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THE EXECUTOR'S ROLE REGARDING CLAIMS TO THE ESTATE

By definition, an Executor's job is to locate the assets & liabilities of the estate, file taxes and make disbursements. This position has several names. Executor (male) & Executrix (female) denote that the decedent had a Last Will & Testament. Administrator (male) & Administratrix (female) denote that the decedent died without a Last Will & Testament.

In determining the liabilities of the estate, many times an Executor will come across situations in which the decedent was involved in some sort of claim against him or was a defendant in a lawsuit before his death. In these cases, the Executor might find himself sitting at home when the State Marshal knocks on his door and serves him with litigation papers.

You may be saying to yourself right about now that you would never want to be involved in this situation and you may be second guessing accepting your appointment as Executor. Don't be alarmed. This situation doesn't put you in personal jeopardy or liability. In a litigated matter, this is a procedural move that is required by law. If there was ongoing litigation against a decedent before his death, technically, the matter is halted until the estate is established with the probate court and an executor is appointed. At that point, the plaintiff must serve the appointed Executor and the estate with pleadings naming them as successors to the litigated claims. At that point, the litigated matter becomes a claim to the estate.

So what does an Executor do in this situation and what should be the concerns? Well, the Executor must have legal counsel to defend the litigation now pending against the estate, if none had already been defending the case before the decedent passed away. Next, the Executor must comply with all of the requirements of the litigated matter, as if he were the defendant himself. However, those requirements are changed a bit as the Executor may not have the information or documents sought and is only required to make inquiries in accordance with his appointment.

Of bigger concern is the amount of the claim as compared to the value of the estate. As with most litigation, matters tend to settle rather than go to trial and verdict so the Executor will be in the position of determining settlement value. This gets tricky because the Executor has a fiduciary responsibility to the Probate Court as well as the beneficiaries of the estate. In that capacity, the Executor is charged with preserving as much of the estate as possible for the benefit of the beneficiaries.

To that end, the Executor must specifically value the claim and must have every piece of information at his disposal before making any decisions to resolve the litigated matter with the estate's funds. Also, the Executor should be in full communication with the beneficiaries of the



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estate, advising them of the claim and it's progress. Finally, no determinations regarding the resolution of any such claim can or should be made without full Probate Court approval.

Getting caught in a litigated matter when you are appointed as an Executor raises the stakes substantially. It can be a very serious matter and the Executor's fiduciary responsibilities are not to be taken lightly. In such a situation, I highly recommend that the estate retain legal counsel to guide the Executor in this regard. This counsel should be separate and aside from the legal counsel who is defending the litigated matter because in many situations, to detailed to discuss here, that attorney could very well be subject to a conflict of interest in defending both the litigation and the estate.

Being a part of litigation will complicate the probate process and require more involvement by the Executor. This is for sure. Therefore, if you know that this situation is looming before an appointment is made for the estate, make sure you consider all of the time and involvement that will be required before you accept the position.

Anthony J. Medico, Esq., has practiced law for over 22 years. To ask a question for this column, or to receive Medico's free Estate Planning Survival Guide, visit his website at www.medicoandassociates.com, send an e-mail to Amedico@medicoandassociates.com or call (203) 661-8151. You can read most of his previous columns on his Greenwich Time estate planning blog on the internet. Just go to <http://www.greenwichtime.com/blogs> and scroll down until you find him under the business section. Enjoy.