WHY YOUR WILL SHOULD BE REDONE IF IT DOESN'T CONTAIN AN AFFIDAVIT OF SUBSCRIBING WITNESSES

By Neil R. Lubarsky, Esq.

Situations which are generally understood to create the need to have your will redone include the following:

1) When the tax law has changed,

2) When the beneficiaries who you want to receive assets have changed,

3) When the proportion of your assets which you wish to go to specific beneficiaries has changed,

4) When the value or ownership form of your assets has substantially changed,

5) When specific assets mentioned in your Will are no longer owned,

6) When a beneficiary receiving assets under your Will has marital problems and is likely to get divorced, and

7) When a beneficiary receiving assets under your Will has become disabled or is expected to need long term care served.

Although not generally understood by non-lawyers, it is also often essential to have your will redone when it does not have an attached affidavit of subscribing witnesses. The absence of such an affidavit can lead to your Will being treated as being legally invalid, thereby unraveling your estate plan. An explanation of what an affidavit of subscribing witnesses is, as well as why its absence can defeat all of your estate planning efforts, is set forth below.

An affidavit of subscribing witnesses is a document which is normally placed at the end of your Will. It usually consists of a one page document on which the individuals who witnessed your Will sign their names for a second time, and then have their signatures notarized. In such affidavit of subscribing witnesses, the witnesses to your Will swear that they saw you sign your Will. This affidavit of subscribing witnesses serves, in the vast majority of circumstances, as sufficient proof for a court to determine that your Will is valid, leaving the court to approve the distribution of assets according to the Will's specific instructions.

When a Will is probated (in very simplistic terms meaning when it is brought to the Surrogate's Court to be approved by the judge), one of the first things considered by the judge is

whether there is proof that the Will was actually executed by the decedent. Having two witnesses to a Will is necessary, but not sufficient, for a judge to approve a Will as being valid. The judge will want to see the notarized signatures of the witnesses, at the bottom of a separate affidavit, which affidavit must state various things specifically including that the witnesses saw the Will being executed. If this affidavit was not prepared at the time that the Will is executed, the Surrogate's Court judge will ask, upon your death, that the witnesses to your Will be tracked down and found, so that they can then sign such an affidavit. Tracking down the witnesses twenty or twenty-five years after they originally witnessed your Will being signed, so that they can then sign an affidavit swearing to various matters including the fact that they saw you sign your Will, often ends up being a very time consuming and expensive process. In fact, if the witnesses cannot then be found, it might end up being impossible to prove to the judge's satisfaction that your Will is valid, with the end result being that your estate would be treated as if such a Will had never been written. Making sure that an affidavit of subscribing witnesses is executed at the same time as your Will is essential in making sure that the Surrogate's Court will approve the validity of your Will as the valid legal blue print for the disposition of your assets, and for making sure that your wishes will be carried out as set forth in your Will in both a timely and cost effective manner.

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