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Basic Estate Planning Topics: What Is a Self-Proving Affidavit, and Why Does My Will Need One?

By Richard M. Morgan & Loraine M. DiSalvo

In a previous newsletter, we went back to basics and discussed the question of "What is a Trust?" For this issue, we'd like to look at another very basic estate planning concept: the self-proving affidavit. To begin our discussion of this topic, we will first provide you with some background information about what must happen for a Will to be validly executed. We will then explain how the self-proving affidavit can be used to help show that a Will was validly executed and make offering the Will for probate easier and faster.

Under Georgia law, a Will must be signed by the testator (the person who is making the Will). The testator must be at least fourteen (14) years old, have the required mental capacity to make a Will, and intend for the document which is actually signed to be his Will. The testator's signature can be as simple as an "X" or other mark, as long as the testator is clear in expressing to the witnesses that the mark is intended to be his signature on the Will. The testator can even have someone else sign the Will on the testator's behalf, although, in this situation, the signing party must actually sign the Will in the presence of the testator and at the testator's express direction.

A Will must be witnessed by at least two witnesses, who must also be at least fourteen (14) years old and legally competent. Ideally, the testator will sign the Will in front of the witnesses. Alternatively, he may sign the Will elsewhere and then show his signature to the witnesses and clearly state to them 1) that it is his signature, 2) that he intends for the document to be his Will, and 3) that he wants each of the witnesses to serve as witnesses to his Will (this process is called "acknowledging" the Will). Although the testator does not need to sign his will in the presence of the witnesses, the witnesses must sign the Will "in the presence of" the testator. For a testator who is able to see, this requirement has generally been interpreted to me that the testator must be conscious and actually able to see the witnesses sign. For a blind testator, this requirement generally means that the witnesses must be physically close to the testator while they sign the Will. Witnesses do not have to sign the Will at the same time, however, or see each other sign it.

If not all of the required factors are present when the Will is executed, then the Will has not been correctly executed and is invalid. As part of the process of offering a Will for probate in Georgia, the person offering the will for probate (generally, the appointed Executor) must prove that the Will was properly executed in accordance with Georgia law. Prior to 1984, this required tracking down at least one of the witnesses to the Will and having the witness execute an "Interrogatories to Witness to Will" form. The Interrogatories form contains a series of questions about the circumstances under which the Will was executed, and it must be signed by the witness in front of a notary public. Pre-1984 Georgia Wills tended to use three witnesses, rather than two, but it is still the case, especially with older Wills, that it may not be easy to find a witness and obtain the needed Interrogatories.

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If no one can find a witness willing and able to sign an Interrogatories, then the Will needs to be offered for probate along with two separate affidavits from credible, disinterested persons (ones who will not receive any property either under the Will or as intestate heirs of the testator). The disinterested persons must be people who knew the testator, have been given a copy or the original of the Will for review, and feel comfortable signing an affidavit stating the length of time for which they knew the testator and that they believe the signature on the Will is the testator's actual signature. When disinterested person affidavits are used, the person offering the Will for probate is also usually required to explain to the probate court the steps which were taken to try to find a witness, and that due diligence in this regard was exercised. If no Interrogatories can be obtained and the two required disinterested persons cannot be found, then the Will generally cannot be admitted to probate, since then there is no proof that it was executed correctly.

In our practice, we have had to use both Interrogatories and disinterested person affidavits to probate Wills. Locating witnesses and disinterested parties is inherently time-consuming and adds considerable time and expense to the probate process.

The 1984 introduction of the self-proving affidavit in Georgia offered a way to greatly simplify the process of submitting a Will for probate. Self-proving affidavits are not a legally required part of a Will, but there is no good reason not to have one. The self-proving affidavit must be executed by both the testator and each of the witnesses in front of a notary public. The self-proving affidavit states that the Will was executed with all required formalities and serves to create a rebuttable presumption in the probate court that the execution took place correctly and that the Will is validly executed. (A rebuttable presumption means that the Will is assumed to have been correctly executed, but that a person who wishes to claim otherwise may, if he brings forth sufficient evidence, be able to overcome that presumption and prove otherwise.) If a challenge to the Will is brought, then a witness or two disinterested persons may still have to be located. However, in most cases where no challenge to the Will is brought, having a self-proving affidavit along with a Will allows the process of offering the Will to probate to proceed much more quickly and with less cost, since it completely eliminates the need to gather witness Interrogatories or disinterested person affidavits.

As stated above, any Will prepared in Georgia after 1984 should ideally have a self-proving affidavit. If no self-proving affidavit was prepared when the Will was signed, it may be possible to have one signed after the fact, since the actual affidavit may be executed at almost any time after the Will has been signed and does not have to be signed at the same time as the Will. However, preparing a self-proving affidavit after the fact means that the testator and original witnesses must all be willing and able to appear together in front of a notary, meaning that it is usually best to have the self-proving affidavit prepared and signed with the Will. If the testator executes a codicil to his Will, and the codicil has a self-proving affidavit, the codicil's affidavit will generally mean that no separate affidavit is needed for the Will itself. This is because the codicil effectively republishes the Will, allowing the codicil's self-proving affidavit to cover both the Will and the codicil. If it has been a number of years since the Will was executed, however, it may be best to simply redo the Will entirely, and to ensure that the new Will has a self-proving affidavit, in addition to making any desired changes and

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updates which may be needed to address changes in state and federal law which have taken place since the older Will was signed or to reflect changes in the testator's estate distribution intent.

As for Wills prepared outside of Georgia: Georgia will generally allow a Will prepared in another state to be offered for probate in Georgia, as long as the testator actually lived in the state where the Will was prepared at the time the Will was executed, and as long as the will meets the basic requirements for a Georgia Will (testator who has the required level of capacity and is at least 14 years old, at least two witnesses who either saw the testator sign the Will or to whom the testator acknowledged the Will, and all of the witnesses having signed in the presence of the testator). However, a non-Georgia Will may lack many of the items which we would want included in a well-drafted Georgia Will, including, but not limited to, the self-proving affidavit.

Some states, like Texas and Florida, do have a version of a self-proving affidavit that satisfies the requirements of a Georgia a self-proving affidavit (Texas, in fact, appears to have been an early adopter, having had a self-proving affidavit which meets Georgia's requirements since at least the late 1960s, long before Georgia adopted its own self-proving affidavit laws). However, other states have self-proving documents which qualify under their laws but do not meet Georgia's requirements. For example, in New York the self-proving affidavit need only be executed by the witnesses and a notary, not by the testator, and therefore a New York self-proving affidavit will not qualify under Georgia law as a self-proving affidavit. In general, if you have recently moved your principal residence to a new state, it is best to update your existing Will and any other estate planning documents, to help ensure that they will work as well as possible under the laws of the new state.

Whether you are dealing with a recently-deceased relative's non-Georgia Will or pre-1984 Georgia Will that now needs to be offered for probate or whether you recently moved to Georgia and would like to update your own estate planning documents, we would be happy to discuss your questions about the situation and see how we may be able to help. Please contact us at either (678) 720-0750 or sollila@morgandisalvo.com to schedule an appointment.