

WHY DO I NEED TO PROBATE A WILL?

Your aunt has just died. She has named you as estate trustee (or executor) of her estate. She has what you would consider to be a modest estate, and you and several other nieces and nephews are the beneficiaries.

You have just been to see the estate lawyer. She has told you that the will has to be probated. What does that mean? Why do you have to go through the time and expense of doing this?

Lawyers do not decide that a will has to be probated. The procedure is required because banks, trust companies and other financial institutions need to protect themselves.

Here is an example. Suppose your aunt made a will before she made her last will in which you are named estate trustee. In that will, she named a close friend as estate trustee rather than you, and left her entire estate to the friend. If the friend went to your aunt's bank with a copy of the will and the bank paid your aunt's money to the friend, it would be placing itself in jeopardy. When you appeared at the bank with your later will, the bank might be obligated to pay out the money a second time.

As a result, financial institutions will require proof that you as estate trustee are authorized to receive the funds belonging to the deceased person. If probate has been obtained, the bank or other financial institution is protected in paying the money to the estate trustee whom the court has appointed.

There are other situations in which probate is required. For example, if a deceased person owns real estate, the real estate cannot generally be sold or transferred without probate. In situations when a person has died owning shares of a company or mutual funds, it is often necessary that probate be obtained before the asset will be

released to the estate trustee. In some cases, there may be doubt as to what a provision in a will means, or the will itself may be contested. In such circumstances, it will be necessary to probate the will.

When a will is submitted to a court to be probated, the estate trustee will be required to pay probate fees (or court fees). In Ontario, probate fees are payable at the rate of \$5.00 per thousand for the first \$50,000.00 of the estate and \$15.00 per \$1,000.00 for the amount of the estate over \$50,000.00. For example, for an estate valued at \$500,000.00, probate fees would amount to \$7,000.00. Needless to say, many estate trustees as well as beneficiaries of estates are not happy that they have to pay this amount to the government.

Many people will go to great lengths to make sure that probate fees are not paid. Banks and other financial institutions have faced increased pressure. As a result of this, many of them have relaxed their standard requirements that probate is required. In such cases, banks will require a notarial (or verified) copy of a will that has not been probated, a copy of a Death Certificate and an Indemnity Agreement confirming that if a more recent will turns up, the financial institution will be indemnified by the estate trustee against any liability that may result. Often, the financial institution will have a policy whereby it will pay money out on an estate provided that the value of assets held is less than a certain amount. This figure will vary from financial institution to financial institution.

One thing to bear in mind is that if probate is required for the purposes of dealing with one estate asset, it will be required for all estate assets. For example, if your aunt owned a home in her own name, probate will likely be required for all assets she owned. It will be of little benefit for you to attempt to have banks and other financial institutions waive the requirement for probate if it has to be obtained in any event. Likewise, if you discover that a financial institution will insist on probate and will not change its mind, you will have to apply for probate regardless of the position of other financial institutions.

No two estates are the same. Sometimes probate will be required for an estate, and sometimes it will not. It will all depend upon the circumstances.