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WILL THE PROBATE COURT PROTECT ME? By Randy Spiro

Probate is a state court supervised procedure to authenticate a Will and to pass ownership of a deceased person's assets to the beneficiaries under that Will. If a person elects to have a probate by signing a Will (rather than signing and transferring assets to a revocable living trust) will court supervision afford greater protection than the Trust?

In example 1, a widow has three children and has a Will leaving her assets equally to them, but she dies one month after having created a new Will leaving everything to her boyfriend. When the boyfriend petitions the court to admit the new Will to probate, the children must be given notice and will have the opportunity to contest.

It would be inaccurate to say that probate court supervision will provide the children or the boyfriend with greater protection than they would have had the decedent signed and funded a living trust. The two adversary parties could either reach a settlement or could resolve their disputes through mediation, arbitration or trial.

Rather than trying to protect one side or the other, the probate court will typically be concerned with the circumstances of the execution of the last Will; the decedent's mental health, and the degree of influence if any that the boyfriend exerted. Each side may try to rely on presumptions, i.e., that the offered Will is presumed to be valid if certain evidence of its execution is available, or for example, if the boyfriend was a caregiver, that the burden of proving the Will's validity could (if state law dictates) be shifted to him.

In example 2, a widow has three children, her Will leaves her assets equally to them, but it names her brother as executor. The brother is appointed as executor and one year later the three children become concerned that the probate has stalled. Some (but not all) probate courts calendar a future date for the executor to report back to the court on the progress of the probate and to explain why the probate has not been closed. This procedure could provide some pressure on the executor to complete his duties in a timely manner, but it is no substitute for vigilance by the beneficiaries.

If the executor were ordered by the court to account and if the executor admitted that there were no assets left, the court would sanction him, requiring him to make the estate whole. But if the executor squandered the estate's asset because he had nothing left of his own (having previously squandered his own assets), the probate court would have little or no ability to make the three children whole.

When the Executor petitioned the Court to be appointed, the three children could have objected to his request to have bond waived. If the Executor were bonded, that would provide protection. Alternatively, they could have requested the court to order the executor to deposit all estate funds into blocked accounts at a particular bank. But, as is common, if the executor were granted broad powers when he was appointed and if no bond was required, he would typically be able to engage in wrongdoing which injures the estate and its beneficiaries before the court or the beneficiaries even knew that the conduct occurred.