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Probate not necessary to sell house in most cases

After her father died, Penny Wilcox decided to put his home on the market. She was in the process of listing it for sale when her real estate agent said that it could not be sold unless the will was probated.

She emailed me last month to say, "I would like to sell the house and I would like to distribute the money according to his wishes in the will. Can I do this? I don't understand the need for probate."

I replied saying that her real estate agent was wrong, and that in most cases obtaining probate is not necessary to sell a house when the owner has died.

I advised her to find a local real estate lawyer who knew how to avoid probate, and to use him or her to act on the sale of the property.

Last week Wilcox emailed back to me to say that on her third try she found a lawyer who agreed with me that probate was not necessary to sell the house.

"Without your initial response," she said, "I would not have known that probate could be avoided."

In Ontario, probate is the process of having one or more persons, or a trust company appointed by the court, to act as an estate trustee, also known as an executor or executrix. After obtaining a court order, the estate trustee is legally able to liquidate and distribute the assets of an estate.

If there is a will, the court will issue a Certificate of Appointment of Estate Trustee with a Will. If there is no will, the certificate is issued without one.

The problem with obtaining the court order is that it is very expensive. The court fees (read government taxes) are $5 per thousand on the first $50,000 of the entire value of an estate, plus $15 per thousand on the excess. Property passing through joint ownership is exempt, as are the proceeds of insurance policies, RRSPs and some other death benefits if they are payable to a named beneficiary.

A home valued at, say, $300,000 would get hit with a tax of $4,000, so if the court process can legally be avoided, substantial amounts of money can be saved, whatever the value of the house.

Today, in order to transfer land registered in the land titles system from an estate to a beneficiary without a court certificate of appointment of estate trustee, the land registrar requires registration of an application containing a copy of the will, and a death certificate. As well, a declaration must be filed that the will was, in fact, the last will and the value of the estate does not exceed $50,000. In appropriate circumstances, the land registrar waives the $50,000 limit.

In addition, the beneficiaries of the estate must sign and file with the land registrar a promise to indemnify the Land Titles Assurance Fund in the event a third party claim is made as a result of registration of the application to transfer title to the land.

It's easier to transfer title to land registered under the old registry system, although most of this land has now been converted to the electronic land titles system. Land of a deceased still registered under the Registry Act may be transferred by the estate trustee simply by registering a copy of the will and, typically, a declaration by a witness to the will.

Land which was previously registered under the registry system and subsequently converted by the government to the electronic land titles system can often be transferred under the old registry rules if there has been no other registration on title since the conversion.

The end result is that in most cases, probate can be avoided, along with the rather onerous 1.5 per cent fee charged by the provincial government.

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