



Why it Pays to be Proactive

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PRACTICE AREAS

Estate Planning

DEAR JONATHAN:

My widowed father passed away recently and he named me as the executor of his will and the successor trustee of his trust. He prepared his trust a few years ago, at my urging, for the specific purpose of making sure his assets would not have to be probated at his death. To my great disappointment, I can't find any evidence that any of his assets were transferred to his trust. He has a house, bank and investment accounts, certificates of deposit, as well as stocks in various companies. In going through his papers, I did come across a document entitled "General Assignment" where he states that all of his assets are assigned to his trust as of the date he signed it. This assignment also specifically references the types of assets that are being assigned to his trust, i.e., real estate, bank accounts, certificates of deposit, personal property, etc. Can I use this document to avoid having to probate his estate?

JONATHAN SAYS:

Unfortunately, for the most part, no. It should work for transferring your father's personal property and any untitled assets to his trust. You might even be lucky enough to find a bank who will accept this assignment for the purpose of retitling his bank accounts in the name of his trust, although that is unlikely to happen. It absolutely will not work for the real estate, investment accounts, stocks and certificates of deposit. Those assets will need to be probated, which of course defeats the purpose of why your father set up the trust in the first place.

As a matter of course, I always caution clients who prepare trusts for probate avoidance that in order to actually have their assets avoid probate, they have to physically retitle those assets in the name of the trust.



DEAR JONATHAN:

A few years back I named my son as my power of attorney on both my financial and health care durable power of attorneys. Fortunately, I have not had any health issues, so he has not had to act on my behalf under the health care durable power of attorney. I have, however, had him use my financial durable power of attorney on occasion when I was out of town. Unfortunately, my son is going through some tough times right now and I don't want him acting as my power of attorney anymore. Specifically, he has a problem with alcohol and drug abuse, as well as a gambling problem. Can I just tell him I don't want him to act anymore and that my daughter, who is the back up agent on both documents, will be acting on my behalf going forward?

JONATHAN SAYS:

You should prepare new financial and health care durable power of attorneys naming your daughter as your agent and in those documents you will want to specifically state that you are revoking the current financial and health care durable power of attorneys, which named your son as your primary agent. In addition to that, you should notify your son that you have revoked those power of attorneys naming him as your agent and ask him to return to you all copies he has of those documents in his possession. There is no guaranty, of course, that he will give you all the copies, but you should request him to do so anyway.

Further, you should contact all of your banking institutions, as well as your physicians, for the purpose of advising them that you have revoked those durable power of attorneys and then provide them with copies of the new ones for their records. Unfortunately, this is not a fool-proof method to protect you because if your son retains a copy of the old financial durable power of attorney, he could approach a teller at your bank who does not know you and does not realize that the power of attorney he is attempting to act under has been revoked by you. However, following these steps should go a long way in protecting you from any misuse by your son of those power of attorneys and hopefully he will honor and respect your decision to remove him as your agent in those documents. Good luck.