

Elder Law Update: The Importance of a Last Will & Testament

By Remo A. Hammid, Esq.

A Last Will and Testament ("Will") is a legal instrument that directs how your assets will be managed and distributed after death. It is a crucial tool for estate planning, yet more than half of all Americans do not have a Will or if they do, the document was executed improperly.

When a person dies, their Will is submitted to the Surrogate's Court for probate (which is the process of proving the validity of a Will). New York, through its Estates, Powers and Trust Law, has prescribed specific requirements for a Will to be considered valid. Failing to adhere to these requirements could result in the Will being set aside by the court.

For example, a Will must be signed in the presence of two witnesses. The witnesses must also sign their names at the end of the Will either at the time of the Will execution or within thirty days. The person executing the Will (testator/testatrix) must also declare to the witnesses that the document is her Will.

If a Will is found to be invalid, or if you die without a Will, the assets of the estate will pass under the intestacy laws – essentially family members of varying degrees will inherit the assets. Relying on the intestacy statutes can lead to unintended consequences.

Aside from procedural issues, there are several factors to consider before the Will is drafted. One consideration is family structure: for instance, beyond the usual beneficiaries, are there children from a prior marriage, step-children, children or family members with special needs, etc. Tax implications are also considered in a well drafted Will. If the testator's estate is large enough to be taxable, then certain provisions should be incorporated into the Will for estate tax planning. An additional consideration is whether any individuals are to be disinherited.

In New York State, you are under no obligation to leave a bequest to your children, parents or siblings. The only person that may not be disinherited is a spouse. In the event that a decedent has attempted to disinherit the surviving spouse, New York law provides that the surviving spouse is entitled to an "elective share," which is the greater of \$50,000 or one-third of the estate. When disinheriting a relative who would normally be expected to be a beneficiary, it is important to be clear about the testator's intent to avoid a Will contest.

As a practical matter, if you believe that the disinherited individual will contest the Will after your death, then you should consider the use of an "in terrorem" or no

contest clause. Will contests can be costly and time consuming. The "in terrorem" clause generally states that if the beneficiary contests the Will, any interest given to that beneficiary is revoked. The clause also typically allows the executor to use estate assets to defend a Will contest, which should further discourage a challenge because estate assets would be reduced by the amount of legal fees expended.

Other considerations when drafting your Will is the presence of minor children or children with special needs. If drafted correctly, parents can provide for a disabled child without affecting any government benefits that the child may be receiving. Parents can also use a Will to nominate a guardian for their minor children.

While these are only some of the considerations when drafting a Will, the conclusion should be clear: dying without a Will or with a poorly drafted document could create undue stress and expenses for your family.

Remo A. Hammid is a local attorney who practices in the areas of Elder Law, Medicaid, Wills, Trusts and Estates. He is an Adjunct Professor at Queens College and Nassau Community College. To schedule an appointment with Mr. Hammid, please call (516) 355-0400.

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UPCOMING SEMINARS:

Elmont Public Library,
Friday,
September 28, 2007
at 12:30 PM
("Legal Update: Medicaid and Long Term Care Planning")

Floral Park Public Library,
Saturday,
November 3, 2007
at 11:00 AM
("Basic Estate Planning for Everyone")

RADIO PROGRAMMING ALERT:

Remo A. Hammid will be the featured guest on the radio program "Law You Should Know" which will be broadcasted on WHPC. Tune in to 90.3 FM on

August 27 at 4PM and
August 28 at 12PM.

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