

**ESTATE SALES
1 CREDIT HOUR**

I. WHAT IS AN ESTATE? (5 MINUTES)

- An Estate is a person's net worth in the eyes of the law. That means the person's bank accounts, home, car, and any smaller assets in one's name. It also encompasses any rights and licenses you might have to, such as a book, or other intellectual property. Even a social media account may be part of one's estate.
- In addition, an estate is also a person's debts, and the estate must take care of one's debts before any of the beneficiaries get anything.

II. DIFFERENT TYPES OF OWNERSHIP OF PROPERTY (10 MINUTES)

- It is important to note how property is held, and the different types of ownership before we discuss what happens to property when a person dies with a will, or without a will (which is set forth in section VII below). There are three types of ownership:
 - Tenancy in Common: This is a shared ownership of property where each owner owns a share of the property. These shares can be freely transferred to other owners both during life and via a will, and can be of unequal size unlike a joint tenancy, as set forth below.
 - Joint Tenancy with Right of Survivorship: This type of ownership has a right of survivorship, meaning it automatically passes to other owners when one owner dies, allowing you to avoid probate. New York law assumes that property is owned by tenants in common, which does not have a right of survivorship.
 - Tenancy by the Entirety: A type of concurrent estate in real property held by a Husband and Wife whereby each owns the undivided whole of the property, coupled with the Right of Survivorship, so that upon the death of one, the survivor is entitled to the decedent's share.

III. WHEN A WILL EXISTS AT THE TIME OF DEATH (15 MINUTES)

- Wills are the most common way for people to state their preferences about how their property should be handled after their death. A will can be viewed as an instruction booklet for the probate court, which is the court that oversees estate administration and disputes over the will itself. The will provides the court with guidance as to how to distribute the deceased person's assets in accordance with his or her wishes.
- In large estates, the only way to legally transfer assets in accordance with the will is through the probate process. However, wills only control probate assets, that is, those assets that can be transferred by the probate court. Some assets do not have to be probated and generally are not controlled by a will. These assets include:
 - Life insurance proceeds, which are paid to the beneficiaries designated in the policy.
 - Property held in joint tenancy, which provides that, upon the death of one joint tenant, the deceased person's interest automatically passes to the surviving joint tenant(s).
 - Property held in Trusts.
 - Because the assets above are transferred by means other than the probate process, a will generally does not control how they are distributed.
- When a person dies with a will, an Executor is appointed to administrate the estate of a deceased person. The Executor's main duty is to carry out the instructions and wishes of the deceased. The Executor is appointed either by the testator of the will (the individual who makes the will) or by a court, in cases where there was no prior appointment.

