WRITE YOUR OWN WILL
(and your family will pay the price)

By Virginia A. McArthur

There is a popular misconception that a Will is all one needs to dispose appropriately of one's property at death, and a widespread misunderstanding, even among lawyers who are not expert in the estates and trusts field, of how the numerous components of an estate plan must be coordinated to avoid skewing the estate disposition. This Alert provides anecdotal descriptions of two kinds of errors the author has seen in wills prepared by persons who are not versed in estates and trusts law: errors within the documents themselves, and errors of how the documents operate with other parts of the estate plan.

In my 30 years of experience in the field of Estate and Trust law, I have had occasion to probate a number of Wills that the testator or testatrix wrote without benefit of experienced counsel. This is almost always a mistake.

Perhaps you're thinking I'm a lawyer claiming to be indispensable to keep business. Well, no. I'd rather not get some of the business we get because of badly written Wills. Ultimately, when the testator or testatrix dies, the Will comes under the magnifying glass. Imperfections loom large. And the additional costs of probating a bad Will are sad reminders of the cost of being cheap.

How serious can these imperfections be? Here are two examples:

FIRST: A well-known jurist who, when he had been practicing in another state, was an estate planning lawyer, wrote his own Will which was probated in Virginia. Virginia law requires a trustee of a trust established under a Will (that is, a "testamentary trust") such as a trust for a spouse or a minor child, to report annually to a Commissioner of Accounts, unless the Will specifically states that the trustee is not required to report.

The Will of the jurist did not have that provision. The Will was in every other respect clear, sensible and eminently manageable, but solely because of this missing sentence, the trustee of the spouse's trust was required to report annually to a Commissioner of Accounts until the trust was moved out of state. The cost of reporting includes preparation of the accounting in the manner the Commissioner wants (this will often be done by a lawyer), plus a fee paid annually to the Commissioner for reviewing the account. All avoidable expenses.

SECOND: A client with a son and daughter who wanted to treat them equally, but wanted to provide controls on management of the daughter's assets had a non E&T lawyer draft a Will that provided that the children would receive separate assets. The son was to receive the large IRA, and the daughter was to receive the (similarly valued) assets under the Will, to be held in trust. The Will was written when amounts over $1 million were subject to Federal estate tax, and the estate exceeded that amount. Thus, the tax clause would be triggered. The Will's tax clause called for the

estate tax to be paid "from the residue of the estate." Because of this language, had the Will not been rewritten before the testatrix died, daughter's share would have paid the taxes on son's share.

These examples illustrate two kinds of errors that can be (and regularly are) made by non-lawyers, or by non-estate planning lawyers writing Wills. The first kind of error (Type A) is within the document, and arises from lack of understanding of the requirements, or in some cases, the effects, of language used. The second example illustrates the problems that can arise from not understanding how the Will fits into the complete estate plan (Type B).

More examples of Type A errors are the following:

Not really thinking about what is written:

We probated a Will written by an engineer, not a lawyer, that had two residuary clauses. A residuary clause leaves the "residue" of the estate, that is, what is left after the off the top bequests have been paid out, and after costs of administration and debts have been paid. The Will looked fine and complete by page three, and then on page four had a second "residuary clause" with slightly different provisions from the first one. So it was necessary to go to court to have a judge decide how these provisions were supposed to work together. Any Will provision that requires a judge's interpretation is an expensive Will provision.

In another matter, the Will called for a testamentary trust to be divided when the income beneficiary of the trust died. That was it. The assets were to be divided equally among several people. Nothing was said about actually conveying the assets after they were divided. It seems obvious that the assets were to be distributed, but a stickler trustee would not act without the direction to distribute, and adding that provision required going to court.

Omitting a required element:

In another matter in our office, the decedent, a lawyer, had written his own Will but had failed to include the "attestation language" required for a D.C. Will to be recognized as having been properly executed. The witnesses to the Will had to be located so they could be questioned as to whether indeed the testator signed the will in front of the witnesses, that the witnesses signed in front of each other, and that they knew the document being signed was the testator's Will.

Another Will executed in Virginia, where you need a "self-proof" page to show proper execution of the Will, was delayed 4 months before being admitted to probate because the Will had no such page. One of the witnesses who had to be contacted to affirm proper execution was in India for an extended period of time, and could not be immediately located. We feared that the Will was not going to be admitted to probate at all. The testatrix had made her own Will on a form.

Failing to understand how the Will will actually operate:

Lawyers who practice estate and trust law will not write a Will requiring payment of "all of my just debts," because this phrase arguably revives debts which otherwise would be noncollectible because of a statute of limitations. E&T lawyers will require payment of only "enforceable debts" or

even not mention debts, because they have to be paid anyway, if legitimate and the funds are available.

Experienced lawyers will not make teeny bequests to people who might expect more: try getting a receipt from a beneficiary to prove that you actually delivered the $10.

On the other hand, it may be necessary to make a bequest to a spouse to prevent the spouse from being treated as having exercised the right of election to take against the Will, automatically giving the surviving spouse a share of the estate as allowed by state law.

A common mistake of lay people writing their own Wills is to dispose of each asset by name. This disposition is appropriate for a piece of real estate that should be given to one or two individuals, but it is not appropriate for "my account at National Bank of Washington." Why? Well, there are at least four reasons: first, that specific account may not exist when the testator dies, and the beneficiary is thus deprived of a bequest that the testator intended him to have. Second, the value of the account, which might be in an appropriate proportion to assets going to other beneficiaries, might change (up or down), and thus skew the relative benefits the testator had intended to convey.

