

Ask the Probate Judge—Pourover Wills & Original Wills

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Q: We have a revocable living trust set up for my mother. Is a pourover will necessary in New Mexico? G.R., Albuquerque

A pourover will is executed in addition to a trust document. Instead of leaving one's assets to individually named recipients, the residuary clause of a pourover will leaves a person's assets to "the Trustee of the YourNameHere Revocable Living Trust dated _____." The settlor (the person creating the trust) signs the trust document first and then signs the pourover will.

Sometimes a settlor forgets to transfer assets into an existing trust or dies before completing the transfers. Or a settlor may fail to add newly acquired assets to the trust.

The pourover will affects assets that are held in the settlor's sole name instead of the trust at the time of the settlor's death. A court probate proceeding is required to transfer assets subject to a pourover will from the settlor's estate into the trust. Once assets "pour over" into a trust, the trust directs the distribution of the assets. (Aside: a settlor might intentionally choose not to transfer all assets to the trust and instead use various beneficiary designations. A pourover will would not govern these assets.)

If a pourover will requires a probate, probate courts offer an inexpensive way to do so when no dispute exists. I regularly admit pourover wills into probate at my court because the settlor forgot to transfer some asset into the trust during his or her lifetime. District courts can also admit pourover wills into probate and have jurisdiction to resolve disputes involving trusts or the administration of trusts.

Pourover wills are "safety valves," used only if a settlor failed to transfer certain assets into the trust. If your mother and her attorney properly transferred assets into her trust, a court probate proceeding should not be necessary.

Q: I thoroughly enjoy your columns. They are educational and easy to understand. My question: are copies of a will acceptable for probate? We cannot find my father-in-law's original will, but we do have a copy. K.R.

Thanks for your kudos. The New Mexico Uniform Probate Code requires wills presented to the probate or district court in *informal* probate proceedings to be "original." Probate courts only have jurisdiction over informal probates and are not allowed to admit a copy of a will for probate.

If you cannot find your father-in-law's will and his estate requires a court proceeding, you would need to proceed in the district court. If an original will is misplaced or lost, the district court, in a formal probate proceeding, has the power to determine whether a copy of the will should be admitted into probate after notice and a hearing to interested persons.

Your question illustrates the importance of communicating the location of one's original will to trusted family members or friends. If the original will is in a safe deposit box, New Mexico laws allow specified people to search that box after the death of the owner.

A financial institution where the safe deposit box is located must permit a spouse, parent, adult descendant, or a person named as a personal representative in a copy of a purported will to open and examine the contents of a safe deposit box belonging to a decedent. This examination is done in the presence of an officer of the financial institution. A receipt is given for any will, deed to a burial plot, burial instructions, or life insurance policy that is removed from the box. No other contents of a safe deposit box can be removed pending the appointment of a personal representative of the estate.

Some New Mexico financial institutions are unfamiliar with this law and may need to be provided a copy of the law to encourage compliance.

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