OAST & TAYLOR
Trusted Elder Law Professionals

**Inside Business Guest Expert Column**
December 2013

# The Holidays Are an Opportunity to Talk About Your Will

Rather than considering the subject as a "downer" on this festive season, families and small business owners should consider the holidays and the upcoming tax season as an opportunity to have some honest conversations about plans for their estates.

The damage caused by improperly written wills can be measured by more than dollars and cents; very often it is reckoned by the numbers of days, months, or years and degrees of anger, frustration, and disappointment.

As someone who has seen the good, the bad, and the ugly when it comes to last wills and testaments, I regularly caution people about "almost-a-will" documents. The key to making one's final wishes known requires a formal, legal instrument – a will – be properly executed.

Traditionally, Virginia has recognized two ways to execute a will. The first is a writing signed by the testator and two witnesses. The second is a holographic will that is valid if it is entirely in the hand of and signed by the testator.

That being said, the best way to ensure that your final wishes are properly documented and comply with Virginia law is to work with a qualified estate planning attorney.

For years, Virginia imposed strict formalities for a document to be considered a valid will. The first relaxation of these strict formalities was a revision to the Uniform Probate Code ("UPC"). That change, known as the "dispensing with formalities provision," relaxed some of the stringent measures to allow for some documents not executed in strict code compliance to be considered validly executed wills.

In 2007, the Virginia General Assembly approved Virginia Code § 64.2-404, which mirrored the UPC's position. As a result, courts may now admit to probate a written document not in strict compliance with the Code of Virginia. To clear this threshold, "clear and convincing evidence" must be shown that a writing was intended by the author to be considered as a will (or a revocation, alteration, or a revival of a formally revoked will).

If you haven't consulted an estate planning attorney to ensure that your final wishes are properly incorporated into a written document, then the next best thing is to make your intentions clear and have these wishes properly written down, signed, and witnessed. Perhaps a family meeting during the upcoming holiday season would be a good time to start this process.

-continued-

**Five things to remember when it comes to wills:**

1. After signing your will, discuss your estate plan with the members of your family and consider providing them and your executor with a copy of your will and other estate planning documents.

2. Couples with children from previous marriages present special issues unless they have a premarital agreement.

3. If a will is not properly executed, then the court may not allow the document to be admitted to probate and used as your will, even if your family knows your intentions.

4. Virginia Code § 64.2-404 allows some written documents that are not executed in strict compliance with the Code of Virginia to be treated as valid wills.

5. Attorneys must petition the appropriate circuit court for permission to admit to probate a written document not executed in strict compliance with the Code of Virginia. The circuit court must find by clear and convincing evidence of the testator's intentions to allow such documents to admit it to probate, and the document must be signed by the testator.