MANOS, MARTIN & PERGRAM CO., LPA

50 North Sandusky Street
Delaware, Ohio 43015-1926

Phone: 740-363-1313
www.mmpdlaw.com

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Client Bulletin

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Should you have a "Premortem" Will?

Your Will is supposed to be your final, authoritative and enforceable statement of intent that governs how your estate is to be distributed. You anticipate that it will be honored and respected by your family. But more importantly, you want your Will to be upheld and enforced by the court and you want that Will to prevail if it is ever challenged.

Your Will can be successfully challenged if the challenger can satisfactorily prove that when you signed the Will, either (1) you lacked the necessary capacity to execute a Will, or (2) the Will is the product of someone else's undue influence upon you. If your Will were challenged, *you* would be the best person to testify as to whether you had sufficient capacity or whether you were unduly influenced. However, you cannot testify because, after all, if this is *your* Will that people are fighting over, then you have already died. Maybe you should have had a "Premortem" Will.

Ohio is one of only a handful of states that will allow your Will to be judicially validated *premortem* or "before your death." Here is how the process works. You file a petition with your county probate court which explains that you want to make a new Will and you ask the court to declare that the new Will, once you execute it, is legally valid. The court schedules a hearing date and notice of the hearing is sent to (1) those who would inherit from you if you died intestate (without a will) and (2) to those who are named to inherit under your most current Will. On the day of the hearing, you bring the new Will that you want to sign (you don't have to disclose its terms) and you give testimony to prove that you have testamentary capacity and that you are not susceptible to undue influence. You would be questioned by your lawyer on these points, but then those who received notice of the hearing (or their lawyers) are allowed to ask you questions too. It is the judge's responsibility to decide if you have sufficiently proven that you have testamentary capacity and that you are not susceptible to undue influence. According to the Supreme Court of Ohio, you have testamentary capacity if you have "sufficient mind and memory to: (1) understand the nature of the business in which you are engaged, (2) comprehend generally the nature and extent of your property, (3) hold in your mind the names and identity of those who have natural claims upon your bounty, and (4) be able to appreciate your relation to the members of your family."

As soon as the judge determines that you possess the necessary testamentary capacity and that you are not susceptible to undue influence, you execute the new Will right then and there. Once the Will has been properly executed, the judge declares the Will, *premortem,* to be valid and the hearing is concluded. Quickly, the Will is sealed in an envelope and then locked away in the court so that its integrity remains protected until after you have passed away. The filed Will is available during your lifetime only to you, but if you remove it from the court's possession, its declaration of validity is void. After your death, the Will's validity cannot be challenged by anyone who is proven to have been provided with notice of the hearing.

If your Will disposes of your assets in a nonconventional or otherwise unexpected manner, you should anticipate a possible challenge to the Will's validity after you've passed away. If this concerns you, a Premortem Will is about as iron-clad as a Will can possibly get, and perhaps worthy of further consideration.

Notice

This bulletin provides general information and is not legal advice. Please contact us if you need legal advice.

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