

TO EACH HIS (AND HER) OWN

Why lawyers should encourage separate wills

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In the days before any reference to the Deity in a legal context became politically incorrect, I would urge spouses to both make their wills even if one were ill or much older than the other – since, as we all know, no one has a contract with G-d.

And therefore if one spouse comes in to make a will because he has a possibly terminal illness or a history of a potentially fatal medical condition, it is still a good idea to have the other spouse make a will.

Let me tell you a true story that illustrates this.

In 1998 a senior lady came in to see me because she had been diagnosed with a brain tumor. Only surgery would determine if it was malignant. And if the test proved positive, she probably would not recover. We prepared her will and strongly suggested her husband make one as well. She told us she would mention it to him but he was on dialysis and it would be an effort for him to come to my office. Fortunately her tumor was benign.

From time to time we would call her or she called us to let us know her husband would be in as soon as he was able. She finally called in late January 1999 and told us he could be in the following week. In February 1999 he died.

After the funeral, she called frantically. It was urgent that she see us. The decedent's three children from his former marriage (both spouses were widowed and each had three children) informed her that they had a will executed by their father leaving everything to them.

I reassured her that as the surviving spouse she was entitled to certain benefits; therefore, the Court would be notifying her that she could come in to Court and claim her elective share of the Estate (one-third) and the surviving spouse allowance of \$40,000.00.

In the meantime, after I advised the executor's counsel that I was representing the widow, he sent me a copy of the inventory for her approval. We examined the inventory and found that the marital residence had been omitted. We notified counsel and he checked with a title examiner who confirmed that the residence was not titled to the decedent. We then did our own search and we found that a deed had been executed by the decedent to one of his daughters two weeks before he died.

A month later, while she was still in mourning for her husband, one of her stepchildren knocked on her door, handed her a paper (Notice to Vacate Premises), and left. In a panic, almost hysterical, she called and asked "does this mean I have to leave my home in three days?" I explained that this was just a first step in an eviction proceeding and must be followed up by a formal complaint in Municipal Court.

Weeks went by and the widow was beginning to think that her stepdaughter was just being nasty when I got another frantic phone call: the eviction case had been filed and was set for hearing on a Monday morning two weeks later.

In the meantime we met with our client to discuss the surrounding incidents leading up to the execution of the deed.

We decided that based on incongruities in the deed we had a viable cause of action.

Thus, we filed a case in Common Pleas Court to set aside the deed. Moreover, we alleged that the widow had an equitable interest in the property because the house had been gutted and rebuilt from scratch by the two spouses. They had pooled their combined resources and incomes to pay for material and labor and had built an attractive modest home. Therefore, we reasoned, the widow had a constructive trust in at least half the property. We also alleged that discrepancies in the dates and notary signature invalidated the deed from decedent to his daughter. We then prepared a motion in Municipal Court for a stay of the eviction proceedings until after the Common Pleas case was heard and settled.

On the Friday before the Monday the eviction hearing was set, the duty judge in Municipal Court approved the entry granting the stay.

After four years the Common Pleas case was settled (due to the mediation skills of then Magistrate Harold Paddock). But the settlement of necessity required the widow to buy out two-thirds of the value of the house, because, under the best case scenario, the deed to the house would go back into the estate and the widow would only receive her one-third intestate share.

The moral of the story is clear: When one spouse wants to make a will, strongly urge the other spouse to do so at the same time. And, while both parties are alive, have someone check the title to their property in the Recorder's office.

These two precautions should prevent the disaster that faced our client – four years of litigation, uncertainty, and legal expense; three separate cases in three different courts.*

* The Estate of Collie Brown, Sr. – Probate Case Number: 472287
Deyett Robertson vs. Angell Brown – Municipal Court Case Number: 200CVG033335

Angell Brown vs. Deyett Brown – Common Pleas Court Case Number: CVH-1212390



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