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"Do-It-Yourself" Wills & Other Estate Planning - If You Really Care, Beware!

By Richard M. Morgan & Loraine M. DiSalvo

As Estate Planning and Elder Law Attorneys, we see the significant benefits of planning done right and the tragic consequences of planning done wrong. Years ago, a metro-Atlanta probate court asked me to serve as a guardian ad litem in a probate matter where a father's do-it-yourself will left his estate to his current wife and to their minor child. Unfortunately, the will did not acknowledge a second minor child he fathered while overseas. Additionally, the will was witnessed outside the father's presence, making the will invalid under Georgia law. This DIY will wasn't worth the paper on which it was printed. Indeed, this "free" will did not carry out its intended purposes, and it cost the family a fortune in legal fees.

Most people have estate planning in some form on their personal "to do" lists, but very few people want to do it. First, no one enjoys thinking about death and the consequences of his death. And, second, no one wants to pay an attorney so that he can spend hours of their time unhappily thinking about what will happen to his stuff after he dies. So, people turn to the "do it yourself" options of will drafting – they either write the will themselves or they buy an inexpensive online service to draft their wills. Hey, it is just a will. What could possibly go wrong?

Attorneys do not like do-it-yourself wills, including the online services, because everything that can go wrong generally does. These wills commonly do not express the intent of the drafter; they do not consider the family situations that require additional provisions to discourage court battles; and they often are not executed properly and never become valid wills under Georgia law. Indeed, even proponents of online will-making services don't recommend them for blended families, families in which there is likely to be fighting over the estate, families with children with disabilities, or families with significant assets (over $5 million). (See When it comes to wills, simple plan better than none)

Here are some of the most common problems we have seen with DIY wills:

1. **The will was not properly executed.** Georgia law requires certain formalities for a will to be valid. It has to be signed by two witnesses, and the witnesses must sign the will while in the testator's "line of vision" so that the person creating the will ("the testator") can see them sign without changing her place. The witnesses are particularly important so that they can later confirm the testator's mental state and understanding of the will.

   Many wills fail because they were not signed with the requisite formality. Georgia has a memorable case involving the signing of a will in a bank parking lot. The testator was presumably too ill to walk into the bank, so she signed her will while sitting in her car in a bank parking lot. A bank employee who had watched the testator sign the will, brought the

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will inside the bank to be witnessed by two tellers. Although the court opinion is not clear on this point, presumably the tellers were sitting at a window where the testator could see their faces. However, the testator could not actually see the tellers witness the will from her position. Because the tellers were not in the testator's "line of vision," the court declared the will invalid. Chester v. Smith, 677 S.E. 2d 128 (Ga. 2009).

2. **The self-proving affidavit with the will is absent or improper**. For a court to admit a will to probate, the court must be reasonably sure that the testator himself signed it. If a will was probated thirty years ago, the executor had to find the witnesses to the will so they could testify that the will had been executed properly. Now Georgia law allows self-proving affidavits, in which the witnesses and testator testify in advance that the will was properly executed. The affidavit must take a very particular form. However, if a self-proving affidavit does not comply with the most important statutory requirements, the actual witnesses must testify about the execution of the will. If both witnesses are deceased, probating the will becomes much more complicated. A DIY will that has no self-proving affidavit increases the hassles, and possibly the costs, of probate. For more information about the consequences of not having a self-proving affidavit, please see our June 2013 article, "Basic Estate Planning Topics: What Is a Self-Proving Affidavit, and Why Does My Will Need One?"

3. **The will does not deal with the "what if" scenarios**. The only constant in life is change. Regrettably, the ability to deal with changed circumstances is also where many fill-in-the-blank forms and "easy" legal assistance websites fail. Just a few of the common overlooked scenarios include:

   a. Future birth, adoption, or death of a child;

   b. Future marriage or divorce;

   c. Death of one or more, or even all, beneficiaries;

   d. Other complications with beneficiaries, like if the beneficiary is too young or incapacitated;

   e. Potential effects an inheritance can have on a beneficiary;

   f. The selected fiduciary is either unable or unwilling to serve; and

   g. Difficulties with identifying a charitable beneficiary.