- Letter Testamentary: a document issued by a court or public official authorizing the executor of a will to take control of a deceased person's estate.
- Release of Estate Tax lien: When a person dies, the Tax Law places a lien on the decedent's real property to secure the payment of any estate tax due. This estate tax lien is effective as of the decedent's date of death. To transfer real property from a decedent's estate, you must request and then receive a release of lien from the I.R.S. and the New York State Tax Department. The release of lien is an authorization to transfer the real property.
- Release of the Federal Lien: As of June 1, 2016, the IRS radically changed the procedure to obtain a Discharge. The new procedure is described below:
 - Step 1: The executors complete and file Form 4422 and provide the relevant closing documents.
 - Step 2: After the IRS accepts the Form 4422, the executors either (1) enter into an escrow agreement with the IRS and appoint an escrow agent (e.g., the estate attorney) to hold the entire net proceeds of the sale; or (2) agree to deposit the entire net proceeds with the IRS to be held as a payment on account of the federal estate tax. If deposited with the IRS, the amount will accrue interest at the underpayment rate (currently 4 percent) commencing 45 days after a timely filed estate tax return (i.e., Form 706). The term "net proceeds", as defined by the IRS, means the gross sale proceeds less senior encumbrances, attorney fees, broker fees, recording fees, and transfer fees.
 - Step 3: After choosing an option (escrow agent or IRS deposit), the IRS will provide the executors with a "conditional commitment to discharge certain property from federal estate tax lien" (Letter 5751). This document is then provided to the Title Company and buyer in order to consummate the sale.
 - Step 4: Provide a final closing statement of the sale to the IRS and either (1) provide proof that the proceeds have been deposited with the escrow agent or (2) send the IRS a check in the amount of the net sale proceeds.
 - Step 5: The IRS will issue the Discharge, which should then be provided to the Title Company and buyer to complete the closing.
 - Step 6: The escrow agent or IRS, as the case may be, releases the net proceeds (less any amount used to pay federal estate tax due) after an estate tax closing letter is issued by the IRS. Note that, as of June 1, 2015, executors have to make a request to receive a closing letter from the IRS. In a conversation with an IRS supervisor, we were informed that the net proceeds would be released earlier if, after a preliminary review of the estate tax return, an IRS auditor determines that the return will not be audited.
- The New York State Department of Taxation and Finance requires two forms to be filed:
 - Form ET-117, Release of Lien of Estate Tax - Real property or cooperative apartment, and one of the following:
 - Form ET-30, Application for Release(s) of Estate Tax Lien – if you're the administrator of the estate, and fewer than 9 months have passed since the date of death);
 - Form ET-706, New York State Estate Tax Return – the estate hasn't obtained an extension of time to file the estate tax return, and more than nine months have passed since the date of death; or
 - the estate obtained an extension of time to file the estate tax return, and more than 15 months have passed since the date of death; or
 - Form ET-85, New York State Estate Tax Certification – no executor or administrator has been appointed; or more than nine months have passed since the date of death, OR

- the estate is required to file a New York State estate tax return, and either:
 - fewer than nine months have passed since the date of death, and an executor or administrator has not been appointed; or
 - more than nine but less than 15 months have passed since the date of death, and an extension of time to file the estate tax return has been granted

IV. INTESTACY – NO WILL (10 MINUTES)

- Intestacy is the condition of the estate of a person who dies without having made a valid will or other binding declaration. This may also apply where a will or declaration has been made, but only applies to part of the estate; the remaining estate forms the "intestate estate".
- Letters of Administration are issued to the person who will administer the estate of someone who dies without a will, often called an Administrator. Such Administrator will deal with a deceased person's estate, passing it under the Intestacy Rules codified in New York Estate Powers and Trusts Law §4-1.1.
- Who gets what depends on who the living relatives are and their relationship to the Decedent, the person who died. The family members who are entitled to a share of the Decedent's estate when there is no will are called "Distributees".
 - If the Decedent has a spouse but no children, then the spouse inherits everything.
 - If the Decedent has children but no spouse, then the children inherit everything.
 - If the Decedent has spouse and children, the spouse inherits the first \$50,000 plus half of the balance. The children inherit everything else.
 - If the Decedent has parents but no spouse and no children, the parents inherit everything.
 - If the Decedent has siblings but no spouse, children, or parents the siblings inherit everything.
 - If the Decedent has a child who dies before the Decedent and had children of their own, then the Decedent would have grandchildren. Those grandchildren would step into the Decedent's child's place and inherit in place of the child.
- For children to inherit from their parents, New York State requires that there is legal parent-child relationship. In most cases this is not an issue but it's not always clear.
 - Adopted children will inherit just like a biological child.
 - Foster children and stepchildren will not inherit unless they were legally adopted.
 - Children born after the Decedent dies will inherit.
 - Children born outside of marriage, also called non-marital child, will inherit from a male Decedent if paternity is established.
 - Grandchildren will inherit only if their parent (the Decedent's child) dies before the Decedent died.
- If the Decedent has no family at all, then the property will go to New York State.
- When a person dies without a will, any property the Decedent leaves is sold under the supervision of the Court and Administrator.
- SELLING OR TRANSFERING A DEED WHEN INTESTACY OCCURRS
 - Petition the court for a sale of the property if a purchaser is available and the property must be sold to divide the proceeds among heirs or to pay debts of the estate. The court may grant your petition and order a sale of the property free of liens or claims. If no purchaser exists, the property may be listed, or the Court will order that the property be advertised for sale in a newspaper.

