

Utah Spirit

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Elder Law: Be Careful When Amending Your Will

Several columns ago, I discussed some of the differences between a Will and a trust. That column also presented the factors to consider in deciding which instrument is best, depending on the particular situation, including costs and pros and cons. Since the number of Wills predominates over trusts, based primarily on costs and convenience, this column addresses amendments to Wills.

An amendment to a Will is also known as a “codicil.” A codicil may supplement, clarify, explain, modify, enlarge, restrict, or may simply confirm or revoke in part or in whole certain provisions of a Will. In drafting a codicil, substantial latitude is allowed. When a codicil is admitted by the Probate Court, it becomes a part of the Will.

A codicil must be drafted and signed in the same manner as a Will. That is, a Will or a codicil must be dated and signed in the presence of two witnesses, unless the Will or codicil is a holographic Will. A holographic Will or codicil, is one where the “material portions” of the Will or codicil are in the testator’s handwriting, the testator being the person for whom the Will or codicil is prepared.

After a Will has been drafted and signed in the presence of two witnesses, a testator may amend the Will with a codicil. Although the Will may have been professionally prepared by an attorney and is in typed form, a codicil to it may be in the handwriting of the testator. The codicil is valid if its material portions are in the testator’s handwriting, dated, signed by the testator, and the codicil contains some reference to the Will which is being amended.

All too often, however, a testator attempts to amend a Will by writing directly on the Will document itself. This may take the form of deleting portions, adding new text, and/or changing some portions. This method of amending a Will can be very risky.

Most likely, the handwritten changes are ignored entirely, leaving the Will intact as originally drafted. However, such changes could invalidate the entire Will. In any event, handwritten additions, deletions, or changes made directly on a Will document generally fail to achieve the purpose for which the changes were intended.

The better approach is to have a codicil drafted with the same formalities as the original Will. This should include having the codicil prepared by an attorney, dated and signed in the presence of two witnesses.

Unless two or more codicils are clearly not in conflict with each other and they relate to distinctly different portions of the Will, earlier codicils should generally be destroyed. By

destroying earlier and usually outdated codicils, litigation may be avoided during probate of the original Will.

An alternative to a codicil is to execute an entirely new Will. A codicil, being a separate document, may become lost or separated from its companion Will. To avoid this possibility and also the possibility of confusion, conflicts, or ambiguity, a new Will has a distinct advantage over a codicil.

The cost of a new Will, provided only minor changes are intended, may not be much greater than a mere codicil. Much of the time expended by an attorney in the preparation of a Will or codicil results from communication with the testator so that the testator's objectives are correctly incorporated in the Will or codicil.

The amount of time required for dialogue with the testator is not much different for a codicil than for a new Will, provided the testator delivers the original Will to the attorney. Certainly the time required to sign a Will in the presence of two witnesses is no greater than doing the same for a codicil.

The main objective, however, is to implement changes to an original Will in a manner that minimizes the risks that such changes may be void or that the original Will may be invalidated. Executing a new Will is the best choice. A formal codicil is the next best alternative. A holographic codicil may be valid if done correctly, but it is the most risky.