

Utah Spirit

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Elder Law: Dangers of Waiting to Probate a Will

Last March I discussed how quickly and inexpensively it was to probate an estate. In September, I also covered the exception for small estates (those less than \$25,000). In this column, I will present the dangers of waiting to probate a Will.

Upon the death of a loved one, there are many tasks to accomplish. These tasks are generally new to most of us. We also grieve for our loss. Probate is usually the last thing on the mind of the responsible family member. Or, probate may intentionally be avoided out of fear or ignorance.

If the primary asset of the deceased's estate is real property, meaning land or real estate, family members may simply continue to live on the land or reside in the house of the deceased. The property taxes are paid and no one generally objects to the family members continuing to use the property. Years go by.

However, there may come a time when the sale of the property is desired. This may stem from a demand by other family members who want their share of the deceased's estate. Or, it may simply arise because the property becomes unsuitable or requires too much maintenance.

Regardless of the cause, selling the property requires some action by the Probate Court. In the normal course of events, the Will of the deceased is probated. That means that the Personal Representative nominated in the Will is approved by the Probate Court. The Personal Representative is then issued "Letters" which empower that person to sell real estate and make other distributions from the deceased's estate.

If, however, more than three years have passed since the passing of the deceased and no probate action has been taken, then Utah law presumes that the deceased died without a Will. That's right, even though the deceased left a Will, it has effect if it is not probated within three years.

The result of having no Will is that the intestate laws govern the distribution of the deceased's estate and not the intentions of the deceased. This could have a substantial impact on step-children and those intended to receive under the deceased's Will but who would not receive anything under the intestate laws. There is no provision under the intestate laws for step-children, and the only way to provide for them is through a valid Will that is probated within three years from death.

There is another consequence of not probating a Will within three years. The heirs need to be officially determined by the Probate Court so that no other persons can later challenge the distribution to such "heirs." This is a fairly simple and speedy process, but one that should be

done by a probate or Elder Law Attorney. The process is similar to probating a Will and takes about the same amount of time.

Simultaneously with determining heirs, the appointment of an Administrator for the estate can be accomplished. This will allow someone to distribute the property of the deceased, including real estate. The sale of the deceased's house or other real property can then proceed expeditiously.

By waiting or procrastinating, other complications and problems may arise. For example, assume that Father has three children; one of them, a Son, predeceases Father; and Father's Will leaves one-third to Son or Son's children if Son predeceases Father. Further assume that Father's Will is not probated within three years after Father's death.

Under Father's Will, Son's children should receive one-third of Father's estate. However, under the intestate laws, each of Father's two surviving children would receive one-half of Father's estate. Nothing passes to the grandchildren as Father's Will intended in the event that any of his children predeceased him.

Even though Father, in this example, knew that his Son had predeceased him, Father knew that his Will provided for such an event by passing Son's share to the grandchildren. Father had no way of knowing that his Will would not have any effect. Father assumed that his Will would be probated in a timely manner, that is, within three years of his death.

This is a hard lesson that we should all learn. After accomplishing the necessary and immediate tasks relating to funeral and burial matters, it is best to contact an Elder Law Attorney or a Probate Attorney to move ahead with the probate of the deceased's Will. This is the only sure way to fulfill the intentions of the deceased.