

The Law and You

A Will Must be Probated Within Three Years

From time to time I have discussed the importance of having a Will. And this advice is equally important when you have a Trust.

A Will is a very specific legal document that expresses your wishes about how your estate should be distributed and how it should be administered.

For example, you may want to distribute part or all of your estate to someone who is not a family member, or to a charitable organization, or in unequal portions to your children, or to your siblings rather than to your children, or to your children rather than to your spouse. Your options are virtually unlimited.

Then there is the issue of who and how you want your estate to be administered.

With a Will, you can specify who should be in charge of the administration of your estate. And, you can also specify many aspects of how your estate is administered.

For those who also have a Trust, the Will usually becomes a tool to transfer any assets that may be outside of that Trust into the Trust so that the distribution of your estate is governed by your Trust instrument.

But, your Will must be probated within three years of your death. Otherwise, it has no value and it will not control or govern any part of your estate.

Under Utah Law,

“If no will is probated within three years from death, the presumption of intestacy is final and the court shall enter an order to that effect and provide for the distribution of the decedent's property in accordance with the laws of intestacy . . .”

After three years from your death, your wishes about how your estate should be

distributed will be ignored. Instead, your estate will be distributed in accordance with the intestacy laws of the State of Utah.

To illustrate how significant this can be, let me relate an actual case.

A Trustee is in litigation over the administration of a Trust for a person who died more than 17 years ago.

As directed by the terms of the Trust, the Trustee has been managing the assets of the Trust. From time to time, the Trustee has also been making required distributions from the Trust.

The assets of the Trust include several investment funds. When the trustee recently attempted to liquidate two particular funds, the investment companies denied the request based on the fact that the funds were not part of the Trust. That is, the decedent had never transferred those funds to the Trust.

The decedent left a Will that directed assets to be transferred to the Trust, if any such assets were inadvertently left out of the Trust. Most importantly, the Trust provides for unequal distributions to the decedent's children.

Since more than three years have lapsed since the decedent's death, the Will cannot be probated. This means that the two funds at issue can no longer be transferred to the Trust.

Instead, the “laws of intestacy” must be followed. And, the laws of intestacy provide that the decedent's estate be distributed in equal shares to the decedent's children. Such a distribution is contrary to the decedent's wishes that unequal distributions be made.

To complicate matters further, Utah law also prohibits the appointment of a personal representative for the decedent's estate.

So, the only remedy in this situation is to petition the Court for a specific order to transfer the funds from the investment

companies to the rightful heirs. In this case, such funds are to be transferred to the children in equal shares, unlike the specific terms of the Trust.

Had the individual who was nominated in the decedent's Will probated the Will within three years, it would have been a simple matter. A Personal Representative would have been appointed and that person would have merely transferred those two investment funds into the Trust. Those funds would then have been distributed in the unequal manner specified by the terms of the Trust.

Having your Will ignored can be equally troublesome when there is no Trust involved. That is, your Will sets forth your wishes. If it is ignored, your wishes are also ignored.

In considering a Will and related documents, you should consult with an expert Elder Law Attorney. To locate an Elder Law Attorney, check your local Yellow Pages or contact the National Academy of Elder Law Attorneys at (520) 881-4005, or on their web site at www.naela.com.