Is a Will a Will? The Devil is in the Details

October 4, 2010 by Deirdre Wheatley-Liss

If you mean for a Will to be your Last Will and Testament, will it be? While the answer is "most likely" my colleague Don Vanarelli, Esq. has a great post outlining a set of facts where the decedent clearly intended her Last Will and Testament to be different, but that details of execution prevented if from being admitted as such.

In Don's post "A Draft Will That Was Not Reviewed By The Client Before Death Cannot Be Admitted To Probate" he discusses the recently decided case of In re Macool where a client went to her attorney with a handwritten note of changes to her Will naming a new beneficiary, the attorney dictated a draft revised will in the clients presence, the client made an appointment to come back to sign the revised Will, but the client tragically died a mere hour after leaving the attorneys office. So, with all of her clear intent to make a new Will, was Ms. Macool successful? Sadly, the answer is "no" because even though Ms. Macool had all the intent in the world to make a new Will, none of actions rose to a level to meet the formal requirements to create a Will.

Bear in mind that a Will only comes into play when you are dead, and by definition you can no longer discuss your intent with anyone. As a result, there are fixed formal requirements in the law for what a document must "look like" to be deemed a Will. New Jersey even has relatively liberal requirements as to what can be a Will as it allows 3 categories of Wills:

1. A Formal Will signed by the decedent and witnessed by 2 people (N.J.S.A. 3B:3-2(a)). Think here of the Will drawn up be a lawyer and executed in her office.

2. A holographic Will - a writing intended to be a will that is entirely in the deceased person's handwriting and signed by him or her (N.J.S.A. 3B:3-2(b)). This is the original DIY will - I write out what I want to happen to my stuff on my death and sign it.

3. An Intended Will - a document that is neither a Formal Will nor a Holographic Will if there is a writing where it can be proved by clear and convincing evidence the decedent intended the document to be their Will (N.J.S.A. 3B:3-3).

Although a document or writing added upon a document was not executed in compliance with N.J.S.A. 3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S.A. 3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (1) the decedent's will;

Even with all these outs, the court could not find that Mrs. Macool had effectively created a new Will.

1. She clearly didn't sign a Formal Will.

2. Her handwritten notes to her attorney weren't signed, so those could not qualify as a Holographic Will.

3. She had never even looked at the draft Will the attorney drew up, so that couldn't be an Intended Will.

While the Court clearly made its decision within the law, the issue here is that the law did not provide a means for the Court to provide justice for Ms. Macool. Her last wishes were clear and not in doubt, but since the communication of those last wishes did not meet the technical requirements, the Court could not enforce them. Once also cannot help wondering why if her wishes were so clear as the record suggests, the unintended beneficiaries wouldn't follow them out of a sense of rightness.

The lesson to be learned? If you want your Will to be a Will, make sure that you have executed it within the bounds of the law.