

THE JOLLY TESTATOR (OR, "SHOULD I WRITE MY OWN WILL?")

by Joseph A. Bollhofer, Esq.

*"When a festive occasion our spirit unbends
We should never forget the profession's best friends.
So we'll pass round the wine
And a light bumper fill
To the jolly testator who makes his own will."*

Anonymous
Jacob M. Brande,
Lifetime Speaker's Encyclopedia, 1962

No caring person desires to cause problems for his heirs. However, sometimes problems occur.

Records from Suffolk County's Surrogate's Court show that each year dozens of challenges to probate proceedings are filed in Suffolk County. Probate is the process of having a will approved by the Surrogate's Court and appointing an executor, as chosen by the testator (the will maker) in his will, to pay the estate's taxes and debts and distribute the estate's property in accordance with the will.

A contested probate proceeding occurs when someone who claims he is in some way legally entitled to some benefit from the estate objects to the validity of the will or its interpretation, or to the way in which the executor is doing his job.

Those who have read a will usually are struck by what appears to be unnecessarily formal and stuffy language. However, wills are written as they are for one very good reason: they work (if done correctly). Lawyers, being the generally cautious group that we are, rarely deviate from the tried and true - "If it ain't broke, don't fix it." Many of the phrases in wills are hundreds of years old, part of the rich legal history inherited by us from the English system. However, blindly following forms without knowing the reasons for what is stated is dangerous. Each will must be tailored so that it (1) accurately reflects the testator's intent and (2) carries out that intent in a legally permissible manner.

Speaking of intent, since the testator no longer is around at the time of probate, he cannot explain any ambiguities in the will. It is therefore of extreme importance that the will clearly express the testator's intent. Those laypersons who make their own will,

like the "jolly testator", run the risk of having their wills interpreted in some manner other than as they intended or, equally unpleasant, of having the will declared invalid because it was not made in accordance with strict legal formality requirements. Even if the Surrogate's Court ultimately interprets an ambiguous provision in a will as the testator had intended, everyone involved has suffered unnecessarily (except the lawyers). Who finds joy in the time, anxiety and expense of a trial?

Under such circumstances, the parties involved might have been better off if the testator had died intestate (i.e., without a will). At least then the property of the estate would be distributed to the next of kin in a clearly-defined order under the law. Of course, this distribution might not be as the testator intended. For example, if a man dies intestate leaving a wife and two children, his estate (except property owned jointly with his wife, which all becomes solely hers) is divided as follows: \$50,000 plus one-half of the remainder to the wife; one-half of the remainder to the children, equally. If the children are under 18, that one half must be held and used for their benefit by a trustee until they become 18. Note: the wife is not automatically appointed the trustee. Nor, for that matter, is she automatically appointed the administratrix, the person who does the same job as the executor, explained earlier. What loving husband would knowingly leave his wife with the burden of administering a trust for her own children, subject to court scrutiny, when he easily could leave her his entire estate outright?

Dying intestate results in the court having to approve the appointments of the administrator and trustee and, if both parents die leaving minor children, the appointment of a guardian. It also might result in the estate property being distributed contrary to the deceased's intent. A will gives him control. However, a person who dies with a poorly written will often leaves beneficiaries who are anything but jolly.

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Editor's Note:

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