required in court*.

The various forms are simply completed and submitted to the office of the clerk of the court, where they are checked and the court fees are paid. Once this checking procedure has been completed, the documents are submitted to a judge who formally issues probate. This document is then mailed out to the applicant.

Needless to say, there are various steps throughout the administration of an estate that may require intermittent services by a lawyer. But, when you reach such steps, there is no reason why you cannot retain a lawyer for those specific purposes only.

An example of this is preparing notarized copies of the probate documents. In order to have documents notarized, it is generally necessary for you to appear before a lawyer or a notary public.

If there are beneficiaries named in the will who have not reached the age of majority (18 in Ontario), the administration of the estate may prove too difficult for a lay person.

The complication in this case is that the share of the estate that has been left to anyone younger than the age of majority cannot be paid to him or her at that time but must be held in trust by the personal representative or in court (depending on the provisions of the will) until the child turns 18.

The administration of an estate will require organization, common sense, and an understanding of the concepts that are set out in this book. The purpose of the book is not to enable everyone who reads it to be able to handle every estate that comes along. Rather, this book sets out in a straightforward manner the various steps required for the successful probate of an estate and the disposition of the assets to the rightful beneficiaries.

As a point of interest, approximately 85 percent of the estates probated are relatively simple, so the chances are that yours will fall into this category.

As mentioned, there are, of course, certain instances where it is advisable to obtain legal advice concerning the distribution of the estate. An example would be where there is a dispute involving the validity of the will or the gifts made under it.

Such disputes often lead to lawsuits. It would probably be inadvisable for you to attempt to handle this sort of situation on your own.

In cases where the estate involves the transferring of property which at the time of death is situated outside the province of Ontario, it would probably be advisable for you to retain a lawyer to ensure that the provisions of the foreign jurisdiction (that is, the other province or country) are properly observed.

There may well be death taxes or duties payable in that foreign jurisdiction. There may also be documents that need to be filed with the other government in question.

4. Why Apply for Probate?

Probating an estate confirms the validity of the will and the appointment of the executor or executrix named in it. It is possible, however, in very simple estates, to avoid any necessity to probate the will at all.

If the assets are small in number and small in value, it is quite possible for the administration to be carried out without application being made. For example, where the estate consists only of a car and a bank account in the name of the deceased person, the car can be transferred readily without probate.

Also, it is often possible to convince a bank to transfer a bank account by providing *suitable indemnities* (guarantees) and by showing a

notarial copy of the will. (A notarial copy is one that has been sworn to as a true copy by a notary public.)

Unfortunately, it is impossible to say just exactly how small is small for purposes of avoiding probate. Really, it depends on the disposition of the person or persons in charge of transferring the various assets. For example, transferring a car is easy and this can be done by simply showing an official at a motor vehicle transfer office a notarial copy of the will and death certificate.

Similarly, a small insurance policy and bank account should be no problem. But Government of Canada bonds or stocks and bonds of public companies would be very difficult to transfer without producing the forms proving that probate had been obtained.

If you are in doubt as to your situation, the simple answer is to pick up the phone and call the various officials in charge of these transfers and see what they say.

Remember, the reason for obtaining probate is to satisfy third parties and to prove you are entitled to deal with the assets of the deceased person. In other words, the court approval given to the will serves as evidence to the world that the personal representative is who he or she claims to be and that the disposition of the deceased's assets is done according to law.

Quite often, strangers are reluctant to deal with a person claiming to be a personal representative under the provisions of a will that has not been probated simply because they do not want to take the risk that the will may be invalid or the appointment of the personal representative may prove not to be proper. For this reason, it is possible in only the very simplest of estates to avoid the necessity of applying for probate.

You will readily see that the best reason for obtaining probate is to enable the personal representative to deal as easily as possible with the assets of the estate and arrange their transfer to the rightful beneficiaries.

This book cannot possibly deal with all the questions that may arise during the handling of an estate, but it will enable you to handle most of the common transfers and to understand the whole process.

In most cases, it will also permit you to probate an estate yourself. It is hoped, as well, that the book will have the effect of indicating when it would be advisable to seek legal advice.

Finally, it should be pointed out that the clerks in the court offices are, generally speaking, very helpful and are prepared to assist in the completion of forms although they are not allowed to fill in the forms for you. You should not hesitate to seek the advice of these individuals if you have any questions that are not answered by this book.