

## WILL EXECUTION

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1. **Your Client.** It does not matter who came to see you, you represent the testator. Someone else coming to you on behalf of the testator is a warning sign, not a client.
2. **Only One Original.** Do not sign duplicate originals.
3. **Sign It In the Lawyer's Presence.** It is not in the statute but it should be. Do not let the will be signed outside of your presence; it increases the risk of error. If it is not possible for the lawyer to be at the execution, he should try to be on the phone with them. Or make them fill out and sign the attached Will Execution Checklist. In any event, make sure they send the lawyer a fully executed copy of the will. The lawyer can then review it for some of the possible errors.
4. **Witness Selection.**
  - a. By law, the witnesses only need to be over 14 and credible. Texas Estates Code Section 251.051. Credible means they are competent to testify.
  - b. While not legally required, the witnesses ideally would be younger than the testator, of good character and reputation and apt to be in the same geographical area in the future.
  - c. The witnesses should not be beneficiaries under the will, Texas Estates Code Section 254.002 voids a bequest to a witness. The bequest may be saved by other corroboration, Texas Estates Code Section 254.002, but it would be foolish to rely on that.
  - d. It is not a good practice to even use someone related to a beneficiary, such as a spouse or child of someone who is a beneficiary.

- e. While the statute does not prohibit it, it is not a good practice to have someone designated as a fiduciary as a witness.
- f. Frequently, the lawyer and his staff are used as witnesses. In addition to the convenience, it may have other advantages. They are familiar with the procedure and they have more awareness of issues of capacity. However, if the lawyer's conduct is brought into question, they may suffer from that taint. If a contest is reasonably expected, it may be a good idea to have friends of the testator as witnesses. The lawyer should weigh these issues very carefully.

## 5. Ceremony

- a. The lawyer should always do the ceremony the same way. Years later when being deposed the lawyer probably will not recall that particular will ceremony but he should be able to say with confidence, "We always did it the same way."
- b. The only people who should be in the room are the testator(s), the witnesses, the notary and the lawyer. If anyone brought them or came with them, put them in the reception area or another room.
- c. The testator and the witnesses must be in each other's presence. While the statute only requires that the witnesses sign in the presence of the testator, if the witnesses do not see the testator sign, questions could be raised about who actually signed the will. The presence requirement suggests a line of sight but some Texas cases have allowed "conscious presence" as the test," Nichols v Rowan, 422 S.W.2d 21 (Tex.Civ.App–Eastland 1982, writ ref'd n.r.e.)
- d. It is the better practice to get everyone in one room. Then close the door and put the phones on hold. Do not let anyone leave until the process is

completed. If anyone has to leave, stop the process and wait until they return. Then prepare a memo to document what happened. Otherwise, a witness may recall that someone left the room but not that the process was stopped.

- e. The testator should tell the witnesses that he wants them to be his witnesses. This is not a strict requirement but the statutory self proving affidavit says that the testator “wanted each of them to sign it as a witness.”
- f. Have the testator tell the witnesses that
  - i. He is familiar with the will
  - ii. It accurately expresses what he wants done with his property at his death
  - iii. He publishes and declares it as his last will and testament
  - iv. He wants the witnesses to serve as his witnesses.
- g. The witnesses do not have to know the contents. They just need to know that the testator knows the contents and that he has testamentary capacity. If there are any doubts or if a will contest is anticipated, the testator should tell them not only that he knows what the will says, but also tell them what it says.
- h. The Testator should initial each page and sign.
- i. The witnesses then sign.
- j. The notary administers the oath to the testator and the witnesses and reads the self proving affidavit to them.
- k. Testators are often asked to sign their wills as the name is shown in the will. However, that may not be their usual signature and at the will contest family and friends may testify that he never signed that way.
- l. Many people recommend that everyone sign in blue ink to make it easier to determine the original.

- m. The testator and the witnesses should sign the notary book
- n. Before anyone leaves the room the attorney should review the will and make sure that each page is initialed, that everyone has signed in the proper places and that all blanks have been completed.
- o. Gerry Beyer, has a section devoted to the will signing ceremony in Section 18.53 of “Texas Practice Series, Texas Law of Wills,”

6. **Interlineations**

- a. Interlineations should be avoided.
- b. However, they are common and valid if properly done.
- c. They are valid if made before the will is signed and notarized, Schoenhals v. Schoenhals, 366 S.W.2d 594 (Tex.Civ.App.–Amarillo, writ ref’d n.r.e.).
- d. Interlineations must be made before the will is signed, Pullen v. Russ, 209 S.W.2d 630 (Tex.Civ.App.–Amarillo 1948, writ ref’d n.r.e.). Otherwise, they are invalid and the will must be probated without the interlineations.
- e. To eliminate the argument that the interlineations were made later, the testator and the witnesses should initial each insertion or strikeout.
- f. The cautious lawyer would also prepare a memo indicating that interlineations, or strikeouts, were made before anyone signed.

7. **Testamentary Capacity.** For a discussion of testamentary capacity see Johanson’s Texas Estates Code Annotated 2017 at page 25 and Beyers “Texas Law of Wills” at Section 16.2.

- a. Have testator tell everyone
  - i. What he is doing: “Executing a Will”
  - ii. What a will is: “Disposes of property at death.”
  - iii. What this will does. Testator should describe how his property is to pass under the will.

