# Client Newsletter

Dibble & Miller, P.C. February 1, 2013 – No 066 www.dibblelaw.com

D&M P.C.

From the
Law Offices of

**Dibble & Miller, P.C.**

55 Canterbury Road
Rochester, NY 14607

Tel: (585) 271-1500
Fax: (585) 271-0118

## Executing Your Will – Failing to Sign a Will Properly Can Cause it Not to Be Followed

As we discussed in the July, 2012 issue of our Client Newsletter, a last will and testament is a simple and inexpensive way to make your wishes known when you can no longer do so personally, to ensure that your assets are used to protect those you love, and to ensure that those assets are ultimately transferred to individuals or entities that you wish to receive those assets. A will is also the document by which you would appoint a guardian for any minor children, and where you would nominate a trusted friend or relative (i.e., an "executor") to handle your estate after your death.

A will does not become operational until after you die and your will is presented to the Surrogate's Court (which is the court that handles wills) for probate – a court proceeding in which your executor "proves" to the Court that you executed a valid will. There are very strict requirements in New York State regarding what will be accepted by the Court as a valid will, and therefore your will should be drafted by an attorney, who will not only ensure that your wishes are properly expressed in clear language, but also oversee the execution of your will in a manner that comports with the formalities required for probate.

Although your will is the best evidence of your testamentary intent, the Surrogate's Court can refuse to admit part or all of your will to probate if the will is not properly executed according to state law. In other words, the Court can disregard your will if it believes it was improperly executed, which would render your will useless. If the Court does not accept your will to probate, the disposition of your assets will be made as directed by statute, as opposed to the wishes and desires expressed in your will.

### The "Will Ceremony"

Except for nuncupative and holographic wills (which will be discussed in greater detail below), every will must be in writing and properly executed by a person who is eighteen years of age or older.

The formal execution of a written will takes place at a will execution "ceremony" which is usually held at an attorney's office and supervised by the attorney. Typically, the attorney will have met with the testator (i.e., the person executing the will), discussed his or her testamentary wishes, and have drafted the testator's last will and testament to the testator's satisfaction.

At the will execution ceremony, the attorney will ask the testator a series of questions to confirm the testator's "testamentary capacity," which refers to the degree of mental ability which the testator legally must have at the time the will is executed.

A testator has testamentary capacity if the testator (a) understands the nature and consequences of executing a will, (b) knows those who would be considered the natural objects of his or her bounty and his or her relation with them, and (c) is aware of the general nature and extent of his estate at the time the will is executed. It is possible for a valid will to be executed even by a person who has been diagnosed with dementia or mental illness, who has been adjudicated an incompetent, or who suffers from drug or alcohol addiction, if such a person can show that he or she possesses the capacity requirements described above.

### Execution and Attestation of the Will

After testamentary capacity has been demonstrated by the testator, the testator must sign the will at the end. If the testator cannot sign his or her name, the testator may direct another person to sign the testator's name to the will so long as the testator is present and that person also signs his or her own name to the will.

At least two witnesses must attest to (i.e., certify) the testator's signature on the will. Although it is possible for the testator to "acknowledge" his or her signature to the attesting witnesses after signing the will, the better practice is that the will be signed by the testator (or testator's appointed signor) in the presence of attesting witnesses. The testator must declare to the witnesses that the document being signed is his or her will, and the testator must request that the witnesses sign a properly drafted attestation clause. Careful consideration must be given to the selection of attesting witnesses in order to avoid the likelihood that the Surrogate's Court will invalidate a gift or bequest made to the attesting witness in the testator's will.

### Nuncupative and Holographic Wills

A will is "*nuncupative*" when it is unwritten, and at least two witnesses can clearly establish that the testator made such a will and can describe its provisions. A will is "*holographic*" when it is written entirely in the handwriting of the testator, and the will is not otherwise executed and attested to in accordance with the formalities described above.

A nuncupative or holographic will is valid only if made by (a) a member of the armed forces while in actual military or naval service during a war or armed conflict, (b) by a civilian who serves with or accompanies an armed force engaged in actual military or naval service during war or armed conflict, or (c) a mariner at sea. However, nuncupative and holographic wills become invalid one year after discharge from the armed services or after a civilian ceases to serve with or accompany an armed force, or three years from the time such a will is made by a mariner at sea.

