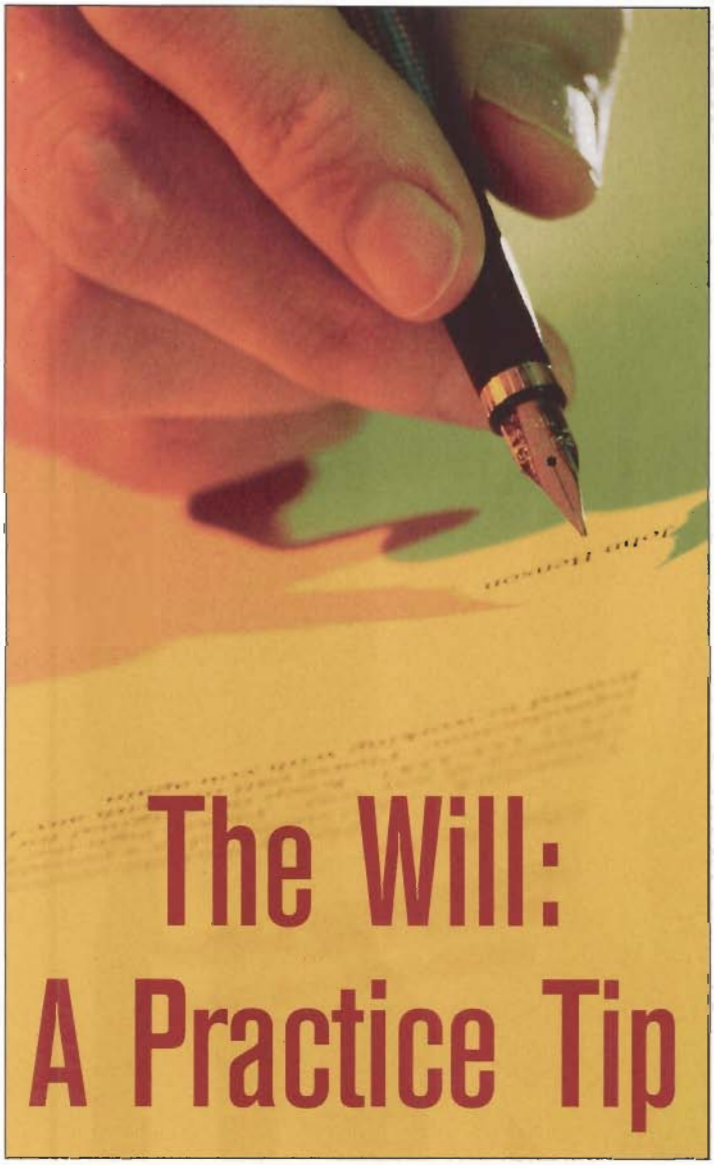

The Will: A Practice Tip

BY DANIEL J. SIEGEL

The will. Virtually every lawyer has drafted one. Whether as a courtesy to a client, as a way of developing a practice or as an integral part of an estate law practice, drafting wills is essential.

For most attorneys, drafting a will, particularly a "simple will," is relatively straightforward. Most clients do not own sufficient assets to worry about the "death tax" that has become a regular part of the political vernacular. There are, of course, other clients whose wills are but one component in a complex series of trusts and other documents designed to minimize estate taxes and maximize the speed with which assets can be conveyed.

Regardless of whether the will you draft is simple, complex or somewhere in between, your client will have to designate an Executor, the person who handles all of the paperwork and is responsible for the affairs of the estate. In virtually every will, the testator also designates a successor Executor, a person who will succeed or replace the first Executor if something prevents that person from completing his or her duties. Again, this seems like a simple process. But it isn't always.

In fact, recent experience has proven just the opposite, at least according to the Register of Wills in Montgomery County. Consider the following clause in a will (drafted, I might add, by one of the most respected probate attorneys in the region):

Should my wife, the Executor, wish to resign, or be unavailable, unable or unwilling for any reason to act as Executrix, I appoint my son as Executor of this my Last Will.

That seems simple and straightforward enough. That depends, however, upon the person to whom you talk.

What happens, according to this clause, when the Executor, after having been duly appointed, dies? Does the son become the Executor? Not according to the Montgomery County Register of Wills. In two instances—on the same day—the Register of Wills refused to appoint the person named in two virtually identical clauses, and instead advised the would-be Executors that their interpretations were wrong.

In my case, I asked the Register of Wills to reconsider her decision, and was told that she would not. According to the Register of Wills, once the original Executor "acts," then the remainder of this clause is irrelevant—and all heirs have the right to become Co-Executors unless they sign a Renunciation.

In other words, the paragraphs appointing the Executor clause must read:

Should Individual A, the Executor, wish to resign, be unavailable, unable or unwilling for any reason to act, or should the Executor die, resign, be unavailable or unwilling to continue to act as Executor after having been appointed, then I appoint Individual B to serve as Executor of this my Last Will.

Without the latter clause, the heirs must obtain Renunciations in order to continue processing the Estate. Of course, if the other heirs balk, your client may be forced to file a Citation and go through other legal proceedings, while the legal fee meter runs.

This "hypertechnical" interpretation is not only inconsistent with the stated desire of the testator, it adds unnecessary costs to the administration of an estate. In addition, it can lead to some absurd results.

For example, consider a will that specifically disinherits one of two children, leaving the entire estate to the other child, and naming that beneficiary's spouse as the alternate Executor. Unfortunately, after the parent dies, the child/beneficiary either dies or is unable to continue as Executor. According to the Montgomery County Register of Wills, if the will contains the first clause, the child's spouse does not become Executor. Instead, the disinherited child has the right to become the sole Executor—or that person must sign a Renunciation. Obviously, for a disinherited child, there is no reason or incentive to cooperate, although there is motivation to do anything possible to add to the other heirs' legal bills.

The paragraph appointing an Executor is a standard part of every will. Most read similarly to the first clause, and seem to be straightforward. While many will disagree with the Register of Wills' interpretation, it is difficult and expensive to challenge the ruling. The best way to address the problem is to prevent it from happening. That's the easy part. When drafting your next will, make sure that the paragraph appointing the Executor is crystal clear, and that there is no room for differing interpretations. Otherwise, the wrath of the heirs will be upon you. ■

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