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Estate Planning with Certainty

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YET ANOTHER CASE OF A WILL DENIED PROBATE

A 2015 Queens County Surrogate's case, *In re Keene*, N.Y.L.J, April 30, 2015, is yet another reminder of the fact that Wills, in order to be effective, must be executed in the proper manner.

The facts in the Keene case are as follows: Apparently the witnesses signed it before the Testator (the person making out the Will), because they could not wait for the Testator to arrive at the signing ceremony. Additionally, and for some unknown reason, a notary public was present and testified that the statutory requirements for the formal execution of a Will were complied with; however, he had no specific recollection of whether the Testator said anything to him or anyone else on that day. The court concluded that the notary's testimony was not credible, because there was no sufficient proof submitted to establish that the elements of the Will signing ceremony had complied with statutory requirements. The court found that the Testator had failed to sign the instrument in the presence of the witnesses and he did not publish and declare the instrument to be his Last Will and Testament. *~cont pg. 2*

MEDICAID APPLICANT PENALIZED FOR GIFTS MADE BEFORE MAJOR HEALTH PROBLEMS-

A 2014 New Jersey case (*S.L. v. Division of Medical Assistance and Health Services*, N.J. Super. Ct., App. Div., No. A-3520-11T4, Sept. 2, 2014), illustrates the problem when an elderly person attempts to make gifts to his or her family for all the right reasons. In this case a 96 year old Medicaid applicant (S.L.) was penalized for gifting $40,000.00 to her children between 2007 and 2009. Although S.L. was 93 of the time of the first gift, she had not been diagnosed with any long-term illnesses and still had money in her savings account after the last gift.

During that period of time, S.L. lived with her son who had helped her with errands and doctors' appointments. Everything was going fine until in 2009 she had an unexpected minor stroke and also a fall where she broke two ribs. After those two health events, she was unable to live with her son any longer and entered the nursing home and applied for Medicaid benefits. *~cont pg. 2*

Free Workshops

May 23, 2017

Randolph VFW

E. Randolph, NY

6:30 to 8:30 p.m.

June 6, 2017

Jamestown Hampton Inn
Jamestown , NY

6:30 to 8:30 p.m.

MEDICAID APPLICANT — (*continued from page 1)*

The Medicaid examiner, applying the federally mandated 60 month lookback rule, discovered the $40,000 gifts made within the last two years and assessed a transfer penalty based on the gifts. S.L. appealed the Medicaid examiner's decision, arguing that the transfers were made for reasons other than to qualify for Medicaid. She claimed that at the time of the gifts, she had no intention of living in a nursing home and had retained money to live on. After an administrative hearing, the state of New Jersey affirmed the penalty, finding that because of her age, health, and lifestyle limitations, she had not rebutted the *presumption* that Medicaid eligibility was a factor in the transfers.

S.L. appealed her case to the New Jersey Superior Court Appellate Division, which affirmed the penalty. The appellate court held that S.L. had not proven the transfers were made for some "*exclusive other purpose*" than to qualify for Medicaid.

The lesson - Be careful of making gifts to children and grandchildren when you are at an advanced age. What age is advanced? No one knows for sure. Any gifts will to be subject to the 60 month Medicaid lookback rule and that can happen at any time if someone were to have a major stroke or other debilitating medical event that is unexpected.

Kameron's Quote of the Month:

"I didn't attend the funeral, but I sent a nice letter saying I approved of it." - Mark Twain

YET ANOTHER CASE OF A WILL DENIED PROBATE (*continued from page 1)*

Additionally, at the court hearing, it was revealed that the execution of the decedent's Will was not supervised by an attorney. This is significant, because a Will whose execution is supervised by an attorney carries a presumption of validity in the law. Thus, a Will that is not signed under the supervision of an attorney carries the additional burden on the nominated executor at the time of probate to affirmatively prove that the will was executed according to the statutory requirements. What are these requirements? At the signing of the Will, the Testator must state to the witnesses that the document is his Will and request the witnesses to witness his signature and then also sign it. The witnesses must then sign the Will in the Testator's presence. Additionally, the witnesses must be satisfied that the Testator has what is referred to as "*testamentary capacity*". This is a legal requirement that anyone must possess to be able to make and sign a valid Will. Without a competent attorney involved in the preparation and execution of a Will, it is very likely the witnesses would have no idea of the testamentary capacity standard or how to establish it at the time the Will is signed. Additionally, they very likely would not know the statutory requirements for the Will signing ceremony.

Anyone desiring to have any effective Will should consult with a competent attorney to do so. At Brooks & Brooks, we believe that a Will is only one part of an effective estate plan. Trusts, for a variety of purposes, should also be considered and an effective plan would also include a Power of Attorney (with enhanced powers), a Health Care Proxy (with enhanced powers and language to be compliant with other states), and a Living Will Declaration.