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Trusts and Estates

Do-It-Yourself Wills Are Penny-Wise and Pound-Foolish

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In the recent Florida Supreme Court case of *Aldrich v. Basile*, No. SC11-2147 (March 27, 2014), a woman ended up paying more than she bargained for by using an "E-Z Legal Form" will to dispose of her entire estate.

In that case, Ann Aldrich wrote her will on a pre-printed E-Z Legal Form and, in the will, disposed of every asset she owned at the time by listing them with particularity. Unfortunately, Aldrich did not contemplate after-acquired property and failed to include a residuary clause, which would have disposed of the balance of her assets. Although Aldrich did sign a codicil to her will in order to leave after-acquired property to her brother, the codicil was not executed with the formalities needed to create a will or codicil under Florida law. As a result, after her death, there was litigation between her brother (the intended beneficiary) and her nieces as to who should receive the residue of the estate, which consisted of the after-acquired property.

Ultimately, the Florida Supreme Court sided with the decedent's brother; however, had the will and codicil been properly drafted and executed in the first place, the brother could have inherited the assets without the cost, expense and aggravation of litigation. Ironically, by opting for the less expensive do-it-yourself option rather than hiring an attorney to draft her will, Aldrich's estate ended up paying a bigger price, which can be best summarized in Florida Supreme Court Justice Barbara Pariente's concurring opinion: "While I appreciate that there are many individuals in this state who might have difficulty affording a lawyer, this case does remind me of the old adage 'penny-wise and pound-foolish.' … The ultimate cost of utilizing such a form to draft one's will has the potential to far surpass the cost of hiring a lawyer at the outset. In a case such as this, which involved a substantial sum of money, the time, effort and expense of extensive litigation undertaken in order to prove a testator's true intent after the testator's death can necessitate the expenditure of much more substantial amounts in attorney fees than was avoided during the testator's life by the use of a pre-printed form."

While the main takeaway in this case seems to be that saving money in the short term by not hiring a lawyer to draft and oversee your estate plan may be shortsighted, this case also

illustrates some of the key mistakes that do-it-yourselfers may easily make. Here is a list, although certainly not exhaustive, of what can go wrong:

• **Failing to execute a will with the proper formalities.** There are certain formalities that are required when executing a will, and each state has different requirements. In Pennsylvania, for example, it is not necessary for the signing of your will to be witnessed by anyone; however, it is customary to have at least two people witness the signing of your will and to have the will be a self-proved will. This would include a separate page that is notarized and signed by the testator and witnesses. By having the will be self-proved, upon the death of the testator, the will may be accepted "as is" without the need to locate the witnesses to the will. Anytime a codicil to the will is executed, the codicil must be executed with the same formalities as a will and care must be taken to make sure that the codicil republishes the correct will. In the *Aldrich* case, had the codicil been executed with the proper formalities under Florida law, it would have been valid on its face, rendering the litigation unnecessary.

• **Not tailoring the will to the state of residency.** There may be certain state-specific provisions that should be incorporated into a will, and these can be easily missed when using a generic will form. For example, in some states only certain individuals are qualified to serve as personal representatives (i.e., executors), such as relatives or residents of that state. Also, depending on the forum, revocable trusts, rather than wills, may be the preferred method for transferring assets to eliminate the probate process. Although this is generally not the case in Pennsylvania, there are other reasons why funding (or partially funding) revocable trusts may be preferable, such as avoiding ancillary probate administration in another state where real property is owned, anticipating incapacity concerns of the settlor of the trust, or facilitating the beneficiary designation process for retirement benefits and life insurance. Also, revocable trusts may be advisable for privacy concerns.

• **Failing to dispose of all of one's assets under the will.** In the *Aldrich* case, the decedent was too particular about what assets she wanted to dispose of, but failed to dispose of certain assets that she acquired after the will was signed. Had the decedent included a residuary provision in the will, that would have covered the balance of her property and avoided the costly litigation.

• **Taxing the wrong beneficiaries.** The inheritance/estate tax clause in a will is something that needs to be carefully examined to make sure that it is allocated to the right source of funds or apportioned to the right beneficiaries. This is a concern if the estate assets (which include assets passing under the will, by beneficiary designation or otherwise) are passing to multiple beneficiaries. Different states may have different default laws as to where the tax is paid from if the will is silent, but a testator can always override the default state law. Without properly evaluating this, a testator may inadvertently cause the tax to come out of a source that was not intended, thereby reducing the amount of funds received by certain beneficiaries and increasing the amount of funds received by others.

• **Failing to coordinate beneficiary designations.** A will usually does not dispose of all the estate assets. There are certain "non-probate" assets that pass by other methods, such as by beneficiary designation forms (in the case of life insurance or retirement plans) or by title (in the case of payable-on-death accounts, joint accounts or jointly owned property). In most states, a will cannot override how that non-probate property will pass. A lawyer who prepares your will can help to coordinate how these assets pass to make sure that they all

dovetail and pass to the right beneficiaries. This step may not be properly managed if a do-it-yourself will is prepared.

• **Not understanding the benefits of trust structures versus outright distributions to beneficiaries.** Most often, do-it-yourself wills are very standard and provide for outright distributions to beneficiaries. Many times, however, there may be reasons to leave assets in trust structures for beneficiaries, whether for tax planning, creditor protection, spendthrift protection or otherwise. Understanding the value of trusts should be discussed with a lawyer. Moreover, if the decision is made to create trusts in the will, care should be taken to make sure that the provisions are properly drafted and that the language is accurate. A trust that is not skillfully drafted can defeat the whole purpose of having the trust in the first place.

While, at first glance, cookie-cutter wills and other legal documents found in books, online forms and online software programs seem appealing in terms of the convenience and cost, they are not always all they are cracked up to be. Buyers should beware and note that by saving now, not only may they be risking that their last wishes will not be properly implemented, but, also, today's savings may end up costing their heirs much more in time, aggravation and expense (mostly legal fees) down the road. As we've heard at least one busy estate litigator sagely (and gratefully) put it: "Pay now, or, pay later." •

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