### The Importance of Attorney Assistance and the "Self Proving Will"

Strict compliance with the execution requirements described here will increase the likelihood that the Surrogate's Court will admit your will to probate, and will significantly decrease the likelihood of a successful challenge to the validity of your will (i.e., a "will contest") based upon improper execution. Again, the Court will not comply with the testamentary wishes set forth in your will if your will is not admitted to probate.

It is important to note that when an attorney conducts the will execution ceremony, the Court adopts a rebuttable presumption that all of the required formalities were satisfied and that the will was properly executed by the testator.

Moreover, an attorney can draft an affidavit for the attesting witnesses to sign which contains the facts necessary to establish the genuineness of the will, the validity of its execution, and to prove that at the time of execution, the testator was in all respects competent to make a will and free from any restraint or duress. When a properly drafted affidavit is included with a will upon its submission to probate, the validity of the will becomes "self-proving" in the eyes of the Court, thereby significantly increasing the probability that the Court will admit the will to probate.

***Please contact Dibble & Miller today if you have questions about your existing will or if you wish to execute a new will. We strongly recommend that your will be reviewed periodically to ensure that it is adequate for your current status and needs.***

# DIBBLE & MILLER, P. C.

ATTORNEYS AT LAW

55 CANTERBURY ROAD, ROCHESTER, NEW YORK 14607
PHONE: 585-271-1500 FAX: 585-271-0118

WEB SITE: www.dibblelaw.com

**WE THANK YOU FOR USING OUR FIRM.**
**PLEASE REMEMBER THAT WE HAVE AN EXTENSIVE PRACTICE TO SERVE YOU:**

- ***Business Agreements*** *— All Types, including Non-Compete, Buy-Sell, Non-Disclosure, Employment, Shareholder and Partnership Agreements*
- ***Business Formations*** *— Start-Up Businesses and Partnerships, Business Purchase and Sale Agreements, and Formation of Corporations and LLC*
- ***Criminal Law*** *— Arrests, Felonies, Misdemeanors, Traffic Tickets, White Collar Crimes, DWIs, Plea Bargains, Trials, and Appeals (State and Federal)*
- ***Debtor Rights*** *— Debt Resolution and Bankruptcy — We Are A Debt Relief Agency — We Help People File for Bankruptcy Under the Bankruptcy Code*
- ***Estate Planning*** *— Preparation of Wills, Trusts, Health Care Proxies, and Powers of Attorney and Estate Planning and Administration*
- ***Family Law*** *— Divorce, Custody, Visitation, Child Support, Paternity, Pre-Nuptial Agreements, Separation Agreements, and Family Mediation*
- ***Litigation*** *— Civil, Business, Contract, Commercial, Corporate, Real Estate and Stockholder and Partner Disputes*
- ***Personal Injury*** *— All Types, including Car Accidents, Slip and Fall, Physical and Sexual Abuse, Assaults and Work Accidents*
- ***Real Estate*** *— Residential and Commercial Purchases, Sales, Closings, Mortgages, Land Contracts, Foreclosures and Real Estate Leases*
- ***Tax Defense*** *— Defense of IRS & NYS Tax Compliance Enforcement:*
  - *Defense against Civil and Criminal Tax, Workers Compensation and Unemployment Audits, Investigations, Protests and Litigation*
  - *Defense against Collection of Income, Payroll, Sales and Corporate Taxes*
  - *Resolution of Tax Levies, Liens and Income Executions*
  - *Responsible Person and TFRP Defense for Trust Funds, Sales, Use and Withholding Taxes Assessments and Collections*
  - *Preparation, Filing and Negotiation of Offers in Compromise*
  - *Negotiation of Tax Installment Agreements and Tax Payment Plans*
  - *Innocent & Injured Spouse Defense*

*** * * IF YOU NEED LEGAL ADVICE, PLEASE CONTACT US FOR A FREE CONSULTATION * * ***

We Are A Full Service Law Firm – Free Initial Consultation – Attorney Advertising