Ask the Probate Judge—Power of Attorney v. Executor, Interested Witnesses

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Q: Is there any difference between "power of attorney" and "executor" of an estate? What are the functions and responsibilities of the positions? What are the responsibilities for informing other heirs to the estate as to what is transpiring with the estate? Thank you for your time. R.F., Los Alamos

Thank you for giving me the opportunity to clarify this issue.

The main difference is that powers of attorney are "during lifetime" documents and "executors" obtain power after a person has died.

I have explained in previous columns that a power of attorney is a legal document in which a principal (person creating the power of attorney) appoints an agent. Once the power of attorney takes effect, the agent has legal authority to make health care or financial decisions on the principal's behalf during the principal's lifetime. A power of attorney is useful if someone is ill, incapacitated, out of town, or immobile.

An agent acting on behalf of a principal should follow the principal's directions or wishes in making financial and health care decisions.

There is no such thing as a "power of attorney of an estate." Powers of attorney expire either when revoked by a competent individual or when the individual dies. Death ends all powers of attorney, and it is improper to use a power of attorney for a person who has died.

That's where executors come in. In New Mexico, we call executors "personal representatives." If a decedent owned assets that were titled in his or her sole name, a court proceeding would be necessary for the personal representative to obtain legal authority to transfer assets to the beneficiaries of the decedent's estate.

After a court appoints someone as personal representative of a decedent's estate, that person must pay creditors and taxes, as well as manage and distribute the estate. The personal representative (or his/her attorney) is also responsible for communicating with heirs. This may include providing: 1) information about the decedent's will; 2) notice of the proceeding; 3) an inventory of the estate's assets; and, 4) reports about receipts and disbursements made on behalf of the estate.

Agents and personal representatives are fiduciaries. This means they serve in positions of trust and are supposed to act in good faith without self-dealing. Unless expressly authorized by the terms of the documents appointing them, fiduciaries should not benefit personally from those whom they serve.

I have observed that, usually, the more a personal representative communicates with beneficiaries, the less the beneficiaries complain about the management of the estate. If you are serving in a position of trust, then being open and honest about your actions makes sense. This approach should prove far more cost effective than litigation involving a secretive or dishonest personal representative.

Q: Referring to an old column of yours, you advise regarding witnesses to a will: "In New Mexico relatives or other interested persons may witness your will. An interested person is someone who stands to inherit under the terms of the will...."

You go on to advise that, despite this law, using disinterested witnesses is preferable. My question: is the practice in quotes still valid and legal in New Mexico? M.S.

Yes. The applicable law reads: “The signing of a will by an interested witness does not invalidate the will or any provision of it.” By the way, the column that you quoted is so old, I was unable to find it. But I still stand by my answer.

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