Probating the Will in a Blended Marriage

Some people don’t know about probate at all. Others think that all you do is make a Will, then read it after death and follow the directions. Some actually don’t realize that in order to validate the Will, it must go through the court system, be admitted into probate and then followed through with the administration of the estate. Others just decide that they don’t want to spend the money necessary to probate the Will. The person who is named as executor in the Will shouldn’t be so cavalier about not probating the Will. That can be very dangerous.

This is not to say that there are some instances in which a person can avoid probating the Will. There are. But you should talk to an experienced probate attorney before you make that decision.

Consider the following scenario involving John and Mary Smith, who married about fifteen years ago. Both had been previously married. John has three children by his prior spouse and Mary, who also had been married previously, has two children by her prior spouse. They have no children together.

John and Mary go to an attorney and get their Wills made. They both want to leave their assets to each other and then to the children of the two separate families in equal shares, meaning that John’s children are to split 50% of the assets of John and Mary upon the second to die and Mary’s two children would split 50%.

John dies on October 3, 2013. Mary looks at the Will just to be confident that his assets are to go to her. John’s Will indeed says, "if my wife survives me, I give all of my assets, both real and personal, to her.

Let’s further say that Mary is able to access all of the liquid assets successfully which is another reason that Mary believes she doesn’t have any need to probate. She may have even called an attorney who agreed that there was no need to probate.

Now it’s October 3, of 2018 and Mary wants to sell real estate that she and her husband bought during their marriage but the title company wants the Will probated. Unfortunately, Mary finds out from another attorney who is experienced in probate that Mary should’ve probated that Will within four years of the date of John’s death. Why? Because there is a statutory time limit to probate a Will. Why does it matter? There are several reasons Mary should have probated the Will. First, she won’t be able to file the application to probate now because the law says that the applicant is prohibited from probating the Will if the person was responsible for the Will not being probated during the four year time limit. You can probably be sure that the alternate executors named in John’s Will are his children.

Second, after four years the intestacy heirship statutes will apply which states that if the decedent was married at the time of death but had children from outside the existing marriage, then his community property estate will be distributed to his children, rather than to his spouse.

Third, if the Will is being filed for probate outside of the four years, which it is in this case, then all of the intestate heirs must be notified, and consent to the probating of the Will. As the intestacy statutes cause the decedent’s heirs to receive a significant share of the assets they have a vested interest in not

agreeing to the probate of the Will outside of the four year time limit. If Mary didn't have a good relationship with John's children, this could be a very upsetting moment for Mary.

The moral of the story is to seek the opinion of an experienced probate attorney before you decide not to probate a Will.

You may email your questions to education@wrightabshire.com *or visit our website at* www.wrightabshire.com. *Wesley E. Wright and Molly Dear Abshire are attorneys with the firm Wright Abshire, Attorneys, P.C., with offices in Bellaire, the Woodlands, and Carmine. Both Wright and Abshire are Board Certified by the Texas Board of Legal Specialization in Estate Planning and Probate Law and are certified as Elder Law Attorneys by the National Elder Law Foundation. Nothing contained in this publication should be considered as the rendering of legal advice to any person's specific case, but should be considered general information.*