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WILL EXECUTION - THE VALUE OF PAYING ATTENTION TO DETAIL

A recent Surrogate's Court case, *Matter of Hedberg, N.Y.L.J. 9/19/14, p. 21, c. 2 (Kings Co.)* serves as a reminder to estate planning attorneys to be careful and cover all the bases necessary to ensure a Will is properly prepared and executed.

The facts of the case are briefly: decedent' daughter called the attorney to prepare a Will for her mother. The attorney sends a questionnaire form to the daughter for her mother to complete. The questionnaire was completed and sent back to him, however, he did not know whether the decedent or her daughter had prepared it. His only follow up to the questionnaire was some phone conversations with the daughter to fill in the blanks left in the questionnaire. When the Will was finished, the daughter brought her mother to the attorney's office, but did not take part of the conference between the attorney and her mother. The attorney testified at trial that he summarized the terms of the Will and asked the decedent to review it herself, which she took along time in doing. This suggested that the decedent carefully read the document.

Interestingly, after trial the jury held in favor of probating the Will; however, the Surrogate Judge entered a directed verdict denying probate. The chief reason? The Petitioner only offered the testimony of one attesting witness to the Will, not both witnesses as is required pursuant to Surrogate's Court Procedure Act Section 1404. Accordingly, the Court had ruled that the Petitioner had failed to establish a *prima facie* case for a valid Will.

The Court could have stopped there, but it did not. Instead, the judge added that even if the Petitioner had made application to dispense with the second witness' testimony, and the Court granted that application, he still would not have admitted the Will to probate. The judge stated that he would have required further additional proof before he would admit the Will, noting that a failure of recollection intensifies the care and vigilance that must be exercised in examining the remaining evidence. The Court stated that the testimony of the attorney draftsman raised more questions than answers. Example: the attorney never asked the decedent about her next of kin, relying only upon the questionnaire he received, although he did not know whose handwriting it was. Further, the Court goes on to note that even assuming the questionnaire was completed by the decedent, it did not mention property specifically bequeathed to a son, other than a reference to it being the decedent's address on the questionnaire.

Brooks' Blast

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Additionally, a question in the questionnaire regarding specific bequests was left blank. The Court thus concludes that since the attorney admittedly never spoke to the decedent until the day of the execution ceremony, at which point the Will was already drafted, it could not have been the decedent who informed him that the property was an asset of hers and that it was to be devised in the Will to her son. In sum, the Court concluded that the proof at trial failed to show that the Will was an expression of what the decedent wanted. And, it added, that it is not the duty of the Court to strain after probate, nor in any case to grant it where grave doubts remain unremoved and great difficulties opppose themselves in so doing.

The interesting thing about this case is that the Court went way beyond what it had to to come to its conclusion. Therefore, it must be assumed that the Surrogate Judge was taking the opportunity to warn attorneys to be careful how they approach the estate planning process and develop estate plans for their clients. A good lesson learned.

We would be honored to serve your clients with their estate and asset protection planning desires and goals. We are available not only at our office, but at yours and the client's home. We regularly serve clients in all eight counties of Western New York and the westerly Finger Lakes region as well.

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