   Recently, a couple walked into our office to complete an estate plan. The couple was young, in their mid-20s, and they brought their toddler with them. The wife was clearly pregnant with child number two. The couple completed their first wills through an online service, and, not completely understanding what these provisions meant, the couple selected most of the

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default provisions. The default provisions did not contemplate any future children that they may have. If the parents had died after their second child had been born, the probate of their online will would have been a disaster.

4. **The will doesn't waive probate court requirements or provide flexible fiduciary power**. Inclusion of additional provisions may specifically minimize probate and estate administration-related costs and hassles. For instance, a testator can waive particular requirements, like the requirement of an executor to file inventory, annual returns, and the necessity of obtaining a bond, and can include flexibility and comprehensive fiduciary powers. When a properly drafted will is probated, the family will likely have fewer expenses and much less hassle.

5. **The will doesn't include a catch-all residuary bequest**. Most people are familiar with the concept of a specific bequest, "I leave my watch to my daughter," or "I leave $10,000 to my favorite charity, the X Foundation." When people draft a DIY will, they usually do not consider how to leave the rest of their property – the bank accounts, cars, and the other miscellaneous property they have acquired over the years. Properly drafted wills contain a catch-all or a "residuary clause" designating who should receive this left-over property. Many expensive and contentious lawsuits result from arguments over who gets the rest of a family member's property when the DIY will fails to include a residuary clause. As seen below, the lack of the residuary clause also can undermine the goal of the will.

   In a DIY will, George Zeevering explicitly disinherited three of his five children. Unfortunately, his estate contained $200,000, and he failed to specify who should receive this amount. He also failed to include a residuary clause in his will. Under Florida law, this remaining $200,000 passed through intestacy, as if Mr. Zeevering had no will. The funds were equally distributed among his five children, even the children he specifically disinherited in the terms of his will. His DIY will produced a result that was the exact opposite of his intent. Estate of Zeevering, 78 A.3d 1106 (Sup. Ct. Penn. 2013).

6. **The will includes improper or poorly drafted trusts**. Creating a trust doesn't take much effort. However, creating a trust that properly carries out your intent often takes effort and expertise.

   I can create a trust for my husband right now by simply depositing money in a bank account and designating myself as the trustee and my husband as the beneficiary. Unfortunately, if I don't create a document defining the terms of the trust, Georgia law provides those terms, and many of those provisions require that I go to court to approve any changes to the trust. Thus, if I want to resign as trustee, or if my husband wants to get rid of me as trustee, we have to get court permission. While I can spend the interest from the bank account for my

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husband's benefit, I need court permission to invade the corpus of the trust (my initial deposit). The statutory trust provisions are not the preferred method of trust creation; they are simply the default provisions.

Frequently, a well-meaning family member will leave a trust to a relative with a disability. If not properly drafted, this trust can spell disaster for the disabled individual by disqualifying that individual from the public benefits he receives, such as Medicaid. We are currently working on a matter where a grandparent left a disabled grandchild money in a trust that would disqualify this child from receiving public benefits. Fortunately, the family has put its differences aside to work together to move the money to an appropriate trust. In a more hostile situation, the family would have to file petitions in Superior Court to change the trust and protect the child's benefits.

As the old adage states, "You don't know what you don't know." This adage is especially true when drafting a will. Inexperienced drafters do not know what provisions they need and what provisions to avoid. Do-it-yourself wills and fill-in documents give minimal assurance that what a testator intends will actually occur. The issues may be with the will provisions included or because needed provisions were left out. The results can be expensive for the family trying to probate the will, and sometimes they are disastrous for the beneficiaries. The will may cost $129 to create, but it may be worth less than the paper on which it was printed, and it may cause very expensive litigation.

So, if you really care about what happens with your loved ones and your assets after you are gone, use the services of an experienced and specialized estate planning attorney. We are here to help you with this very important process, offering complementary estate planning consultations, which are focused on helping you come to the right decisions for yourself. To schedule an appointment, please contact Karrah Hammock at (678) 720-0750 or KHammock@morgandisalvo.com.