



Elder Law Guys: I've been named Executor of a Will: Now what?

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Preparing a Last Will and Testament is an important process that complements a well-rounded estate plan.

Granted, you've seen us preach the virtues of a comprehensive estate plan before, which may include more sophisticated planning techniques employed through various trust documents or other arrangements. Regardless of the complexity of an overall estate plan, it is important to have a Will for a variety of reasons.

After deciding who will receive the objects of your bounty (your "stuff"), the next decision involves who will manage your estate assets after your death. This designation is commonly referred to as an Executor (or Executrix when female). Frankly, we've used the term "personal representative" for as long as we can remember, which is a gender-neutral term accomplishing the same legal effect.

The personal representative has great responsibility as a fiduciary (one who acts in good faith relative to another's interests). Charged with identifying the assets, liabilities and other aspects of property owned by the decedent at death, the personal representative has much to do shortly after the funeral service.

However, here's the catch — the legal rights of the personal representative do not arise themselves until after the testator (one whose Will it is) dies and the Will is submitted to the court for a process known as probate. This is a very common process across the country, but we thought we'd shed some light on some common misconceptions about the personal representative's duties and legal authority.

1. ‘I’m in charge of my parent’s finances because I’m the named Executor under their Wills.’

First, recognize that the personal representative has no legal authority to act upon the assets subject to the Will until the person who signed the Will actually dies. A personal representative must be sworn in by the Register of Wills in order to have the authority to collect the asset of the decedent’s estate. However, the Will is not accepted without a death certificate — and it’s hard to get one of those while someone is alive. So, do not confuse the surrogate decision making of an agent under a power of attorney with the personal representative’s duties after death.

2. ‘I’m in charge of everything the decedent owned at death because I’m the named Executor under the Will.’

Not so fast. Remember, a Will only applies to assets owned by the decedent in their sole name at death that do not have a designated beneficiary or survivorship owner.

Let’s examine things that fall outside the authority of the personal representative.

Here’s a big one — all IRA’s, 401k’s, 403b’s, 457 plans, SEP’s, etc. All of these tax deferred investments typically have a named death beneficiary so they are not subject to probate and are not under the authority of the personal representative. And let’s remember that these retirement plans now make up the bulk of people’s liquid savings.

Life Insurance — also an asset that typically names a beneficiary to receive the life insurance proceeds and not subject to probate or the personal representative’s duties.

Jointly owned assets such as bank accounts or real estate also do not pass through probate and thus are not included in the list of assets to manage.

3. ‘I can do this on my own and I don’t need a lawyer.’

While some estates are fairly simple and can be handled with limited exposure to the legal system, there are a variety of issues that a personal representative will encounter that should be overseen by an experienced estate lawyer. There are tax filing deadlines, asset valuation issues, possible challenges by heirs, real estate negotiations and sales, debts owed to creditors and claims by government agencies to consider.

Remember, the personal representative has a duty to the beneficiaries of the estate to properly handle these proceedings. Most people who are named as a personal representative go through this process only once in their lives. This is not something you want to learn as you go.

While there are many more issues involved in properly handling the administration of an estate, this should give you an idea of some of the considerations facing a personal representative. As one of our fathers used to comment, “Where there’s a Will, there’s also relatives!”

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