When a Loved One Passes Away

Steps to Take Even If You Think There Is No 'Probate' Estate

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The passing of a parent, spouse, partner, or good friend is never easy to address or contemplate. In addition to the physical and emotional loss, the mere thought of navigating through the legal system is frequently overwhelming.

Generally speaking, if your loved one passes away and clearly has significant assets in his or her own name, i.e. stocks, bonds, or other securities; partnership business assets; bank accounts; real estate; or other assets, it is helpful to engage the counsel and assistance of an experienced estate administration attorney to provide guidance and help through the complex probate process.

Even if there is not a formal probate, certain steps should be taken. Some of them include:

- Checking for abandoned property;
- Filing the will with the appropriate court;
- Changing title to jointly owned assets;
- Contemplating whether estate tax returns are due.

One of the first things you should address is whether your loved one left a valid last will and testament. When this happens, he or she is said to have died "testate," and where no will is found or properly executed (signed), then the decedent is said to have died "intestate."

If you think that a will was properly signed by your loved one, but you can't locate the original document, present whatever paperwork you have to your attorney and discuss the issues and options. Your loved one's original will and other essential estate-planning documents may have been left with the offices of the attorney where the will was executed for safe-keeping, or the paperwork may be located in your loved one's safe deposit box, which might not be easily accessed. Where appropriate, however, a photocopy can be probated.

Whether or not a probate action is required will be determined, in part, by whether the person who passed (known as a "decedent") held any assets that require a change in title from his or her own name alone. Generally speaking, all property is held in one of three ways:

Decedent's name individually. This is when property is held in an individual's name alone, so that some formal legal, (probate) action must occur to change the title. An example would be bank accounts in one person's name or real estate held as a tenant in common. A tenancy in common indicates that each owner holds a separate share of the property, and that the interest can be sold by each separate owner, and/or it descends through probate for each separate owner.

A joint tenant designation or tenancy by the entirety. This usually means that survivorship is the only requirement to establishing one's title. When a couple holds real estate or securities as joint tenants, the recording or submission of a certified death certificate is usually sufficient to establish the sole ownership of the surviving joint owner.

Designated Beneficiary. Ownership is clearly defined where there is a designated beneficiary under a contract. This would include named beneficiaries (other than one's estate), trusts, a life insurance policy, annuity, or pension benefits.

Of the three title holding methods above, a probate action will only be required to be filed with the court where your loved one died owning assets in his or her name as described in example number one.

If your loved one died with probate assets, the will and other paperwork must be filed and approved by the court and a fiduciary (responsible party) appointed to assist with moving the matter through the probate process. The fiduciary collects assets, pays bills, and ultimately distributes the net assets according to the decedent's wishes under the will and/or as allowed under state law. A male fiduciary of an estate is referred to as an executor or administrator, depending on whether the decedent died testate or intestate, while a female fiduciary is an executrix or administratrix.

Even if there are no probate assets, an original will and certified death certificate should be filed with the county probate court where the decedent lived. Here are some examples where filing with the Court is still prudent even though not required:

- Where you believe that all of your loved one's assets were jointly held;
- Where there were designated beneficiaries for all assets (such as life insurance or annuities which name beneficiaries);
- Where one died an impoverished resident of a nursing home, such that Medicaid is paying for the stay.

It is important to note that the general public is not required to file a decedent's will with the court; nor are there statutory sanctions or penalties for not filing the paperwork.

This filing is, however, recommended because you cannot know with certainty whether your loved one was named in a will of another, or whether there is that $8 million lottery ticket, as yet uncashed, sitting in your loved one's old winter coat pocket. Further, probate records are regularly searched in conjunction with performing a title search for real estate, and it can be a significant time saver when the will and certified death certificate are on file with the proper court.

Real estate conveyancers frequently have to address and resolve situations where a title search for a parcel of land reflects a 'missing probate.' In other words, a prior owner did not completely grant all of his interest in real estate when it was conveyed. Therefore, a portion of the interest remained in the property owner's name at the time of his or her death. The original conveyance that triggered the problem, however, could have occurred decades before your loved one's passing, but the oversight might have gone unnoticed. Without the will and death certificate on file, the search for the current record owner becomes harder and more expensive. If you file the will and death certificate with the court in a timely fashion, obstacles to clearing the record title will be reduced.

In Massachusetts, if you file your loved one's will and death certificate with the court together with a statement that there are no assets requiring probate, then there is no fee. On the other hand, if an original will is provided to the court without a certified copy of the decedent's death certificate, then it is considered to be held for safe-keeping, and a $75 filing fee must be paid before the court will accept it. Generally the paperwork should be filed where your loved one last permanently lived.

For non-probate assets, such as jointly held bank accounts or

brokerage accounts, proper notification of your loved one's passing, together with the correct tax-reporting form for the survivor(s), must be provided to the institution. In addition, under certain circumstances you might have to file federal and Massachusetts estate tax returns, even though there is no probate estate.

This is because the estate tax returns measure the transfer of all assets or interests that a decedent owned at the time of death, which includes assets held individually, jointly, in trust, life insurance proceeds, or in any other capacity, as well as certain gifts which may have been made during the decedent's lifetime.

Even if an estate tax return is not required to be filed, you might still have to record an affidavit of no estate tax when your loved one died owning an interest in real estate, but where the total value of the decedent's estate falls below the required filing threshold for a formal estate tax return.

The question of whether a probate action has to be filed for a deceased loved one is only the tip of the iceberg. Generally, even if you think that no other formal action is necessary, it is recommended that you contact an estate administration attorney to discuss the issues that may have to be addressed. In the process, the lawyer will also confirm that your loved one did not leave any abandoned property by design or neglect sitting in the state's coffers. All loose ends will be tied up.❖

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