

TALES FROM THE TRENCHES™

BY BARRY C. MCGUIRE

March, 2017

PROBATE SALES NEED PATIENCE

A long-time client got in touch to say that her Dad had passed away. I knew her Dad and had done seven or eight real estate transactions for the family over the last 15 years. Dad was a great guy and I was very sorry to hear of his passing.

My client said it was a simple estate; basically a bank account, some personal possessions, a few stocks, bonds and mutual funds, and an acreage where Dad still lived at the time of his passing. There was a Will appointing my client as sole executor and an estate lawyer was already on working on probate.

For a quick review, probate is the process whereby an executor, usually through a lawyer, makes application to the Probate Court here in Alberta for what is known as a Grant of Probate. The application process involves the executor gathering in all the assets of the deceased, figuring out whether the deceased owed any money, checking for bank accounts, insurance policies, RRSPs, LIRAs, RESPs, TFSAs, etc., and also involves a determination of whether there are beneficiaries or dependents of the estate. It's a long paper process that can be a pain in the 'you know what,' extremely time-consuming.

Fortunately, my client is a very organized person and had provided the estate lawyer all the estate information and the application for probate have been submitted to the Probate Court.

The most difficult asset to deal with was Dad's acreage. My client had retained a realtor to list the property and during the listing process they had a meeting with the estate lawyer. The estate lawyer informed my client that the probate process is lengthy. The probate clerks are currently working on applications for probate submitted four months ago. Their process has changed so that if an application for probate is rejected, once the corrected application is returned to the Probate Court, the application goes to the bottom of the pile taking another four months to rise to the top.

The Probate Court is very careful with probate applications, knowing from experience that wills and estates are fertile ground for misrepresentation, little white lies, and outright fraud. They are especially careful if there are beneficiaries.

The saying amongst estate lawyers is that you can count on your probate application being rejected at least once. In today's probate world, that would mean an application would take eight months to work its way through the process and for the executor to have his or her Grant of Probate. This kind of timing is more typical than not across Canada. I just ran into it through my involvement in a British Columbia probate application.

With that background and understanding of the timing, the estate lawyer said to my client and the realtor, "don't list the property until we have the actual, approved Grant of Probate". Everyone agreed and then the property was promptly listed with a couple of offers coming in

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almost immediately. Those offers were written, acknowledging that probate had to be obtained, but the buyer maintained the right to withdraw from the contract at any time on two weeks notice to the Estate.

My client went to the estate lawyer and asked what they could do. Without much hope, the estate lawyer talked to the judge in charge of the Probate Court. The judge said, as you might expect, “Why the heck did the property get listed? Almost every probate application on my desk has a piece of real estate to deal with. Why should I make an exception for you?”

The estate lawyer said he understood what the judge was saying, but that it was a good offer in a tough marketplace; the estate and the executor did not want to miss being able to close. The market could easily get worse and the buyer already had the right to withdraw. Reluctantly the judge agreed to give an Order of the Court directing the Land Titles Office to allow the executor to sign paperwork that would allow the sale to go ahead. The rest of the estate would have to wait. The offer to purchase was amended to now show a fixed closing date.

The judge drafted the order using the accepted offer to purchase for details and sent it to the estate lawyer for registering at the Land Titles Office, which he did reporting to me that he had done so and he was going to send me a copy of the registered order. When the order arrived on my desk, I noted that Dad’s name in the order was not the same as Dad’s name on title to the acreage. Dad had used two last names during his lifetime with slightly different spellings. The estate lawyer advised the judge who agreed to make changes. The judge was a little testy because he had to come in on the weekend having been in Northern Alberta on the circuit court.

Meanwhile, we heard from the buyer’s lawyer who wondered whether or not we were going to be able to get him paperwork to meet the new fixed closing date. At the same time he gave me the names of his clients showing first, middle and last names for both the husband and wife. Uh oh, the judge used the buyer’s names from the offer to purchase, which were different than the names provided by the buyer’s lawyer! A mad scramble ensued and the problem was solved with an Affidavit of Identity where the buyers swore that the names on the transfer of land and the names in the judge’s order were the names of the same people. The Land Titles Office accepted this and the deal closed.

Not waiting for the Grant of Probate and causing the estate lawyer to deal with the probate judge costs the estate an extra \$2,500 in legal fees. Our legal account was about \$800 higher than normal because of all the time expended. On the other hand, the sale went through at a good price. More importantly, the possibility of a falling market was avoided.

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LESSONS LEARNED:

1. When someone passes away, an official Grant of Probate is required for the Executor to carry out the deceased person's Will. The Executor needs that Grant of Probate to have official authority to deal with estate matters.
2. Obtaining a Grant of Probate is a lengthy process. It takes months to gather in estate details, and then the application process takes more time. Any mistake in the application will cause rejection and resubmission to the Probate Court with further lengthy delays.
3. If you are Executor of an estate, be very careful what you commit to, since you have no authority until you have that actual Grant of Probate in your hands.

**FOR ALL YOUR ALBERTA REAL ESTATE LEGAL NEEDS,
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