NEW YORK PROBATE: CAN IT BE AVOIDED?

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MARK S. EGHRARI
NEW YORK ESTATE PLANNING ATTORNEY

You may be under the impression that a last will can facilitate a very quick and efficient transfer of financial assets after you pass away. The executor simply follows the instructions, and the property is distributed immediately after the funeral, right?

In reality, things don't work this way. When someone passes away in possession of personal property that is being distributed through the terms of a last will, the will must be admitted to probate.

Legal Process

Probate is a legal process. In the state of New York, the Surrogate's Court handles probate matters. The executor that you name in the last will would conduct the business of the estate, but the administration of the estate would be supervised by the court.

On the one hand, probate provides certain protections, and the state of New York does everything possible to provide a streamlined process. At the same time, there are some things about probate that are not going to be well received by the heirs to the estate.

While the process is underway, the people who are named in the will do not receive their inheritances. Each jurisdiction is a bit different, but in general, a straightforward, simple case will take perhaps nine months to a year.

There are complicated cases involving a great deal of property and/or disagreements among interested parties that can be held up in probate for multiple years.

Waiting for an inheritance can be a mere inconvenience for some people, but there are others who may really need the money. The time lag can cause hardships for people who may have been depending on the decedent for day-to-day support.

Expenses are another factor. Probate expenses can add up to consume a noticeable portion of the estate. The money that is spent during probate could have otherwise gone to the heirs.

Lastly, there is a loss of privacy when probate is a factor. Because probate is a public proceeding, anyone who is interested could access probate records.

Throughout your life, you probably conduct your financial affairs in private. If you want to give someone money, you don't make that information available to the general public.

Estate matters can be sensitive, and confidentiality can prevent acrimony among extended family members. Unfortunately, confidentiality is lost when your estate passes through probate.

Avoiding Probate

Now that we have explained why you may want to avoid probate, we can look at the question of probate avoidance. It is possible to facilitate the transfer of your monetary assets outside of the process of probate.

There are numerous different options available to you if you want to avoid probate. The optimal course of action will vary depending on the circumstances.

If you have estate tax concerns, you could potentially mitigate your exposure while you simultaneously avoid probate through the creation of an irrevocable trust of some kind. These trusts also protect assets from creditors and claimants seeking redress.

Those who are not concerned about the estate tax could use a revocable living trust to avoid probate.

Revocable Living Trusts

Revocable living trusts are very popular among those who are seeking probate avoidance strategies. With this type of trust, you do not lose control of the assets while you are living. You can act as the trustee initially, so you control the actions of the trust. You can also make yourself the primary beneficiary at first, so you can take monetary distributions from the trust.

When you look at the name of the vehicle, you see that it is in fact revocable. If you were to decide that you do not want the trust anymore, you could revoke or rescind it. The trust would no longer exist, and the property that it contained would once again become your direct personal property.

To facilitate future asset transfers, you name a successor trustee and successor beneficiaries to assume these roles after your passing. When you create the trust agreement, you leave instructions that the trustee must follow. After you die, the trustee will distribute monetary resources to the beneficiaries according to your wishes.

These distributions would not be subject to the process of probate. As a result, the heirs to the estate would begin to receive their inheritances in a timely and efficient manner.

Beware of "Easy Answers"

We must point out the fact that there are other ways to avoid probate that are sometimes looked upon by the uninitiated as "easy answers." These would include joint tenancy and payable on death accounts.

There are various different drawbacks that go along with these notions. You may want to seek out professional guidance before you buy into any shortcuts.

Conclusion

Probate is the legal process of estate administration. It comes into play if you pass away in direct personal possession of property. If you have a last will in place, the will must be admitted to probate.

Probate can be time-consuming, and there are considerable expenses that go along with the process. It is a public proceeding, and as a result, it opens the door for people with prying eyes.

There are various different ways to avoid probate. To explore your options, schedule a consultation with an estate planning attorney.

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About the Author

Mark S. Eghrari

Mark S. Eghrari is an attorney in private practice in Smithtown, New York. He has been in practice since 1988. Mark S. Eghrari provides extensive estate and tax planning services to individuals and businesses. Mr. Eghrari's primary focus is helping clients avoid probate, minimize or eliminate Federal and State Estate taxes and protect their assets from the high cost of nursing care, if they become ill. Mr. Eghrari's expertise is in providing unique and innovative estate planning solutions that create a secure future for his clients and their loved ones. Mr. Eghrari is a member of the American Bar Association and New York State Bar Association as well as the National Academy of Elder Law Attorneys and the American Academy of Estate Planning Attorneys.

Mr. Eghrari completed his undergraduate work at Lafayette College in Easton, Pennsylvania and received his MBA in banking and finance from Hofstra University on Long Island. He earned his Juris Doctorate from the Hofstra University School of Law, where he was a member of the Law Review. While in law school, Mr. Eghrari gained practical experience in the corporate tax department of Citicorp in New York city.

Mark S. Eghrari and Associates PLLC
www.myestateplan.com
50 Karl Avenue, Suite 202
Smithtown, NY 11787
Phone: (631) 265-0599
Fax: (631) 265-0754