- iv. What he owns
    - v. Who his family is and who are the natural objects of his bounty.
    - vi. Why he made any unusual provisions.
  - b. Establish that the testator can hold all of this information in mind and appreciate each elements natural relationship to each other.
  - c. In addition, have him talk about
    - (1) Who he is
    - (2) What he has done
    - (3) What he likes and dislikes
    - (4) Where he is
    - (5) What year it is
    - (6) Who is president
    - (7) Anything else that would satisfy people who knew him (and a judge or a jury) that he had capacity.
- 8. **Contest Expected or Anything Unusual.** If a contest could be expected or there is anything unusual about the ceremony or the bequests, the lawyer should prepare a memo. In appropriate circumstances it is a good idea to have the witnesses also write down what they saw.
- 9. **Copies.** The lawyer will want a copy of the signed will for his file. The client may want copies as well. In making copies do not unstaple the will. Two sets of staple holes are one of the first things examined in a will contest. See Mahan v. Dovers, 730 S.W.2d 467 (Tex.App.–Ft. Worth 1987, no writ) If for any reason the will has to be unstapled, do a memo.
- 10. **Should the Lawyer Keep the Original.**
  - a. **No.** James Brill of Houston says the answer is clearly no. James Brill, “Will Vaults–Profit Centers or Malpractice Traps,” Chapter 33, 2003 Advanced Estate Planning and Probate Course.

**The Problem, Presumption of Revocation.** If the will is last seen in the possession of the decedent and it cannot be found at death, it is presumed that it cannot be found because the decedent revoked it. Matter of Estate of Glover, 744 S.W.2d 939 (Tex. 1988) and Gerry Beyer, “Texas Practice Series, Texas Law of Wills,” Section 33.9.

- b. **Yes.** If there is reasonable concern, it may be appropriate for the lawyer to safekeep it. Some testator’s may not have a safe place to keep it. Or there may be concern that a disappointed heir will find it and put pressure on the testator to change the will. Or after death the disappointed heir may find the will and simple destroy it. If it was last seen in the possession of the testator, it is presumed to have been destroyed (by the testator). If the lawyer keeps it he should clearly mark on all copies where the original is.
  - c. **Yes, But.** A lawyer who keeps the will assumes a great deal of responsibility.
    - i. He cannot allow it to be lost or destroyed.
    - ii. Further, he has to do something with them when he retires or when he dies his spouse will have to do something.
    - iii. All copies should be stamped that the original is in the lawyer’s safe.
    - iv. If the lawyer returns it, he should get a receipt.
  - d. **It Belongs to the Client.** Make it clear that it belongs to the client and that you are holding it as a service and if he ever wants it, you will deliver it without reservation or question.
11. **Questionable Capacity.** If there is a question about capacity, can the lawyer even do the will. The ACTEC Commentaries on the Model Rules of Professional Conduct (3<sup>rd</sup> Ed. 1999), MRPC 1.14 say “If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to

modify his or her estate plan.” That commentary goes on to say that the lawyer may need to take action if capacity is borderline. If the lawyer does nothing, a court will never have a chance to determine if the testator had capacity.

12. **Videotaping.** When home video cameras became prevalent, it was thought that most questionable will executions would be videotaped. That has not been the case.
  - a. First and foremost, there is a great deal of concern that the videotape will raise more doubts than it solves. The testator may look even more infirm on video. Or he or the witnesses may make a misstatement or an inappropriate joke (“I can’t understand anything a lawyer writes.”), or there may be stage fright or the lighting may be bad.
  - b. If the tape is not favorable the lawyer may be guilty of despoilation if he destroys it. Even if despoilation is not a problem, the jury will certainly wonder what was on the tape that he erased.
  
13. **Badges of A Will Contest**
  - a. Children who are not children of the surviving spouse.
  - b. Unusual disposition
    - i. More to one child than the others
    - ii. Gifts to Bambie
    - iii. Gifts to Caretakers
  - c. Elderly testator
  - d. Ill testator
  - e. Someone calls or comes to see the lawyer on behalf of the testator
  - f. Someone brings the testator to the office
  - g. The testator is in a hospital or nursing home
  - h. The testator dozes during conferences or the ceremony

- i. The testator looks to another person when asked questions



#### 14. Reading List

- a. Gerry W. Beyer, "The Will Execution Ceremony," [www.professorbeyer.com](http://www.professorbeyer.com).
- b. Steve Akers, R.J. Watts, II, "the Anatomy of a Will: Practical Considerations in Will Drafting (most recently, South Texas College of Law, Wills and Probate Institute, 2005), pages 25-31.
- c. James Brill, "Will Vaults–Profit Centers or Malpractice Traps," Chapter 33, 2003 Advanced Estate Planning and Probate Course.
- d. Joyce Moore, "A Different Look at Will Contests," Tarrant County Probate Bar Association, Probate Litigation Seminar, 2002.
- e. Mike Cenatiempo, "Preventing Will Contests," Chapter L, 1994 Advanced Estate Planning and Probate Course.
- f. Joe Horrigan, "Preparing to Try a Will Contest," Chapter M, 1994 Advanced Estate Planning and Probate Course.
- g. Stanley Johanson, Texas Probate Code Annotated, 2005, pages 116-118.
- h. Gerry Beyer, "Texas Practice Series, Texas Law of Wills," volumes 9 and 10
- i. ACTEC Commentaries on the Model Rules of Professional Conduct (3<sup>rd</sup> Ed. 1999)