The third reason experienced E&T lawyers avoid Wills naming a beneficiary for each asset is that the administration of the estate will require money. The decedent needs a funeral and has legitimate bills that need to be paid. The attorney for the estate needs to be paid. There may be a state estate tax. How do these things get paid if every individual asset owned by the testator is designated by name to go to a beneficiary? Straightening this out is messy and expensive.

The fourth reason is this: the testator may have additional assets at the time of death that are not listed in the Will. These assets pass "by intestate succession." That is, they go to the beneficiaries required by applicable state law. In effect, each state has statutory language that operates as a Will for people who have not had a custom-made Will prepared for them (such people are said to die "intestate"). Most people don't know what the provisions of that intestate "Will" are. For example, in many states the spouse does not receive the entire estate.

Yet another example of not thinking about how things will play out is the case of the same sex couple, or the childless heterosexual couple, whose Wills provide that if the partner (or spouse) has predeceased, the estate will go entirely to the family of the survivor. That often means that the assets produced by the efforts of the predeceased partner will go to the surviving partner's family instead of to his own. This seems so random and accidental as to be unfair, and it is very likely not what the parties want.

Finally, in the category of not comprehending how things will play out in experience, we have the bequest to a minor, or to "children in equal shares," where the children are minors. The problem? The estate can't remain in existence and under the control of the Personal Representative until the 5, 7 and 9 year olds reach age 18, the age of majority. So the court will require another responsible party to take control: a guardian appointed by the court—who may or may not be someone the parents ever knew.

The cost of this mistake is quite high: The court-supervised guardian must be bonded (ka-CHING), paid (ka-CHING), must file annual accountings with the court or Commissioner (depending on jurisdiction), must petition the court in advance for authority to spend money for identified purposes on behalf of the minor (ka-CHING), must invest the guardianship assets in approved ways, and must pay over the remaining funds to the child at age 18 (the red Porsche clause). Note to young parents buying life insurance: if you have minor contingent beneficiaries the same process will be required by the insurance company if those minors become the beneficiaries.

Type B Errors – Lack of Coordination

The second broad category of errors of non E&T lawyers writing Wills (the "Type B" error) is the failure to understand the Will as only one element of an estate plan. The "estate plan" is NOT just a fancy way to refer to the Will. Consider the living trust. Beneficiary designations. POD (Payable on Death) and TOD (Transfer on Death) designations. Joint ownership of assets. A very high percentage of a typical decedent's assets may pass under these forms of ownership or these contracts. The Will does not touch these assets, except perhaps to allocate the tax burden.

A client once came in who had two major assets: an IRA and a residence, each worth about $1.3 million. He had quite detailed ideas about how his Will should dispose of his assets, and it took an hour of our meeting to flesh these out. Of course, the Will provisions applied only to the residence and his minimal other probate assets. When I asked about his IRA beneficiary designation, he waved it off as "just a form." OK, but it's a "form" that disposes of $1.3 million. That made him sit up—it just had not occurred to him that this was as important as his Will.

Doing the proper job to carry out a client's intentions requires looking at all of the client's interests in property and coordinating them. Under current law there simply is no single document that swoops in to collect all assets and direct them where the client wants them to go when he dies. John Hancock will pay attention only to the completed beneficiary designation in its file. Fidelity will distribute the IRA to the named beneficiary, A, upon delivery of a death certificate, even if the Will says that "the personal representative shall give my Fidelity IRA to B." The joint bank account the decedent owned with his sister Joan goes to her, even if his Will leaves "my entire estate to my daughter, Mable." And so on.

It is not uncommon for a decedent to have nothing, or next to nothing, passing under a Will. Take the case of many married couples who have everything in joint name. Wife's probate assets might include her wedding and engagement rings and the ratty sofa and CD collection she brought to the marital home from her bachelorette apartment. If there is nothing passing under the Will, the Will is not the most important part of the estate plan. The most important part might be the IRA beneficiary designation that is "just a form."

A typical result of failing to understand how these parts must be coordinated is illustrated by the following fact pattern:

Widowed mom has three children. (It's always three children, in my experience, but the horror is just as great with other numbers of children.) Mom lives in DC, near middle daughter, Two, who helps Mom with her finances. Older and younger sisters, One and Three, respectively, live on the West Coast.

One day Mom says to her banker, "I want Two to be able to pay my bills for me." "Oh certainly," says the banker, rendering legal advice: "just add her to your account," which Mom does. Now the account is owned by Mom and Two. Perhaps Mom thinks this is a convenient way to have Two manage other assets, too, so she retitles all of her liquid funds into the new ownership, until she has $900,000 of assets owned in joint name with Two.

Mom dies, owning her house worth $600,000 in her own name. Her Will says (because she wanted to treat all of her children equally) "I give my estate to my daughters, One, Two and Three in equal shares."

Result?: Until the girls meet in court, One and Three get 1/3 of the house, or $200,000 each and Two gets 1/3 of the house, plus the joint assets, for a total of $1.1 million.

The message: understanding how the assets are held and disposed of is a critical part of estate planning, and if changed, can undermine a plan. Estate planning is complicated. Most clients are best served by having a team of professionals: lawyer, accountant, financial adviser and others, fashion the plan.