- Execute an administrator's deed to all heirs in equal shares or as ordered by the court, once the administration is complete if there has been no sale of the property to a third party, uninterested purchaser. Record the deed in the land records for the county where the property is located.

V. COST BASIS AND STEP UP BASIS (10 MINUTES)

- Cost basis means an asset's cost for tax purposes. To determine whether you have a profit or loss when you sell an asset, you subtract its basis from the sale price. If you have a positive number, you have a gain. If you have a negative number, you have a loss.
- Upon inheriting real property, there is a step-up basis. A step-up in basis is the readjustment of the value of an appreciated asset for tax purposes upon inheritance, determined to be the higher market value of the asset at the time of inheritance. When an asset is passed on to a Beneficiary, its value is typically more than what it was when the original owner acquired it.
 - "Stepped-up basis" means that the home's cost for tax purposes is not what the now-deceased prior owner paid for it. Instead, its basis is its fair market value at the date of the prior owner's death, which is typically more than the prior owner's basis.
- The bottom line is that if you inherit property and later sell it, you pay capital gains tax based only on the value of the property as of the date of death.
- If you sell an inherited home for less than its stepped-up basis, you have a capital loss that can be deducted (assuming you don't use the home as your personal residence). However, only \$3,000 of such losses can be deducted against your ordinary income per year. Any excess must be carried over to future years to be deducted.

VI. NEW YORK STATE ESTATE TAX VERSUS GIFT TAX (10 MINUTES)

- An estate tax is levied on an heir's inherited portion of an estate if the value of the estate exceeds an exclusion limit set by law. The estate tax is mostly imposed on assets left to heirs, but it does not apply to the transfer of assets to a surviving spouse.
- The New York estate tax exclusion amount (formerly \$1 million) was increased incrementally until the New York exclusion matches the federal estate tax exemption, as follows:
 - Exclusion – \$1 million --New York Tax Law §951 (a) (Prior to 4/1/14);
 - Exclusion - \$2,062,500 for deaths 4/1/14-3/31/15;
 - Exclusion- \$3,125,000 for deaths 4/1/15-3/31/16;
 - Exclusion- \$4,187,500 for death 4/1/16-3/31/17;
 - Exclusion- \$5,250,000 for deaths 4/1/17-12/31/18; and
 - Exclusion- \$5,740,000 for deaths 1/1/19 – 12/31/19
- Note, in 2018, the Federal estate and gift tax exemption was more than doubled, from \$5,490,000.00 to \$11,180,000.00 as part of the new tax cut legislation. In 2019, the Federal estate and gift tax exemption is \$11,400,000.00 per individual.
- Be aware that in addition to increasing its estate tax exclusion amount, New York also implemented a rule precluding certain estates from taking advantage of that exclusion at all. If the amount of your taxable estate is more than 5% of the exclusion amount at your death, you cannot take advantage of New York's exclusion. You essentially "fall off the cliff" if your taxable estate is too high. These estates are subject to New York estate tax in their entirety – starting from dollar one.
- The gift tax is a tax on the transfer of property by one individual to another while receiving nothing, or less than full value, in return. The tax applies whether the donor intends the transfer to be a gift or not. The gift tax applies to the transfer by gift of any property.

- Tax rate equals estate tax rate
- The general rule is that any gift is a taxable gift. However, there are many exceptions to this rule. Generally, the following gifts are not taxable gifts.
 - Gifts that are not more than the annual exclusion for the calendar year.
 - Tuition or medical expenses you pay for someone (the educational and medical exclusions).
 - Gifts to your spouse.
 - Gifts to a political organization for its use.
 - In addition to this, gifts to qualifying charities are deductible from the value of the gift(s) made.



SKHHeiberger
L L P