THY WILL BE DONE by Atty. Angelo M. Cabrera

IGNORANCE AND INADVERTENCE IN WRITING WILLS, THE EFFECT

Whenever I conduct an estate planning forum, I would usually ask how many among those in the audience have already written a will and it would be not be surprising to see only one hand raised. Interestingly, that raised hand is usually mine.

In the few times that I actually had a participant acknowledge having written a will, almost always it is either improperly written or defective and for the most part, invalid.

Our laws on writing wills, particularly notarial wills, require substantial compliance with prescribed formalities as outline in Article 805 of the Civil Code. It cannot be over-emphasized that a will may be denied probate if the testator fails to follow one or two prescribed rules out of his ignorance of the law or just mere inadvertence. Simply put, it takes some effort and attention, if not legal advice, to produce a valid will. One mistake and you run the risk of invalidating not just a provision but the entire will itself.

Take for instance the case decided by the Supreme Court in 2006.

The case involves the probate of a notarial will, which was opposed on the ground that it was not executed and attested to in accordance with law. It was noted that the attestation clause did not state the number of pages; and the document was not signed by the attesting witnesses at the bottom thereof (although their signatures appear on the left-hand margin of the page). It was also asserted that the will was not properly acknowledged.

The Supreme Court ruled that the failure of the attestation clause to state the number of pages on which the will was written is a fatal flaw. This requirement aims at safeguarding the will against possible interpolation or omission of one or some of its pages and thus preventing any increase or decrease in the pages. There is, however, substantial compliance with this requirement if the will states elsewhere in it how many pages it is composed of. In this case, however, there could have been no substantial compliance with this requirement since there is no statement in the attestation clause or anywhere in the will itself as to the number of pages, which comprise the will.

The Supreme Court also ruled that a will whose attestation clause is not signed by the instrumental witnesses is fatally defective. It held that an unsigned attestation clause results in an unattested will. Even if the instrumental witnesses signed the left-hand margin of the page containing the unsigned attestation clause, such signatures cannot demonstrate these witnesses' undertakings in the clause, since the signatures that do appear on the page were directed towards a wholly different avowal. The signatures on the left-hand corner of every page signify, among others,

that the witnesses are aware that the page they are signing forms part of the will. On the other hand, the signatures to the attestation clause establish that the witnesses are referring to the statement contained in the attestation clause itself.

Finally, the Supreme Court also ruled that a notarial will that is not acknowledged before a notary public by the testator and the witnesses is fatally defective, even if it is subscribed and sworn to before a notary public. The expressed requirement of the law is that the will be acknowledged and not merely subscribed and sworn to, the latter being that part of the affidavit where the notary certifies that before him, the document was subscribed and sworn to by the executor. An acknowledgment, on the other hand, is the act of one who has executed a deed in going before some competent officer or court and declaring it to be his act or deed.

An acknowledgment coerces the testator and the instrumental witnesses to declare before an officer of the law that they had executed and subscribed to the will as their own free act or deed. Such declaration is under oath and under pain of perjury, thus allowing for the criminal prosecution of persons who participate in the execution of spurious wills, or those executed without the free consent of the testator. It also provides a further degree of assurance that the testator is of certain mindset in making the testamentary dispositions to those persons he had designated in the will.

The Supreme Court declared, "A will whose attestation clause does not contain the number of pages on which the will is written is fatally defective. A will whose attestation clause is not signed by the instrumental witnesses is fatally defective. And perhaps most importantly, a will which does not contain an acknowledgment, but a mere *jurat,* is fatally defective. Any one of these defects is sufficient to deny probate. A notarial will with all three defects is just aching for judicial rejection." (G.R. 122880, 12 April 2006)

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My public seminar on inheritance and estate planning organized by Elyon Management and Consultancy Services will resume on February 23, 2013. For details, email elyonmanagement@gmail.com.