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## IS YOUR WILL WORTH THE PAPER IT'S PRINTED ON?

### *Five Details To Know Before You Sign*

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In my experience, I often find that client's have Wills that they assume will accomplish certain goals. In many instances, for a variety of reasons, this assumption is incorrect.

The following may be used as a checklist to determine whether you're Will is really worth the paper it's printed on.

#### **1. Why a Will is needed:**

A Will empowers a person, called an Executor, to manage the assets of a deceased person. But the only assets that fall under an Executor's control are those assets in the deceased persons' name alone.

Joint banks accounts, "in trust for" or "payable on death" accounts, life insurance and Individual Retirement Accounts with named beneficiaries do not come under the control of an Executor. These types of accounts are called "Will substitutes."

Often Testators, those people for whom the will is being drawn, desire to avoid probate by using Will substitutes. However, if a single person dies with more than \$5,000.00 in their name alone, or a married person dies with more than \$10,000.00 in their name alone, then a Will must still be probated before anyone can access the funds. Therefore, if a Client's goal is to use Will substitutes, then every asset must be held that way. If the Client

misses one account, probate will not be avoided.

#### **2. Proper Execution:**

A valid Will must be written, signed and witnessed in a very specific manner, and if it is not, then the Will may not be able to be used. If the Will cannot be used, a law called "intestacy" determines who will get a Client's assets. Often times, if a person dies without a Will, the wrong people receive the assets. So, for instance, if a person dies without a Will and has no children, or spouse, then the assets will pass on to his or her parents (if they are alive) and then to siblings. If there are no siblings, then the assets will be given to the nieces and nephews of the deceased person.

Does your Will  
accomplish your goals?  
Use this 10-minute  
primer to find out.

#### **Proper Execution Checklist**

- A Will should be signed at the bottom by the Testator.
- A Will in New Jersey should be "self-proving." If the Will is notarized by a notary or a lawyer (lawyers do not use seals), then generally it is self-proving.
- In New Jersey, except in the case of a completely handwritten Will, the signatures of two witnesses must be on the Will. The witnesses must be competent and over the age of 18.

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— New Jersey law recognizes an entirely handwritten Will that is signed at the bottom. But a handwritten Will must be probated in the time consuming and expensive Superior Court, rather than the quick and inexpensive Surrogate's Court.

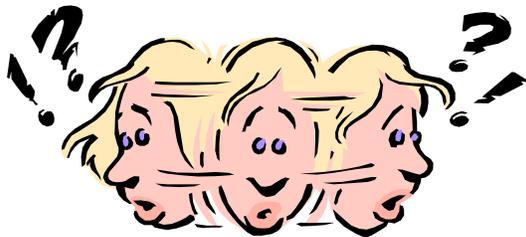
### 3. The Will does not work with the real world:

#### Joint Assets

The best way to explain this issue is with an example.

Mrs. Example has two children, Jersey, who lives close, and Cali, who lives in California. Mrs. Example made a perfectly executed Will leaving everything to Cali and Jersey in equal shares. As Mrs. Example got older, she began making Jersey a joint owner on her bank accounts. Mrs. Example did so because Jersey was close by and she needed the help. By the time Mrs. Example passed away, all her assets were held jointly with Jersey.

Cali came back for the funeral. After looking at her Mother's Will, she was surprised to find out that she would get no inheritance whatsoever.



The reason Cali got nothing is that the joint accounts with Jersey acted as Will substitutes. Thus, no assets came into the hands of the Executor to give to Cali.

Mrs. Example was never told that the name on the bank account overrides the Will. Therefore, her goal of leaving half her assets to each daughter was not met.

Of course, Jersey can give Cali half the assets, and often times that is what happens. But she is not required to.

#### Bankrupt Estate

Let's now assume that Mrs. Example died with \$30,000.00 of credit card debt.

Mrs. Example's Executor must pay the debt, but she has no money to use. Since all of Mrs. Example's assets passed to Jersey at death, the Estate has no assets.

If Cali is the Executor of the Estate, she can ask Jersey for the money to pay the debt. But Jersey does not have to give the funds to Cali. At some point the credit card company will sue the Estate and Cali, as the Executor, to get the money. Cali will then be forced to sue Jersey for the funds, or file bankruptcy for the Estate.

Mrs. Example could have avoided this bad outcome if she had only left an account in her name alone (no joint owner or beneficiary).

#### Special Beneficiaries

Special beneficiaries fall into several categories. Many Clients have children who are disabled, or who cannot hold onto money. Some heirs have drug and alcohol problems, or worrisome spouses. Often, Clients are unaware of death taxes.

Clients need trusts in their Wills, but do not employ trusts because it is hard to understand the benefit.

#### -Disabled Heirs-

In the most common situation, a parent will leave their entire estate to their healthy child with the understanding that half is going to be used for the disabled child.

Even though there is a moral obligation for the healthy child to use the

funds for his or her sibling, he or she does not have to. If the conditions change (like the death, divorce or bankruptcy of the healthy child), the Client's goal of caring for their disabled child may fail.

A Trust in the parent's Will can make the same arrangement, but it will be legally enforceable. In addition, if the healthy child died, divorced or went bankrupt, the funds of the disabled child would be protected.

As a general rule, because of New Jersey Estate tax, any married couples with assets exceeding \$675,000.00 need a trust in their Will to save on death taxes. The Federal limit is different than New Jersey. Couples with more than \$1,500,000.00 need a trust in their Wills to minimize Federal Estate taxes.

#### *-Troubled Heirs-*

Trusts can also be used to protect assets for heirs with personal problems such as drug dependency or marital difficulties.

#### **4. Naming Contingent Heirs and Executors:**

A Will should name initial heirs and contingent heirs if the first set of heirs dies before the Testator.

If a person leaves part of their estate to another person, and then adds nothing to the Will to deal with the situation where the heir dies before the Testator, then the heirs' children or other intestate heirs will get their share (not the people named in the Will of the deceased heir).

Sometime this leads to people getting assets that the Client does not want. If a person runs out of heirs, then the State of New Jersey would get their assets.

Naming a contingent Executor is equally important. If the sole executor dies, several people may have a right to be the new Executor. Finding those people and having a new Executor appointed can be time consuming and expensive.



#### **5. Include Detailed Executor's Powers:**

A properly prepared Will should contain a list of Executor's powers that is specific and detailed.

State law lets executors to take certain actions and allows the Testator to expand the Executor's powers.

Many times the reason for expanding the Executors' powers is to protect him or her. So, for instance, State Law does not allow an Executor to hold assets of the Estate "in kind" unless the Will gives that power. That means if a person dies with 1000 shares of Exxon-Mobile stock, absent an "in kind" power, the stock must be sold.

If the Executor does not sell the stock, and its value diminishes, absent an "in kind" clause, a beneficiary can sue the Executor personally to recover the lost value of the stock.

#### **Conclusion**

Knowing these five important details will help to ensure that your will is not only worth the paper it is written on, but also the value of your entire estate.

If you have composed a will and paid close attention to these points – Congratulations! You have completed an exceptionally challenging task. Enjoy your triumph. If you have not done this and are concerned about your assets, please contact an experienced elder law attorney.

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