



This Nephew Won't Get What His Uncle Wants Him to Have

Jonathan J. David
go60.us Legal Ease Column
August 2012

DEAR JONATHAN:

I am the agent under my uncle's financial power of attorney. Although he is physically disabled, his mind is fine. He has a rather large estate and a variety of different types of investments. Because I have recently engaged in my own estate planning, I know the importance of preparing a will and trust, and as a result I have encouraged my uncle to prepare his own will and trust. However, since he is not married and has no children of his own, he hasn't felt the urgency to engage in estate planning. In fact, every time I bring up the subject to him, he tells me that he wants me to keep whatever I want for myself and then give the rest to charity. Obviously, I do not feel comfortable doing that. What happens if my uncle dies without having made a will or trust? Also, will I still be able to act on his behalf under his power of attorney after he has passed away?

JONATHAN SAYS:

I assume your uncle's financial power of attorney under which you are named agent is a durable power of attorney as opposed to a non-durable power of attorney. The difference is that a durable power of attorney allows an agent to act for the principal during his lifetime even when he is disabled; a non-durable power of attorney automatically terminates upon the principal's disability. Assuming the power of attorney you are acting under is in fact a durable power of attorney, then that power of attorney automatically terminates upon your uncle's death. Consequently, when your uncle passes away, you will no longer be able to act for him under that power of attorney.

As to your other question, if your uncle fails to prepare a will prior to his death, he will be deemed to have died intestate, which essentially means that he died without leaving a will. If that is the case, then all of his assets, other than any assets he jointly owns with another, if any, and assets that contractually pass to a named beneficiary at his death, i.e., such as life insurance proceeds, will need to be probated in the

AUTHORS/ CONTRIBUTORS

Jonathan J. David

PRACTICE AREAS

Estate Planning

Trust & Estate Litigation



county in which he lived at the time of his death. Further, upon the completion of probate, those assets will be distributed pursuant to state law. Consequently, your uncle's desire for you to keep a portion of his estate and then give the rest to charity cannot happen if he does not prepare a will or a trust.

You should find out from an estate planning attorney in your uncle's city as to who will be entitled to your uncle's estate if he dies without leaving a will. You should then pass that information on to your uncle, which might convince him to take the time to prepare a will so that at least his estate is distributed to beneficiaries of his own choosing, as opposed to individuals directed by the state. Further, if he also prepares a trust, he can, with your help, transfer his assets to that trust while he alive, and by doing so those assets will avoid probate upon his death. Good luck.

DEAR JONATHAN:

What is the difference between a personal representative and trustee?

JONATHAN SAYS:

A personal representative, sometimes known as an executor, is a person named in a last will and testament whose job is to administer the estate of a decedent while the estate is being probated. A trustee is the person named in a trust whose job is to manage the assets owned by the trust.